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INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Reports of Orders, Decisions and Judgements

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TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA

Recueil des ordonnances, décisions, jugements et arrêts

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Volume I

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***** Rendered by the Chamber in charge of the *Kajelijeli* Case, this decision concerns the case of Gratien Kabiligi and can be read in this file / Quoique rendue par la Chambre de première instance charge de l'affaire *Kajelijeli*, cette décision concerne l'affaire *Bagosora* et se trouve donc dans ce dossier.

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Statute of the International Criminal Tribunal for Rwanda

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "The International Tribunal for Rwanda") shall function in accordance with the provisions of the present Statute.

Article 1
Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Article 2
Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
    a) Killing members of the group;
    b) Causing serious bodily or mental harm to members of the group;
    c) Deliberately inflicting on the group conditions of life calculated to bring about its physical
    d) destruction in whole or in part;
    e) Imposing measures intended to prevent births within the group;
    f) Forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
    a) Genocide;
    b) Conspiracy to commit genocide;
    c) Direct and public incitement to commit genocide;
    d) Attempt to commit genocide;
    e) Complicity in genocide.

Article 3
Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
    a) Murder;
    b) Extermination;
    c) Enslavement;
    d) Deportation;
    e) Imprisonment;
    f) Torture;
    g) Rape;
    h) Persecutions on political, racial and religious grounds;
    i) Other inhumane acts.

Article 4
Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the

Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as
b) cruel treatment such as torture, mutilation or any form of corporal punishment;
c) Collective punishments;
d) Taking of hostages;
e) Acts of terrorism;
f) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced
g) prostitution and any form of indecent assault;
h) Pillage;
i) The passing of sentences and the carrying out of executions without previous judgement pronounced
j) by a regularly constituted court, affording all the judicial guarantees which are recognised as
k) indispensable by civilised peoples;
l) Threats to commit any of the foregoing acts.

Article 5
Personal jurisdiction

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 6
Individual Criminal Responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Article 7
Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.

Article 8
Concurrent jurisdiction

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994.
2. The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

Article 9
Non bis in idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.
2. A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:
   a) The act for which he or she was tried was characterised as an ordinary crime; or
   b) The national court proceedings were not impartial or independent, were designed to shield the
   c) accused from international criminal responsibility, or the case was not diligently prosecuted.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10
Organisation of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall consist of the following organs:
   a) The Chambers, comprising three Trial Chambers and an Appeals Chamber;
   b) The Prosecutor;
   c) A registry.

Article 11
Composition of the Chambers

1. The Chambers shall be composed of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of nine *ad litem* independent judges appointed in accordance with article 12 *ter*, paragraph 2, of the present Statute, no two of whom may be nationals of the same State.
2. Three permanent judges and a maximum at any one time of six *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem* judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the present Statute and shall render judgement in accordance with the same rules.
3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.
4. A person who for the purposes of membership of the Chambers of the International Tribunal for Rwanda could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

Article 12
Qualification and election of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

2. Eleven of the judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:
a) The Secretary-General shall invite nominations for judges from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;
b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a permanent judge of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (hereinafter referred to as "the

International Tribunal for the Former Yugoslavia") in accordance with article 13 bis of the Statute of that Tribunal;

c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-two and not more than thirty-three candidates, taking due account of the adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world;

d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect eleven judges of the International Tribunal for Rwanda. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

3. In the event of a vacancy in the Chambers amongst the judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned.

4. The judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Tribunal for the Former Yugoslavia. They shall be eligible for re-election.

Article 12 *quater*

Status of ad litem judges

1. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall:

a) Benefit from the same terms and conditions of service mutatis mutandis as the permanent judges of the International Tribunal for Rwanda;

b) Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal for Rwanda;

c) Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal for Rwanda;

d) Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to try.

2. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall not:

a) Be eligible for election as, or to vote in the election of, the President of the International Tribunal for Rwanda or the Presiding Judge of a Trial Chamber pursuant to article 13 of the present Statute;

b) Have power:

(i) To adopt rules of procedure and evidence pursuant to article 14 of the present Statute. They shall, however, be consulted before the adoption of those rules;

(ii) To review an indictment pursuant to article 18 of the present Statute;

(iii) To consult with the President of the International Tribunal for Rwanda in relation to the assignment of judges pursuant to article 13 of the present Statute or in relation to a pardon or commutation of sentence pursuant to article 27 of the present Statute.

Article 13

Officers and members of the Chambers

1. The judges of the International Tribunal for Rwanda shall elect a President.

2. The President of the International Tribunal for Rwanda shall be a member of one of its Trial Chambers.

3. After consultation with the judges of the International Tribunal for Rwanda, the President shall assign two of the judges elected or appointed in accordance with Article 12 of the present Statute to be members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia and eight to the Trial Chambers of the International Tribunal for Rwanda. A judge shall serve only in the Chamber to which he or she was assigned.

4. The members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.

5. The judges of each Trial Chamber shall elect a Presiding Judge, who shall conduct all of the proceedings of that Trial Chamber as a whole.

Article 14
Rules of procedure and evidence

The judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the former Yugoslavia with such changes as they deem necessary.

Article 15
The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.
2. The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any government or from any other source.
3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.
4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.
5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 16
The registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal for Rwanda.
2. The Registry shall consist of a Registrar and such other staff as may be required.
3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal for Rwanda. He or she shall serve for a four-year term and be eligible for re-appointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.
4. The Staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 17
Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.
2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.
3. If questioned, the suspect shall be entitled to be assisted by counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if

he or she does not have sufficient means to pay for it, as well as necessary translation into and from a language he or she speaks and understands.
4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 18
Review of the Indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.
2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 19
Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused with due regard for the protection of victims and witnesses.
2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda.
3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.
4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 20
Rights of the Accused

1. All persons shall be equal before the International Tribunal for Rwanda.
2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to article 21 of the Statute.
3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.
4. In determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

- **a) To be informed promptly and in detail in a language which he or she understands of the nature and**
- **b) cause of the charge against him or her;**
- **c) To have adequate time and facilities for the preparation of his or her defence and to communicate**
- **d) with counsel of his or her own choosing;**
- **e) To be tried without undue delay;**
- **f) To be tried in his or her presence, and to defend himself or herself in person or through legal**
- **g) assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of**
- **h) this right; and to have legal assistance assigned to him or her, in any case where the interest of justice**
- **i) so require, and without payment by him or her in any such case if he or she does not have sufficient**
- **j) means to pay for it;**
- **k) To examine, or have examined, the witnesses against him or her and to obtain the attendance and**
- **l) examination of witnesses on his or her behalf under the same conditions as witnesses against him or**

m) her;
n) To have the free assistance of an interpreter if he or she cannot understand or speak the language
o) used in the International Tribunal for Rwanda;
p) Not to be compelled to testify against himself or herself or to confess guilt.

Article 21
Protection of victims and witnesses

The International Tribunal for Rwanda shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victims identity.

Article 22
Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.
2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 23
Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 24
Appellate Proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
a) An error on a question of law invalidating the decision; or
b) An error of fact which has occasioned a miscarriage of justice.
2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 25
Review Proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

Article 26
Enforcement of Sentences

Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.

Article 27
Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 28
Cooperation and judicial assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

a) **The identification and location of persons;**
b) **The taking of testimony and the production of evidence;**
c) **The service of documents;**
d) **The arrest or detention of persons;**
e) **The surrender or the transfer of the accused to the International Tribunal for Rwanda.**

Article 29:
The status, privileges and immunities of the International Tribunal for Rwanda

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal for Rwanda, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.
2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.
3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under Articles V and VII of the Convention referred to in paragraph 1 of this article.
4. Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda.

Article 30
Expenses of the International Tribunal for Rwanda

The expenses of the International Tribunal for Rwanda shall be expenses of the Organisation in accordance with Article 17 of the Charter of the United Nations.

Article 31
Working languages

The working languages of the International Tribunal for Rwanda shall be English and French.

Article 32
Annual Report

The President of the International Tribunal for Rwanda shall submit an annual report of the International Tribunal for Rwanda to the Security Council and to the General Assembly.

Statut du Tribunal pénal international pour le Rwanda

Créé par le Conseil de sécurité agissant en vertu du Chapitre VII de la Charte des Nations Unies, le Tribunal criminel international chargé de juger les personnes présumés responsables d'actes de génocide ou d'autre violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 (ci-après dénommé « Tribunal international pour le Rwanda ») exercera ses fonctions conformément aux dispositions du présent statut.

Article premier
Compétence du Tribunal international pour le Rwanda

Le Tribunal international pour le Rwanda est habilité à juger les personnes présumés responsables de violations graves du droit international humanitaire commises sur le territoire du Rwanda et les citoyens rwandais présumés responsables de telles violations commises sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994, conformément aux dispositions du présent statut.

Article 2
Génocide

1. Le Tribunal international pour le Rwanda est compétent pour poursuivre les personnes ayant commis un génocide, tel que ce crime est défini au paragraphe 2 du présent article, ou l'un quelconque des actes énumérés au paragraphe 3 du présent article.
2. Le génocide s'entend de l'un quelconque des actes ci-après, commis dans l'intention de détruire, en tout ou en partie, un groupe national, ethnique, racial ou religieux, comme tel:

a) **Meurtre de membres du groupe;**
b) **Atteinte grave à l'intégrité physique ou mentale de membres du groupe;**
c) **Soumission intentionnelle du groupe à des conditions d'existence devant entraîner sa destruction**
d) **physique totale ou partielle;**
e) **Mesures visant à entraver les naissances au sein du groupe;**
f) **Transfert forcé d'enfants du groupe à un autre groupe**

3. Seront punis les actes suivants:

a) **Le génocide;**
b) **L'entente en vue de commettre le génocide;**
c) **L'incitation directe et publique à commettre le génocide;**
d) **La tentative de génocide;**
e) **La complicité dans le génocide.**

Article 3
Crimes contre l'humanité

Le Tribunal international pour le Rwanda est habilité à juger les personnes responsables des crimes suivants lorsqu'ils ont été commis dans le cadre d'une attaque généralisée et systématique dirigée contre une population civile quelle qu'elle soit, en raison de son appartenance nationale, politique, ethnique, raciale ou religieuse:

a) **Assassinat;**
b) **Extermination;**
c) **Réduction en esclavage;**
d) **Expulsion;**
e) **Emprisonnement;**
f) **Torture;**
g) **Viol;**
h) **Persécutions pour des raisons politiques, raciales et religieuses;**
i) **Autres actes inhumains.**

Article 4

Violations de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II

Le Tribunal international pour le Rwanda est habilité à poursuivre les personnes qui commettent ou donnent l'ordre de commettre des violations graves de l'article 3 commun aux Conventions de Genève du 12 août 1949 pour la protection des victimes en temps de guerre, et du Protocole additionnel II auxdites Conventions du 8 juin 1977. Ces violations comprennent, sans s'y limiter:

a) **Les atteintes portées à la vie, à la santé et au bien-être physique ou mental des personnes, en particulier le meurtre, de même que les traitements cruels tels que la torture, les mutilations ou toutes formes de peines corporelles;**
b) **Les punitions collectives;**
c) **La prise d'otages;**
d) **Les actes de terrorisme;**
e) **Les atteintes à la dignité de la personne, notamment les traitements humiliants et dégradants, le viol, la contrainte à la prostitution et tout attentat à la pudeur;**
f) **Le pillage;**
g) **Les condamnations prononcées et les exécutions effectuées sans un jugement préalable rendu par un tribunal régulièrement constitué, assorti des garanties judiciaires reconnues comme indispensables par les peuples civilisés;**
h) **La menace de commettre les actes précités.**

Article 5
***Compétence* ratione personae**

Le Tribunal international pour le Rwanda a compétence à l'égard des personnes physiques conformément aux dispositions du présent statut.

Article 6
Responsabilité pénale individuelle

1. Quiconque a planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter un crime visé aux articles 2 à 4 du présent statut est individuellement responsable dudit crime.
2. La qualité officielle d'un accusé, soit comme chef d'Etat ou de gouvernement, soit comme haut fonctionnaire, ne l'exonère pas de sa responsabilité pénale et n'est pas un motif de diminution de la peine.
3. Le fait que l'un quelconque des actes visés aux articles 2 à 4 du présent statut a été commis par un subordonné ne dégage pas son supérieur de sa responsabilité pénale s'il savait ou avait des raisons de savoir que le subordonné s'apprêtait à commettre cet acte ou l'avait fait et que le supérieur n'a pas pris les mesures nécessaires et raisonnables pour empêcher que ledit acte ne soit commis ou en punir les auteurs.
4. Le fait qu'un accusé a agi en exécution d'un ordre d'un gouvernement ou d'un supérieur ne l'exonère pas de sa responsabilité pénale mais peut être considéré comme un motif de diminution de la peine si le Tribunal international pour le Rwanda l'estime conforme à la justice.

Article 7
***Compétence* ratione loci *et compétence* ratione temporis**

La compétence *ratione loci* du Tribunal international pour le Rwanda s'étend au territoire du Rwanda, y compris son espace terrestre et son espace aérien, et au territoire d'Etats voisins en cas de violations graves du droit international humanitaire commises par des citoyens rwandais. La compétence *ratione temporis* du Tribunal international s'étend à la période commençant le 1er janvier 1994 et se terminant le 31 décembre 1994.

Article 8
Compétences concurrentes

1. Le Tribunal international pour le Rwanda et les juridictions nationales sont concurremment compétences pour juger les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire du Rwanda et les citoyens rwandais présumés responsables de telles violations commises sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994.

2. Le Tribunal international pour le Rwanda a la primauté sur les juridictions nationales de tous les Etats. A tout stade de la procédure, il peut demander officiellement aux juridictions nationales de se dessaisir en sa faveur conformément au présent statut et à son règlement.

Article 9
Non bis in idem

1. Nul ne peut être traduit devant une juridiction nationale pour les faits constituant de graves violations du droit international humanitaire au sens du présent statut s'il a déjà été jugé pour les mêmes faits par le Tribunal international pour le Rwanda.
2. Quiconque a été traduit devant une juridiction nationale pour des faits constituant de graves violations du droit international humanitaire ne peut subséquemment être traduit devant le Tribunal international pour le Rwanda que si:

a) **Le fait pour lequel il a été jugé était qualifié crime de droit commun; ou**
b) **La juridiction nationale n'a pas statué de façon impartiale ou indépendante, la procédure engagée devant elle visait à soustraire l'accusé à sa responsabilité pénale internationale, ou la poursuite n'a pas été exercée avec diligence.**

3. Pour décider de la peine à infliger à une personne condamnée pour un crime visé par le présent statut, le Tribunal international pour le Rwanda tient compte de la mesure dans laquelle cette personne a déjà purgé toute peine qui pourrait lui avoir été infligée par une juridiction nationale pour le même fait.

Article 10
Organisation du Tribunal international pour le Rwanda

Le Tribunal international comprend les organes suivants:

a) **Les Chambres, soit trois Chambres de première instance et une Chambre d'appel;**
b) **Le Procureur;**
c) **Un Greffe.**

Article 11
Composition des Chambres

1. Les Chambres sont composées de 16 juges permanents indépendants, ressortissants d'États différents et, au maximum au même moment, de neuf juges *ad litem* indépendants, tous ressortissants d'États différents, désignés conformément à l'article 12 *ter*, paragraphe 2 du présent Statut.
2. Trois juges permanents et, au maximum au même moment, six juges *ad litem* sont membres de chacune des Chambres de première instance. Chaque Chambre de première instance à laquelle ont été affectés des juges *ad litem* peut être subdivisée en sections de trois juges chacune, composées à la fois de juges permanents et *ad litem*. Les sections des Chambres de première instance ont les mêmes pouvoirs et responsabilités que ceux conférés à une Chambre de première instance par le présent Statut et rendent leurs jugements suivant les mêmes règles.
3. Sept des juges permanents siègent à la Chambre d'appel, laquelle est, pour chaque appel, composée de cinq de ses membres.
4. Aux fins de la composition des Chambres du Tribunal pénal international pour le Rwanda, quiconque pourrait être considéré comme le ressortissant de plus d'un État est réputé être ressortissant de l'État où il exerce habituellement ses droits civils et politiques.

Article 12
Qualifications et élection des juges

1. Les juges doivent être des personnes de haute moralité, impartialité et intégrité possédant les qualifications requises, dans leurs pays respectifs, pour être nommés aux plus hautes fonctions judiciaires. Il est dûment tenu compte, dans la composition globale des Chambres, de l'expérience des juges en matière de droit pénal et de droit international, notamment de droit international humanitaire et de droits de l'homme.

2. Onze des juges du Tribunal international pour le Rwanda sont élus par l'Assemblée générale sur une liste présentée par le Conseil de sécurité, selon les modalités ci-après :

a) Le Secrétaire général invite les États Membres de l'Organisation des Nations Unies et les États non membres ayant une mission d'observation permanente au Siège de l'Organisation à présenter des candidatures;
b) Dans un délai de soixante jours à compter de la date de l'invitation du Secrétaire général, chaque État peut présenter la candidature d'au maximum deux personnes réunissant les conditions indiquées au paragraphe 1 ci-dessus et n'ayant pas la même nationalité ni celle d'un juge qui est membre de la Chambre d'appel et qui a été élu ou nommé juge permanent du Tribunal international chargé de poursuivre les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991 (ci-après dénommé le « Tribunal international pour l'ex-Yougoslavie ») conformément à l'article 13 bis du Statut de ce Tribunal;
c) Le Secrétaire général transmet les candidatures au Conseil de sécurité. Sur la base de ces candidatures, le Conseil dresse une liste de vingt-deux candidats au minimum et trente-trois candidats au maximum en tenant dûment compte de la nécessité d'assurer au Tribunal international pour le Rwanda une représentation adéquate des principaux systèmes juridiques du monde;
d) Le Président du Conseil de sécurité transmet la liste de candidats au Président de l'Assemblée générale. L'Assemblée élit sur cette liste les onze juges du Tribunal international pour le Rwanda. Sont élus les candidats qui ont obtenu la majorité absolue des voix des États Membres de l'Organisation des Nations Unies et des États non membres ayant une mission d'observation permanente au Siège de l'Organisation. Si deux candidats de la même nationalité obtiennent la majorité requise, est élu celui sur lequel s'est porté le plus grand nombre de voix.

3. Si le siège de l'un des juges élus ou désignés conformément au présent article devient vacant à l'une des Chambres, le Secrétaire général, après avoir consulté les Présidents du Conseil de sécurité et de l'Assemblée générale, nomme une personne réunissant les conditions indiquées au paragraphe 1 ci-dessus pour siéger jusqu'à l'expiration du mandat de son prédécesseur.

4. Les juges élus conformément au présent article ont un mandat de quatre ans. Leurs conditions d'emploi sont celles des juges du Tribunal international pour l'ex-Yougoslavie. Ils sont rééligibles.

Article 12 *quater*
Statut des juges ad litem

1. Pendant la durée où ils sont nommés pour servir auprès du Tribunal pénal international pour le Rwanda, les juges *ad litem* :
a) Bénéficient, mutatis mutandis, des mêmes conditions d'emploi que les juges permanents du Tribunal pénal international pour le Rwanda;
b) Jouissent des mêmes pouvoirs que les juges permanents du Tribunal pénal international pour le Rwanda, sous réserve du paragraphe 2 ci-après;
c) Jouissent des privilèges et immunités, exemptions et facilités d'un juge du Tribunal pénal international pour le Rwanda;
d) Sont habilités à se prononcer pendant la phase préalable au procès dans des affaires autres que celles pour lesquelles ils ont été nommés.
2. Pendant la durée où ils sont nommés pour servir auprès du Tribunal pénal international pour le Rwanda, les juges *ad litem* :
a) Ne peuvent ni être élus Président du Tribunal pénal international pour le Rwanda ou Président d'une Chambre de première instance, ni participer à son élection, conformément à l'article 13 du présent Statut;
b) Ne sont pas habilités :
i) A participer à l'adoption du règlement conformément à l'article 14 du présent Statut. Ils sont toutefois consultés avant l'adoption dudit règlement;
ii) A participer à l'examen d'un acte d'accusation conformément à l'article 18 du présent Statu
iii) A participer aux consultations tenues par le Président du Tribunal pénal international pour le Rwanda au sujet de la nomination de juges, conformément à l'article 13 du Statut, ou de l'octroi d'une grâce ou d'une commutation de peine, conformément à l'article 27 du Statut.

Article 13
Constitution du Bureau et des Chambres

1. Les juges du Tribunal international pour le Rwanda élisent un président.

2. Le Président du Tribunal international pour le Rwanda doit être membre de l'une de ses Chambres de première instance.

3. Après avoir consulté les juges du Tribunal international pour le Rwanda, le Président nomme deux des juges élus ou nommés conformément à l'article 12 du présent Statut membres de la Chambre d'appel du Tribunal international pour l'ex-Yougoslavie et huit membres des Chambres de première instance du Tribunal international pour le Rwanda. Les juges ne siègent qu'à la Chambre à laquelle ils ont été nommés.

4. Les juges qui siègent à la Chambre d'appel du Tribunal international pour l'ex-Yougoslavie siègent également à la Chambre d'appel du Tribunal international pour le Rwanda. Les juges de chaque Chambre de première instance élisent un président qui conduit toutes les procédures devant cette chambre.

Article 14
Règlement du Tribunal

Les juges du Tribunal international pour le Rwanda adopteront, aux fins de la procédure du Tribunal international pour le Rwanda, le règlement du Tribunal international pour l'ex-Yougoslavie régissant la mise en accusation, les procès en première instance et les recours, la recevabilité des preuves, la protection des victimes et des témoins et d'autres questions appropriées, en y apportant les modifications qu'ils jugeront nécessaires.

Article 15
Le Procureur

1. Le Procureur est responsable de l'instruction des dossiers et de l'exercice de la poursuite contre les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire du Rwanda et les citoyens rwandais présumés responsables de telles violations commises sur le territoire d'États voisins entre le 1er janvier et le 31 décembre 1994.
2. Le Procureur, qui est un organe distinct au sein du Tribunal pénal international pour le Rwanda, agit en toute indépendance. Il ne sollicite ni ne reçoit d'instructions d'aucun gouvernement ni d'aucune autre source.
3. Le Bureau du Procureur se compose du Procureur et du personnel qualifié qui peut être nécessaire.
4. Le Procureur est nommé par le Conseil de sécurité sur proposition du Secrétaire général. Il ou elle doit être de haute moralité, d'une compétence notoire et avoir une solide expérience de l'instruction des affaires criminelles et des poursuites. Son mandat est de quatre ans et peut être reconduit. Ses conditions d'emploi sont celles d'un secrétaire général adjoint de l'Organisation des Nations Unies.
5. Le personnel du Bureau du Procureur est nommé par le Secrétaire général sur recommandation du Procureur.

Article 16
Le Greffe

1. Le Greffe est chargé d'assurer l'administration et les services du Tribunal international pour le Rwanda.
2. Le Greffe se compose d'un greffier et des autres fonctionnaires nécessaires.
3. Le Greffier est désigné par le Secrétaire général après consultation du Président du Tribunal international pour le Rwanda pour un mandat de quatre ans renouvelable. Les conditions d'emploi du Greffier sont celles d'un sous-secrétaire général de l'Organisation des Nations Unies.
4. Le personnel du Greffe est nommé par le Secrétaire général sur recommandation du Greffier.

Article 17
Information et établissement de l'acte d'accusation

1. Le Procureur ouvre une information d'office ou sur la foi des renseignements obtenus de toutes sources, notamment des gouvernements, des organes de l'Organisation des Nations Unies, des Organisations intergouvernementales et non gouvernementales. Il évalue les renseignements reçus ou obtenus et décide s'il y a lieu de poursuivre.
2. Le Procureur est habilité à interroger les suspects, les victimes et les témoins, à réunir des preuves et à procéder sur place à des mesures d'instruction. Dans l'exécution de ces tâches, le Procureur peut, selon que de besoin, solliciter le concours des autorités de l'Etat concerné.
3. Tout suspect interrogé a le droit d'être assisté d'un conseil de son choix, y compris celui de se voir attribuer d'office un défenseur, sans frais, s'il n'a pas les moyens de le rémunérer et de bénéficier, si nécessaire, de services de traduction dans une langue qu'il parle et comprend et à partir de cette langue.
4. S'il décide qu'au vu des présomptions, il y a lieu d'engager des poursuites, le Procureur établit un acte d'accusation dans lequel il expose succinctement les faits et le crime ou les crimes qui sont reprochés à l'accusé en vertu du statut. L'acte d'accusation est transmis à un juge de la Chambre de première instance.

Article 18
Examen de l'acte d'accusation

1. Le juge de la Chambre de première instance saisi de l'acte d'accusation examine celui-ci. S'il estime que le Procureur a établi qu'au vu des présomptions il y a lieu d'engager des poursuites, il confirme l'acte d'accusation. A défaut, il le rejette.
2. S'il confirme l'acte d'accusation, le juge saisi décerne sur réquisition du Procureur, les ordonnances et mandats d'arrêt, de dépôt, d'amener ou de remise et toutes autres ordonnances nécessaires pour la conduite du procès.

Article 19
Ouverture et conduite du procès

1. La Chambre de première instance veille à ce qui le procès soit équitable et rapide et à ce que l'instance se déroule conformément au règlement de procédure et de preuve, les droits de l'accusé étant pleinement respectés et la protection des victimes et des témoins dûment assurés.
2. Toute personne contre laquelle un acte d'accusation a été confirmé est, conformément à une ordonnance ou un mandat d'arrêt décerné par le Tribunal international pour le Rwanda, placée en état d'arrestation, immédiatement informée des chefs d'accusation portés contre elle et déférée au Tribunal international pour le Rwanda.
3. La Chambre de première instance donne lecture de l'acte d'accusation, s'assure que les droits de l'accusé sont respectés, confirme que l'accusé a compris le contenu de l'acte d'accusation et l'invite à faire valoir ses moyens de défense. La Chambre de première instance fixe alors la date du procès.
4. Les audiences sont publiques à moins que la Chambre de première instance décide de les tenir à huis clos conformément à son règlement de procédure et de preuve.

Article 20
Les droits de l'accusé

1. Tous sont égaux devant le Tribunal international pour le Rwanda.
2. Toute personne contre laquelle des accusations sont portées a droit à ce que sa cause soit entendue équitablement et publiquement, sous réserve des dispositions de l'article 21 du statut.
3. Toute personne accusée est présumée innocente jusqu'à ce que sa culpabilité ait été établie conformément aux dispositions du présent statut.
4. Toute personne contre laquelle une accusation est portée en vertu du présent statut a droit, en pleine égalité, au moins aux garanties suivantes:

- **a) A être informée, dans le plus court délai, dans une langue qu'elle comprend et de façon détaillée, de la nature et des motifs de l'accusation portée contre elle;**
- **b) A disposer du temps et des facilités nécessaires à la préparation de sa défense et à communiquer avec le conseil de son choix;**
- **c) A être jugée sans retard excessif;**
- **d) A être présente au procès et à se défendre elle-même ou à avoir l'assistance d'un défenseur de son choix; si elle n'a pas de défenseur, à être informée de son droit d'en avoir un, et, chaque fois que l'intérêt de la justice l'exige, à se voir attribuer d'office un défenseur, sans frais, si elle n'a pas les moyens de le rémunérer;**

e) **A interroger ou faire interroger les témoins à charge et à obtenir la comparution et l'interrogatoire des témoins à décharge dans les mêmes conditions que les témoins à charge;**
f) **A se faire assister gratuitement d'un interprète si elle ne comprend pas ou ne parle pas la langue employée à l'audience;**
g) **A ne pas être forcée de témoigner contre elle-même ou de s'avouer coupable.**

Article 21
Protection des victimes et des témoins

Le Tribunal international pour le Rwanda prévoit dans son règlement de procédure et de preuve des mesures de protection des victimes et des témoins. Les mesures de protection comprennent, sans y être limitées, la tenue d'audiences à huis clos et la protection de l'identité des victimes.

Article 22
Sentence

1. La Chambre de première instance prononce des sentences et impose des peines et sanctions à l'encontre des personnes convaincues de violations graves du droit international humanitaire.
2. La sentence est rendue en audience publique à la majorité des juges de la Chambre de première instance. Elle est établie par écrit et motivée, des opinions individuelles ou dissidentes pouvant y être jointes.

Article 23
Peines

1. La Chambre de première instance n'impose que des peines d'emprisonnement. Pour fixer les conditions de l'emprisonnement, la Chambre de première instance a recours à la grille générale des peines d'emprisonnement appliquée par les tribunaux du Rwanda.
2. En imposant toute peine, la Chambre de première instance tient compte de facteurs tels que la gravité de l'infraction et la situation personnelle du condamné.
3. Outre l'emprisonnement du condamné, la Chambre de première instance peut ordonner la restitution à leurs propriétaires légitimes de tous biens et ressources acquis par des moyens illicites, y compris par la contrainte.

Article 24
Appel

1. La Chambre d'appel connaît des recours introduits soit par les personnes condamnées par les Chambres de première instance soit par le Procureur, pour les motifs suivants:
a) **Erreur sur un point de droit qui invalide la décision; ou**
b) **Erreur de fait qui a entraîné un déni de justice.**
2. La Chambre d'appel peut confirmer, annuler ou réviser les décisions de Chambres de première instance.

Article 25
Révision

S'il est découvert un fait nouveau qui n'était pas connu au moment du procès en première instance ou en appel et qui aurait pu être un élément décisif de la décision, le condamné ou le Procureur peut saisir le Tribunal international pour le Rwanda d'une demande en révision de la sentence.

Article 26
Exécution des peines

Les peines d'emprisonnement sont exécutées au Rwanda ou dans un Etat désigné par le Tribunal international pour le Rwanda sur la liste des Etats qui ont fait savoir au Conseil de sécurité qu'ils étaient disposés à recevoir des condamnés. Elles sont exécutées conformément aux lois en vigueur de l'Etat concerné, sous la supervision du Tribunal.

Article 27

Grâce et commutation de peine

Si le condamné peut bénéficier d'une grâce ou d'une commutation de peine en vertu des lois de l'Etat dans lequel il est emprisonné, cet Etat en avise le Tribunal international pour le Rwanda. Une grâce ou une commutation de peine n'est accordée que si le Président du Tribunal international pour le Rwanda, en consultation avec les juges, en décide ainsi dans l'intérêt de la justice et sur la base des principes généraux du droit.

Article 28
Coopération et entraide judiciaire

1. Les Etats collaborent avec le Tribunal international pour le Rwanda à la recherche et au jugement des personnes accusées d'avoir commis des violations graves du droit international humanitaire.
2. Les Etats répondent sans retard à toute demande d'assistance ou à toute ordonnance émanant d'une Chambre de première instance et concernant, sans s'y limiter:

a) **L'identification et la recherche des personnes;**
b) **La réunion des témoignages et la production des preuves;**
c) **L'expédition des documents;**
d) **L'arrestation ou la détention des personnes;**
e) **Le transfert ou la traduction de l'accusé devant le Tribunal.**

Article 29
Statut, privilèges et immunités du Tribunal international

1. La Convention sur les privilèges et immunités des Nations Unies en date du 13 février 1946 s'applique au Tribunal international pour le Rwanda, aux juges, au Procureur et à son personnel ainsi qu'au Greffier et à son personnel.
2. Les juges, le Procureur et le Greffier jouissent des privilèges et immunités, des exemptions et des facilités accordés aux agents diplomatiques, conformément au droit international.
3. Le personnel du Procureur et du Greffier jouit des privilèges et immunités accordés aux fonctionnaires des Nations Unies en vertu des articles V et VII de la Convention visée au paragraphe 1 du présent article.
4. Les autres personnes, y compris les accusés, dont la présence est requise au siège du Tribunal international pour le Rwanda bénéficient du traitement nécessaire pour assurer le bon fonctionnement du Tribunal international pour le Rwanda.

Article 30
Dépenses du Tribunal international pour le Rwanda

Les dépenses du Tribunal international pour le Rwanda sont imputées sur l'Organisation des Nations Unies conformément à l'article 17 de la Charte des Nations Unies.

Article 31
Langues de travail

Les langues de travail du Tribunal international sont l'anglais et le français.

Article 32
Rapport annuel

Le Président du Tribunal international pour le Rwanda présente chaque année un rapport du Tribunal international pour le Rwanda au Conseil de sécurité et à l'Assemblée générale.

Rules of Procedure and Evidence
(Adopted on 29 June 1995, as amended on 10 November 2006)

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[7] As amended on 10 November 2006.

PART FIVE : Pre-trial proceedings

Section 1 Indictments

Section 2 Orders and Warrants

Section 3 Production of Evidence

Section 4 Depositions

Section 5 Preliminary Motions

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[8] As amended on 10 November 2006.

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[9] As amended on 10 November 2006.
[10] Ibidem.
[11] Ibidem.
[12] Ibidem.
[13] Ibidem.
[14] Ibidem.
[15] Ibidem.

Rule 126 General Standards for Granting Pardon or Commutation

Part One – General provisions

Rule 1
Entry into Force

These Rules of Procedure and Evidence, adopted pursuant to Article 14 of the Statute of the Tribunal, shall come into force on 29 June 1995.

Rule 2
Definitions

A) In the Rules, unless the context otherwise requires, the following terms shall mean:

Rules: The Rules referred to in Rule 1;

Statute: The Statute of the Tribunal adopted by Security Council resolution 955 of 8 November 1994;

Tribunal: The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, established by Security Council resolution 955 of 8 November 1994;

Accused: A person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47;

Ad litem Judge**:** A Judge appointed pursuant to Article 12 *ter* of the Statute;

Arrest: The act of apprehending and taking a suspect or an accused into custody pursuant to a warrant of arrest or under Rule 40;

Bureau: A body composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers;

Investigation: All activities undertaken by the Prosecutor under the Statute and the Rules for the collection of information and evidence, whether before or after confirmation of an indictment;

Party: The Prosecutor or the accused;

Permanent Judge: A Judge elected or appointed pursuant to Article 12 *bis* of the Statute;

President: The President of the Tribunal;

Prosecutor: The Prosecutor designated pursuant to Article 15 of the Statute;

Regulations: The provisions framed by the Prosecutor pursuant to Rule 37 (A) for the purpose of directing the functions of the Office of the Prosecutor;

Suspect: A person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction;

Transaction: A number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan;

Victim: A person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.

B) In the Rules, the masculine shall include the feminine and the singular the plural, and vice-versa.

Rule 3
Languages

A) The working languages of the Tribunal shall be English and French.

B) The accused or suspect shall have the right to use his own language.

C) Counsel for the accused may apply to a Judge or a Chamber for leave to use a language other than the two working ones or the language of the accused. If such leave is granted, the expenses of interpretation and translation shall be borne by the Tribunal to the extent, if any, determined by the President, taking into account the rights of the Defence and the interests of justice.

D) Any other person appearing before the Tribunal, who does not have sufficient knowledge of either of the two working languages, may use his own language.

E) The Registrar shall make any necessary arrangements for interpretation and translation of the working languages.

Rule 4
Sittings away from the Seat of the Tribunal

A Chamber or a Judge may exercise their functions away from the Seat of the Tribunal, if so authorized by the President in the interests of justice.

Rule 5
Non-compliance with Rules

A) Where an objection on the ground of non-compliance with the Rule or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to that party.

B) Where such an objection is raised otherwise than at the earliest opportunity, the Trial Chamber may in its discretion grant relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to the objecting party.

C) The relief granted by a Trial Chamber under this Rule shall be such remedy as the Trial Chamber considers appropriate to ensure consistency with fundamental principles of fairness.

Rule 6
Amendment of the Rules

A) Proposals for amendment of the Rules may be made by a Judge, the Prosecutor or the Registrar and shall be adopted, if agreed to by not less than ten Judges at a Plenary Meeting of the Tribunal convened with notice of the proposal addressed to all Judges.

B) An amendment of the Rules may be adopted otherwise than as stipulated in Sub-Rule (A) above, provided it is approved unanimously by any appropriate means either done in writing or confirmed in writing.

C) An amendment shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case.

Rule 7
Authentic Texts

The English and French texts of the Rules shall be equally authentic. In case of discrepancy, the version which is more consonant with the spirit of the Statute and the Rules shall prevail.

Rule 7 *bis*
Non Compliance with Obligations

A) Except in cases to which Rules 11, 13, 59 or 61 applies, where a Trial Chamber or a Judge is satisfied that a State has failed to comply with an obligation under Article 28 of the Statute relating to any proceedings before that Chamber or Judge, the Chamber or Judge may request the President to report the matter to the Security Council.

B) If the Prosecutor satisfies the President that a State has failed to comply with an obligation under Article 28 of the Statute in respect of a request by the Prosecutor under Rules 8 or 40, the President shall notify the Security Council thereof.

Rule 7 *ter*
Time limits

1. Unless otherwise ordered by the Chambers or otherwise provided by the Rules, where the time prescribed by or under the Rules for the doing of any act shall run as from the occurrence of an event, that time shall run from the date on which notice of the occurrence of the event has been received in the normal course of transmission by counsel for the accused or the Prosecutor as the case may be.

2. Where a time limit is expressed in days, only ordinary calendar days shall be counted. Weekdays, Saturdays, Sundays and public holidays shall be counted as days. However, should the time limit expire on a Saturday, Sunday or public holiday, the time limit shall automatically be extended to the subsequent working day.

Part Two - Primacy Of The Tribunal

Rule 8
Request for Information

Where it appears to the Prosecutor that a crime within the jurisdiction of the Tribunal is or has been the subject of investigations or criminal proceedings instituted in the courts of any State, he may request the State to forward to him all relevant information in that respect, and the State shall transmit to him such information forthwith in accordance with Article 28 of the Statute.

Rule 9
Prosecutor's Application for Deferral

Where it appears to the Prosecutor that crimes which are the subject of investigations or criminal proceedings instituted in the courts of any State

i) Are the subject of an investigation by the Prosecutor;
ii) Should be the subject of an investigation by the Prosecutor considering, *inter alia*
a) The seriousness of the offences;
b) The status of the accused at the time of the alleged offences;
c) The general importance of the legal questions involved in the case;
iii) Are the subject of an indictment in the Tribunal,

the Prosecutor may apply to the Trial Chamber designated by the President to issue a formal request that such court defer to the competence of the Tribunal.

Rule 10
Formal Request for Deferral

A) If it appears to the Trial Chamber seized of a request by the Prosecutor under Rule 9 that paragraphs (i), (ii) or (iii) of Rule 9 are satisfied, the Trial Chamber shall issue a formal request to the State concerned that the Court defer to the competence of the Tribunal.

B) A request for deferral shall include a request that the results of the investigation and a copy of the court's records and the judgement, if already delivered, be forwarded to the Tribunal.

C) The State to which the formal request for deferral is addressed shall comply without undue delay in accordance with Article 28 of the Statute.

Rule 11
Non-compliance with a Formal Request for Deferral

If, within sixty days after a request for deferral has been notified by the Registrar to the State under whose jurisdiction the investigations or criminal proceedings have been instituted, the State fails to file a response which satisfies the Trial Chamber that the State has taken or is taking adequate steps to comply with the request, the Trial Chamber may invite the President to report the matter to the Security Council.

Rule 11 *bis*
Referral of the Indictment to another Court

A) If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:
i) in whose territory the crime was committed; or
ii) in which the accused was arrested; or
(ii) having jurisdiction and being willing and adequately prepared to accept such a case,

so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

B) The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where the accused is in the custody of the Tribunal, the accused, the opportunity to be heard.

C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.

D) Where an order is issued pursuant to this Rule :

i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;

ii) the Trial Chamber may order that protective measures for certain witnesses or victims remain in force;

iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;

iv) the Prosecutor may send observers to monitor the proceedings in the courts of the State concerned on his [or her][16] behalf.

E) The Trial Chamber may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred for trial.

F) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a court in the State concerned, the Trial Chamber may, at the request of the Prosecutor and upon having given to the authorities of the State concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10.

G) Where an order issued pursuant to this Rule is revoked by the Trial Chamber, it may make a formal request to the State concerned to transfer the accused to the seat of the Tribunal, and the State shall accede to such a request without delay in keeping with Article 28 of the Statute. The Trial Chamber or a Judge may also issue a warrant for the arrest of the accused.

H) An appeal by the accused or the Prosecutor shall lie as of right from a decision of the Trial Chamber whether or not to refer a case. Notice of appeal shall be filed within fifteen days of the decision unless the accused was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the accused is notified of the decision.

Rule 12
Determinations of Courts of any State

Subject to Article 9 (2) of the Statute, determinations of courts of any State are not binding on the Tribunal.

Rule 13
Non Bis in Idem

When the President receives reliable information to show that criminal proceedings have been instituted against a person before a court of any State for acts constituting serious violations of international humanitarian law under the Statute for which that person has already been tried by the Tribunal, a Trial Chamber shall, following *mutatis mutandis* the procedure provided in Rule 10, issue a reasoned order requesting that court permanently to discontinue its proceedings. If that court fails to do so, the President may report the matter to the Security Council.

Part Three - Organization Of The Tribunal

SECTION 1 - The Judges

Rule 14
Solemn Declaration

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[16] As amended on 10 November 2006.

A) Before taking up his duties each Judge shall make the following solemn declaration :

"I solemnly declare that I will perform my duties and exercise my powers as a Judge of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, honourably, faithfully, impartially and conscientiously."

B) The declaration, signed by the Judge and witnessed by the Secretary-General of the United Nations or his representative, shall be kept in the records of the Tribunal.

Rule 14 *bis*

The members of the Tribunal shall continue to discharge their duties until their places have been filled.

Rule 15
Disqualification of Judges

[A) A Judge may not sit in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in any such circumstance withdraw from that case. Where the Judge withdraws from the Trial Chamber, the President shall assign another Trial Chamber Judge to sit in his place. Where a Judge withdraws from the Appeals Chamber, the Presiding Judge of that Chamber shall assign another Judge to sit in his place.

B) Any party may apply to the Presiding Judge of a Chamber for the disqualification of a Judge of that Chamber from a case upon the above grounds. After the Presiding Judge has conferred with the Judge in question, the Bureau, if necessary, shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge.

C) The Judge who reviews an indictment against an accused, pursuant to Article 18 of the Statute and Rule 47 or 61, shall not be disqualified from sitting as a member of a Trial Chamber for the trial of that accused.][17]

Rule 15 *bis*
Absence of a Judge

A) If

i) a Judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and
ii) the remaining Judges of the Chamber are satisfied that it is in the interests of justice to do so,

those remaining Judges of the Chamber may order that the hearing of the case continue in the absence of that Judge for a period of not more than five working days.

B) If

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[17] As amended on 10 November 2006.

i) a Judge is, for illness or urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and

ii) the remaining Judges of the Chamber are not satisfied that it is in the interests of justice to order that the hearing of the case continue in the absence of that Judge, then

a) those remaining Judges of the Chamber may nevertheless conduct those matters which they are satisfied it is in the interests of justice that they be disposed of notwithstanding the absence of that Judge, and

b) the Presiding Judge may adjourn the proceedings.

C) If, by reason of death, illness, resignation from the Tribunal, non-reelection, non-extension of term of office or for any other reason, a Judge is unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the Presiding Judge shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of the accused, except as provided for in paragraph (D).

D) If, in the circumstances mentioned in the last sentence of paragraph (C), the accused withholds his consent, the remaining Judges may nonetheless decide to continue the proceedings before a Trial Chamber with a substitute Judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice. This decision is subject to appeal directly to a full bench of the Appeals Chamber by either party. If no appeal is taken or the Appeals Chamber affirms the decision of the Trial Chamber, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarised himself or herself with the record of the proceedings. Only one substitution under this paragraph may be made.

E) Appeals under paragraph (D) shall be filed within seven days of filing of the impugned decision. When such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless

i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision.

F) In case of illness or an unfilled vacancy or in any other similar circumstances, the President may, if satisfied that it is in the interests of justice to do so, authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members.

Rule 16
Resignation

A Judge who decides to resign shall give notice of his resignation in writing to the President, who shall transmit it to the Secretary-General of the United Nations.

Rule 17
Precedence

A) All Judges are equal in the exercise of their judicial functions, regardless of dates of election, appointment, age or period of service.

B) The Presiding Judges of the Chambers shall take precedence according to the dates of their election or appointment as judges, after the President and the Vice-President. Presiding Judges elected or appointed on the same date shall take precedence according to age.

C) Judges elected or appointed on different dates shall take precedence according to the dates of their election or appointment; Judges elected or appointed on the same date shall take precedence according to age.

D) In case of re-election, the total period of service as a Judge of the Tribunal shall be taken into account.

SECTION 2 - The Presidency

Rule 18
Election of the President

A) The President shall be elected for a term of two years, or such shorter term as shall coincide with the duration of his term of office as a Judge. The President may be re-elected once.

B) If the President ceases to be a member of the Tribunal or resigns his office before the expiration of his term, the Judges shall elect from among their number a successor for the remainder of the term.

C) The President shall be elected by a majority of the votes of the Judges of the Tribunal. If no Judge obtains such a majority, the second ballot shall be limited to the two Judges who obtained the greatest number of votes on the first ballot. In the case of equality of votes on the second ballot, the Judge who takes precedence in accordance with Rule 17 shall be declared elected.

Rule 19
Functions of the President

A) The President shall preside at all plenary meetings of the Tribunal, co-ordinate the work of the Chambers and supervise the activities of the Registry as well as exercise all the other functions conferred on him by the Statute and the Rules.

B) The President may, in consultation with the Bureau, the Registrar and the Prosecutor, issue Practice Directions, consistent with the Statute and the Rules, addressing detailed aspects of the conduct of proceedings before the Tribunal.

Rule 20
The Vice-President

A) The Vice-President shall be elected for a term of two years, or such shorter term as shall coincide with the duration of his term of office as a Judge. The Vice-President may be re-elected once.

B) Rules 18 (B) and (C) shall apply *mutatis mutandis* to the Vice-President.

Rule 21
Functions of the Vice-President

The Vice-President shall exercise the functions of the President in case the latter is absent or is unable to act.

Rule 22
Replacements

If neither the President nor the Vice-President can carry out the functions of the Presidency, this shall be assumed by the senior Judge of the Trial Chambers, determined in accordance with Rule 17.

SECTION 3 - Internal Functioning of the Tribunal

Rule 23
The Bureau

A) The Bureau shall be composed of the President, the Vice-President and the Presiding Judge of the Trial Chambers.

B) The President shall consult the other members of the Bureau on all major questions relating to the functioning of the Tribunal.

C) A Judge may draw the attention of any member of the Bureau to issues that in his opinion ought to be discussed by the Bureau or submitted to a Plenary Meeting of the Tribunal.

Rule 23 *bis*
The Coordination Council

A) The Coordination Council shall be composed of the President, the Prosecutor and the Registrar.

B) In order to achieve the mission of the Tribunal, as defined in the Statute, the Coordination Council ensures the coordination of the activities of the three organs of the Tribunal.

C) The Coordination Council shall meet once a month at the initiative of the President. A member may at any time request that additional meetings be held. The President shall chair the meetings.

D) The Vice-President, the Deputy Prosecutor and the Deputy Registrar may *ex officio* represent respectively, the President, the Prosecutor and the Registrar.

Rule 23 *ter*
The Management Committee

A) The Management Committee shall be composed of the President, the Vice-President, a Judge elected by the Judges in plenary session for a one year renewable mandate, the Registrar, the Deputy Registrar and the Chief of Administration.

B) The Management Committee shall assist the President with respect to the functions set forth in Rules 19 and 33, concerning in particular, all Registry activities relating to the administrative and judicial support provided to the Chambers and to the Judges. To this end, the Management Committee shall coordinate the preparation and implementation of the budget of the Tribunal with the exception of budgetary lines specific to the activities of the Office of the Prosecutor.

C) The Management Committee shall meet once a month at the initiative of the President. Two members may at any time request that additional meetings be held. The President shall chair the meetings.

D) In the performance of its functions, the Management Committee may call on the services of one or several advisers or experts.

Rule 24

Plenary Meetings of the Tribunal

The Judges shall meet in plenary to

i) Elect the President and Vice-President;
ii) Adopt and amend the Rules;
iii) Adopt the Annual Report provided for in Article 32 of the Statute;
iv) Decide upon matters relating to the internal functioning of the Chambers and the Tribunal;
v) Determine or supervise the conditions of detention;
vi) Exercise any other functions provided for in the Statute or in the Rules.

Rule 25
Dates of Plenary Meetings

A) The dates of the scheduled Plenary Meetings of the Tribunal shall normally be agreed upon in July of each year for the following calendar year.

B) Other Plenary Meetings shall be convened by the President if so requested by at least eight Judges, and may be convened whenever the exercise of his functions under the Statute or the Rules so requires.

Rule 26
Quorum and Vote

A) The quorum for each Plenary Meeting of the Tribunal shall be ten Judges.

B) Subject to Rule 6 (A) and (B) and Rule 18 (C), the decisions of the Plenary Meeting of the Tribunal shall be taken by the majority of the Judges present. In the event of an equality of votes, the President or the Judge who acts in his place shall have a casting vote.

SECTION 4 - The Chambers

Rule 27
Rotation of the Judges

A) Judges shall rotate on a regular basis between the Trial Chambers. Rotation shall take into account the efficient disposal of cases.

B) The Judges shall take their places in their assigned Chamber as soon as the President thinks it convenient, having regard to the disposal of pending cases.

C) The President may at any time temporarily assign a member of one Trial Chamber to another Trial Chamber.

Rule 28
Duty Judges

Every six months and after consultation with the Judges, the President shall, designate for each month of the next six months one Judge from each Trial Chamber to whom indictments, warrants, and other submissions not pertaining to a case already assigned to a Chamber, shall be transmitted for review. The duty roster shall be published by the Registrar. However, in exceptional circumstances, a Judge on duty may request another Judge of the same Chamber to replace him, after having informed the President and the Registrar.

Rule 29

Deliberations

The deliberations of the Chambers shall take place in private and remain secret.

SECTION 5 - The Registrar

Rule 30
Appointment of the Registrar

The President shall seek the opinion of the Judges on the candidates for the post of Registrar, before consulting with the Secretary-General of the United Nations pursuant to Article 16 (3) of the Statute.

Rule 31
Appointment of the Deputy Registrar and Registry Staff

The Registrar, after consultation with the President, shall make his recommendations to the Secretary-General of the United Nations for the appointment of the Deputy Registrar and other Registry staff.

Rule 32
Solemn Declaration

A) Before taking up his duties, the Registrar shall make the following declaration before the President

"I solemnly declare that I will perform the duties incumbent upon me as Registrar of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in all loyalty, discretion and good conscience and that I will faithfully observe all the provisions of the Statute and the Rules of Procedure and Evidence of the Tribunal."

B) Before taking up his duties, the Deputy Registrar shall make a similar declaration before the President.

C) Every staff member of the Registry shall make a similar declaration before the Registrar.

Rule 33
Functions of the Registrar

A) The Registrar shall assist the Chambers, the Plenary Meetings of the Tribunal, the Judges and the Prosecutor in the performance of their functions. Under the authority of the President, he shall be responsible for the administration and servicing of the Tribunal and shall serve as its channel of communication.

B) The Registrar, in the execution of his functions, may make oral or written representations to Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions, including that of implementing judicial decisions, with notice to the parties where necessary.

C) The Registrar may, in consultation with the President of the Tribunal and the Presiding Judge of the Appeals Chamber, as the case may be, issue Practice Directions addressing particular aspects of

the practice and procedure in the Registry of the Tribunal and in respect of other matters within the powers of the Registrar.

Rule 34
Victims and Witnesses Support Unit

A) There shall be set up under the authority of the Registrar a Victims and Witnesses Support Unit consisting of qualified staff to

i) Recommend the adoption of protective measures for victims and witnesses in accordance with Article 21 of the Statute;
ii) Ensure that they receive relevant support, including physical and psychological rehabilitation, especially counselling in cases of rape and sexual assault; and
iii) Develop short term and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family.

B) A gender sensitive approach to victims and witnesses protective and support measures should be adopted and due consideration given, in the appointment of staff within this Unit, to the employment of qualified women.

Rule 35
Minutes

Except where a full record is made under Rule 81, the Registrar, or Registry staff designated by him, shall take minutes of the Plenary Meetings of the Tribunal and of the sittings of the Chambers, other than private deliberations.

Rule 36
Record Book

The Registrar shall keep a Record Book which shall list, subject to Rule 53, all the particulars of each case brought before the Tribunal. The Record Book shall be open to the public.

SECTION 6 - The Prosecutor

Rule 37
Functions of the Prosecutor

A) The Prosecutor shall perform all the functions provided by the Statute in accordance with the Rules and such Regulations, consistent with the Statute and the Rules, as may be framed by him. Any alleged inconsistency in the Regulations shall be brought to the attention of the Bureau to whose opinion the Prosecutor shall defer.

B) The Prosecutor's powers under Parts Four to Eight of the Rules may be exercised by staff members of the Office of the Prosecutor authorized by him, or by any person acting under his direction.

Rule 38
Deputy Prosecutor

A) The Prosecutor shall make his recommendations to the Secretary-General of the United Nations for the appointment of a Deputy Prosecutor.

B) The Deputy Prosecutor shall exercise the functions of the Prosecutor in the event of his absence or inability to act or upon the Prosecutor's express instructions.

Part Four - Investigations And Rights Of Suspects

SECTION 1 - Investigations

Rule 39
Conduct of Investigations

In the conduct of an investigation, the Prosecutor may

i) Summon and question suspects, interview victims and witnesses and record their statements, collect evidence and conduct on-site investigations;
ii) Take all measures deemed necessary for the purpose of the investigation and to support the prosecution at trial, including the taking of special measures to provide for the safety of potential witnesses and informants;
iii) Seek, to that end, the assistance of any State authority concerned, as well as of any relevant international body including the International Criminal Police Organization (INTERPOL); and
iv) Request such orders as may be necessary from a Trial Chamber or a Judge.

Rule 40
Provisional Measures

A) In case of urgency, the Prosecutor may request any State

i) To arrest a suspect and place him in custody;
ii) To seize all physical evidence;
iii) To take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.

The State concerned shall comply forthwith, in accordance with Article 28 of the Statute.

B) Upon showing that a major impediment does not allow the State to keep the suspect in custody or to take all necessary measures to prevent his escape, the Prosecutor may apply to a Judge designated by the President for an order to transfer the suspect to the seat of the Tribunal or to such other place as the Bureau may decide, and to detain him provisionally. After consultation with the Prosecutor and the Registrar, the transfer shall be arranged between the State authorities concerned, the authorities of the host Country of the Tribunal and the Registrar.

C) In the cases referred to in paragraph B, the suspect shall, from the moment of his transfer, enjoy all the rights provided for in Rule 42, and may apply for review to a Trial Chamber of the Tribunal. The Chamber, after hearing the Prosecutor, shall rule upon the application.

D) The suspect shall be released if (i) the Chamber so rules; or (ii) the Prosecutor fails to issue an indictment within twenty days of the transfer.

Rule 40 *bis*
Transfer and Provisional Detention of Suspects

A) In the conduct of an investigation, the Prosecutor may transmit to the Registrar, for an order by a Judge assigned pursuant to Rule 28, a request for the transfer to and provisional detention of a suspect in the premises of the detention unit of the Tribunal. This request shall indicate the grounds upon which the request is made and, unless the Prosecutor wishes only to question the suspect, shall include a provisional charge and a summary of the material upon which the Prosecutor relies.

B) The Judge shall order the transfer and provisional detention of the suspect if the following conditions are met

i) The Prosecutor has requested a State to arrest the suspect and to place him in custody, in accordance with Rule 40, or the suspect is otherwise detained by a State;
ii) After hearing the Prosecutor, the Judge considers that there is a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction; and
iii) The Judge considers provisional detention to be a necessary measure to prevent the escape of the suspect, physical or mental injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation.

C) The provisional detention of the suspect may be ordered for a period not exceeding 30 days from the day after the transfer of the suspect to the detention unit of the Tribunal.

D) The order for the transfer and provisional detention of the suspect shall be signed by the Judge and bear the seal of the Tribunal. The order shall set forth the basis of the request made by the Prosecutor under Sub-Rule (A), including the provisional charge, and shall state the Judge's grounds for making the order, having regard to Sub-Rule (B). The order shall also specify the initial time limit for the provisional detention of the suspect, and be accompanied by a statement of the rights of a suspect, as specified in this Rule and in Rules 42 and 43.

E) As soon as possible, copies of the order and of the request by the Prosecutor are served upon the suspect and his counsel by the Registrar.

F) At the Prosecutor's request indicating the grounds upon which it is made and if warranted by the needs of the investigation, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing and before the end of the period of detention, to extend the provisional detention for a period not exceeding 30 days.

G) At the Prosecutor's request indicating the grounds upon which it is made and if warranted by special circumstances, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing and before the end of the period of detention, to extend the detention for a further period not exceeding 30 days.

H) The total period of provisional detention shall in no case exceed 90 days after the day of transfer of the suspect to the Tribunal, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made.

I) The provisions in Rules 55 (B) to 59 shall apply *mutatis mutandis* to the execution of the order for the transfer and provisional detention of the suspect.

J) After his transfer to the seat of the Tribunal, the suspect, assisted by his counsel, shall be brought, without delay, before the Judge who made the initial order, or another Judge of the same Trial Chamber, who shall ensure that his rights are respected.

K) During detention, the Prosecutor, the suspect or his counsel may submit to the Trial Chamber of which the Judge who made the initial order is a member, all applications relative to the propriety of provisional detention or to the suspect's release.

L) Without prejudice to Sub-Rules (C) to (H), the Rules relating to the detention on remand of accused persons shall apply *mutatis mutandis* to the provisional detention of persons under this Rule.

Rule 41

Preservation of Information

A) The Prosecutor shall be responsible for the preservation, storage and security of information and physical evidence obtained in the course of his investigations.

B) The Prosecutor shall draw up an inventory of all materials seized from the accused, including documents, books, papers, and other objects, and shall serve a copy thereof on the accused. Materials that are of no evidentiary value shall be returned without delay to the accused.

Rule 42
Rights of Suspects during Investigation

A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands

i) The right to be assisted by counsel of his choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it;
ii) The right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning; and
iii) The right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.

B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

Rule 43
Recording Questioning of Suspects

Whenever the Prosecutor questions a suspect, the questioning shall be audio-recorded or video-recorded, in accordance with the following procedure:

(i) The suspect shall be informed in a language he understands that the questioning is being audio-recorded or video-recorded;
ii) In the event of a break in the course of the questioning, the fact and the time of the break shall be recorded before audio-recording or video-recording ends and the time of resumption of the questioning shall also be recorded;
iii) At the conclusion of the questioning the suspect shall be offered the opportunity to clarify anything he has said, and to add anything he may wish, and the time of conclusion shall be recorded;
iv) The content of the recording shall then be transcribed as soon as practicable after the conclusion of questioning and a copy of the transcript supplied to the suspect, together with a copy of the recording or, if multiple recording apparatus was used, one of the original recorded tapes; and
v) After a copy has been made, if necessary, of the recorded tape for purposes of transcription, the original recorded tape or one of the original tapes shall be sealed in the presence of the suspect under the signature of the Prosecutor and the suspect.

SECTION 2 - *Of Counsel*

Rule 44
Appointment and Qualifications of Counsel

A) Counsel engaged by a suspect or an accused shall file his power of attorney with the Registrar at the earliest opportunity. Subject to verification by the Registrar, a counsel shall be considered

qualified to represent a suspect or accused, provided that he is admitted to the practice of law in a State, or is a University professor of law.

B) In the performance of their duties counsel shall be subject to the relevant provisions of the Statute, the Rules, the Rules of Detention and any other rules or regulations adopted by the Tribunal, the Host Country Agreement, the Code of Conduct and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defence Counsel.

Rule 44 *bis*
Duty Counsel

A) A list of duty counsel who speak one or both working languages of the Tribunal and have indicated their willingness to be assigned pursuant to this Rule shall be kept by the Registrar.

B) Duty counsel shall fulfil the requirements of Rule 44, and shall be situated within reasonable proximity to the Detention Facility and the Seat of the Tribunal.

C) The Registrar shall at all times ensure that duty counsel will be available to attend the Detention Facility in the event of being summoned.

D) If an accused, or suspect transferred under Rule 40 *bis*, is unrepresented at any time after being transferred to the Tribunal, the Registrar shall as soon as practicable summon duty counsel to represent the accused or suspect until counsel is engaged by the accused or suspect, or assigned under Rule 45.

E) In providing initial legal advice and assistance to a suspect transferred under Rule 40 *bis*, duty counsel shall advise the suspect of his or her rights including the rights referred to in Rule 55 (A).

Rule 45
Assignment of Counsel

A) A list of counsel who speak one or both of the working languages of the Tribunal, meet the requirements of Rule 44, have at least 10 years relevant experience, and have indicated their willingness to be assigned by the Tribunal to indigent suspects or accused, shall be kept by the Registrar.

B) The criteria for determination of indigence shall be established by the Registrar and approved by the Judges.

C) In assigning counsel to an indigent suspect or accused, the following procedure shall be observed

i) A request for assignment of counsel shall be made to the Registrar;
ii) The Registrar shall enquire into the financial means of the suspect or accused and determine whether the criteria of indigence are met;
iii) If he decides that the criteria are met, he shall assign counsel from the list; if he decides to the contrary, he shall inform the suspect or accused that the request is refused.

D) If a request is refused, a further reasoned request may be made by the suspect or the accused to the Registrar upon showing a change in circumstances.

E) The Registrar shall, in consultation with the Judges, establish the criteria for the payment of fees to assigned counsel.

F) If a suspect or an accused elects to conduct his own Defence, he shall so notify the Registrar in writing at the first opportunity.

G) Where an alleged indigent person is subsequently found not to be indigent, the Chamber may make an order of contribution to recover the cost of providing counsel.

H) Under exceptional circumstances, at the request of the suspect or accused or his counsel, the Chamber may instruct the Registrar to replace an assigned counsel, upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings.

I) It is understood that Counsel will represent the accused and conduct the case to finality. Failure to do so, absent just cause approved by the Chamber, may result in forfeiture of fees in whole or in part. In such circumstances the Chamber may make an order accordingly. Counsel shall only be permitted to withdraw from the case to which he has been assigned in the most exceptional circumstances.

Rule 45 *bis*
Detained Persons

Rules 44 and 45 shall apply to any person detained under the authority of the Tribunal.

Rule 45 *ter*
Availability of Counsel

A) Counsel and Co-Counsel, whether assigned by the Registrar or appointed by the client for the purposes of proceedings before the Tribunal, shall furnish the Registrar, upon date of such assignment or appointment, a written undertaking that he will appear before the Tribunal within a reasonable time as specified by the Registrar.

B) Failure by Counsel or Co-Counsel to appear before the Tribunal, as undertaken, shall be a ground for withdrawal by the Registrar of the assignment of such Counsel or Co-Counsel or the refusal of audience by the Tribunal or the imposition of any other sanctions by the Chamber concerned.

Rule 45 *quater*
Assignment of Counsel in the Interests of Justice

The Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign a counsel to represent the interests of the accused.

Rule 46
Misconduct of Counsel

A) A Chamber may, after a warning, impose sanctions against a counsel if, in its opinion, his conduct remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice. This provision is applicable *mutatis mutandis* to Counsel for the prosecution.

B) A Judge or a Chamber may also, with the approval of the President, communicate any misconduct of counsel to the professional body regulating the conduct of counsel in his State of admission or, if a professor and not otherwise admitted to the profession, to the governing body of his University.

C) If a counsel assigned pursuant to Rule 45 is sanctioned in accordance with Sub-Rule (A) by being refused audience, the Chamber shall instruct the Registrar to replace the counsel.

D) The Registrar may set up a Code of Professional Conduct enunciating the principles of professional ethics to be observed by counsel appearing before the Tribunal, subject to adoption by the

Plenary Meeting. Amendments to the Code shall be made in consultation with representatives of the Prosecutor and Defence counsel, and subject to adoption by the Plenary Meeting. Amendments to the Code shall be made in consultation with representatives of the Prosecutor and Defence counsel, and subject to adoption by the Plenary Meeting. If the Registrar has strong grounds for believing that Counsel has committed a serious violation of the Code of Professional Conduct so adopted, he may report the matter to the President or the Bureau for appropriate action under this rule.

Part Five - Pre-Trial Proceedings

SECTION 1 - Indictments

Rule 47
Submission of Indictment by the Prosecutor

A) An indictment, submitted in accordance with the following procedure, shall be reviewed by a Judge designated in accordance with Rule 28 for this purpose.

B) The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material.

C) The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.

D) The Registrar shall forward the indictment and accompanying material to the designated Judge, who will inform the Prosecutor of the scheduled date for review of the indictment.

E) The reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 18 of the Statute, whether a case exists against the suspect.

F) The reviewing Judge may:

i) Request the Prosecutor to present additional material in support of any or all counts, or to take any further measures which appear appropriate;
ii) Confirm each count;
iii) Dismiss each count; or
iv) Adjourn the review so as to give the Prosecutor the opportunity to modify the indictment.

G) The indictment as confirmed by the Judge shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Tribunal. If the accused does not understand either of the official languages of the Tribunal and if the language understood is known to the Registrar, a translation of the indictment in that language shall also be prepared, and a copy of the translation attached to each certified copy of the indictment.

H) Upon confirmation of any or all counts in the indictment

i) The Judge may issue an arrest warrant, in accordance with Sub-Rule 55 (A), and any orders as provided in Article 19 of the Statute; and
ii) The suspect shall have the status of an accused.

I) The dismissal of a count in an indictment shall not preclude the Prosecutor from subsequently bringing an amended indictment based on the acts underlying that count if supported by additional evidence.

Rule 48
Joinder of Accused

Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

Rule 48 *bis*
Joinder of Trials

Persons who are separately indicted, accused of the same or different crimes committed in the course of the same transaction, may be tried together, with leave granted by a Trial Chamber pursuant to Rule 73.

Rule 49
Joinder of Crimes

Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.

Rule 50
Amendment of Indictment

A) (i) The Prosecutor may amend an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47 (G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.
(ii) In deciding whether to grant leave to amend the indictment, the Trial Chamber or, where applicable, a Judge shall, *mutatis mutandis*, follow the procedures and apply the standards set out in Sub-Rules 47(E) and (F) in addition to considering any other relevant factors.

B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the Defence.

Rule 51
Withdrawal of Indictment

A) The Prosecutor may withdraw an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance an indictment may only be withdrawn by leave granted by a Trial Chamber pursuant to Rule 73.

B) The withdrawal of the indictment shall be promptly notified to the suspect or the accused and to the counsel of the suspect or accused.

Rule 52
Public Character of Indictment

Subject to Rule 53, upon confirmation by a Judge of a Trial Chamber, the indictment shall be made public.

Rule 53
Non-disclosure

A) In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order.

B) When confirming an indictment the Judge may, in consultation with the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused.

C) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.

D) Notwithstanding sub-rules (A), (B) and (C), the Prosecutor may disclose an indictment or part thereof to the authorities of a State or an appropriate authority or international body where the Prosecutor deems it necessary to secure the possible arrest of an accused.

Rule 53 *bis*
Service of Indictment

A) Service of the indictment shall be effected personally on the accused at the time the accused is taken into the custody of the Tribunal or as soon as possible thereafter.

B) Personal service of an indictment on the accused is effected by giving the accused a copy of the indictment certified in accordance with Rule 47 (G).

SECTION 2 - Orders and Warrants

Rule 54
General Provision

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

Rule 55
Execution of Arrest Warrants

A) A warrant of arrest shall be signed by a Judge and shall bear the seal of the Tribunal. It shall be accompanied by a copy of the indictment, and a statement of the rights of the accused. These rights include those set forth in Article 20 of the Statute, and in Rules 42 and 43 *mutatis mutandis*, together with the right of the accused to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.

B) The Registrar shall transmit to the national authorities of the State in whose territory or under whose jurisdiction or control the accused resides, or was last known to be, three sets of certified copies of :

i) The warrant for arrest of the accused and an order for his surrender to the Tribunal;
ii) The confirmed indictment;
iii) A statement of the rights of the accused; and if necessary a translation thereof in a language understood by the accused.

C) The Registrar shall instruct the said authorities to

i) Cause the arrest of the accused and his transfer to the Tribunal;
ii) Serve a set of the aforementioned documents upon the accused;
iii) Cause the documents to be read to the accused in a language understood by him and to caution him as to his rights in that language; and
iv) Return one set of the documents together with proof of service, to the Tribunal.

D) When an arrest warrant issued by the Tribunal is executed, a member of the Prosecutor's Office may be present as from the time of arrest.

Rule 55 *bis*
Warrant of Arrest to All States

A) Upon the request of the Prosecutor, and if satisfied that to do so would facilitate the arrest of an accused who may move from State to State, or whose whereabouts are unknown, a Judge may without having recourse to the procedures set out in Rule 61, and subject to sub-rule (B), address a warrant of arrest to all States.

B) The Registrar shall transmit such a warrant to the national authorities of such States as may be indicated by the Prosecutor.

Rule 56
Cooperation of States

The State to which a warrant of arrest or a transfer order for a witness is transmitted shall act promptly and with all due diligence to ensure proper and effective execution thereof, in accordance with Article 28 of the Statute.

Rule 57
Procedure after Arrest

Upon the arrest of the accused, the State concerned shall detain him, and shall promptly notify the Registrar. The transfer of the accused to the seat of the Tribunal, or to such other place as the Bureau may decide, after consultation with the Prosecutor and the Registrar, shall be arranged by the State authorities concerned, in liaison with the authorities of the host country and the Registrar.

Rule 58
National Extradition Provisions

The obligations laid down in Article 28 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.

Rule 59

Failure to Execute a Warrant of Arrest or Transfer Order

A) Where the State to which a warrant of arrest or transfer order has been transmitted has been unable to execute the warrant of arrest or transfer order, it shall report forthwith its inability to the Registrar, and the reasons therefore.

B) If, within a reasonable time after the warrant of arrest or transfer order has been transmitted to the State, no report is made on action taken, this shall be deemed a failure to execute the warrant of arrest or transfer order and the Tribunal, through the President, may notify the Security Council accordingly.

Rule 60
Publication of Indictment

At the request of the Prosecutor, a form of advertisement shall be transmitted by the Registrar to the national authorities of any State or States, for publication in newspapers or for broadcast via radio, transmission via Internet or television, notifying publicly the existence of an indictment and calling upon the accused to surrender to the Tribunal and inviting any person with information as to the whereabouts of the accused to communicate that information to the Tribunal.

Rule 61
Procedure in Case of Failure to Execute a Warrant of Arrest

A) If, within a reasonable time, a warrant of arrest has not been executed, and personal service of the indictment has consequently not been effected, the Judge who confirmed the indictment shall invite the Prosecutor to report on the measures taken. When the Judge is satisfied that:

i) The Registrar and the Prosecutor have taken all reasonable steps to secure the arrest of the accused, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the accused to be served resides or was last known to be; and
ii) If the whereabouts of the accused are unknown, the Prosecutor and the Registrar have taken all reasonable steps to ascertain those whereabouts, including by seeking publication of advertisement pursuant to Rule 60,

the Judge shall order that the indictment be submitted by the Prosecutor to his Trial Chamber.

B) Upon obtaining such an order the Prosecutor shall submit the indictment to the Trial Chamber in open court, together with all the evidence that was before the Judge who initially confirmed the indictment and any other evidence submitted to him after confirmation of the indictment. The Prosecutor may also call before the Trial Chamber and examine any witness whose statement has been submitted to the confirming Judge.

C) If the Trial Chamber is satisfied on that evidence, together with such additional evidence as the Prosecutor may tender, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine. The Trial Chamber shall have the relevant parts of the indictment read out by the Prosecutor together with an account of the efforts to effect service referred to in Sub-Rule (A) above.

D) The Trial Chamber shall also issue an international arrest warrant in respect of the accused which shall be transmitted to all States. Upon request by the Prosecutor or *proprio motu*, after having heard the Prosecutor, the Trial Chamber may order a State or States to adopt provisional measures to freeze the assets of the accused, without prejudice to the rights of third parties.

E) If, during the hearing, the Prosecutor satisfies the Trial Chamber that the failure to effect personal service of the indictment was due in whole or in part to a failure or refusal of a State to co-

operate with the Tribunal in accordance with Article 28 of the Statute, the Trial Chamber shall so certify. After consulting the Presiding Judges of the Chambers, the President shall notify the Security Council thereof in such manner as he thinks fit.

Rule 62
Initial Appearance of Accused and Plea

A) Upon his transfer to the Tribunal, the accused shall be brought before a Trial Chamber or a Judge thereof without delay, and shall be formally charged. The Trial Chamber or the Judge shall:

i) Satisfy itself or himself that the right of the accused to counsel is respected;
ii) Read or have the indictment read to the accused in a language he understands, and satisfy itself or himself that the accused understands the indictment;
iii) Call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on his behalf;
iv) In case of a plea of not guilty, instruct the Registrar to set a date for trial;
v) In case of a plea of guilty:
a) if before a Judge, refer the plea to the Trial Chamber so that it may act in accordance with Rule 62 (B) ; or
b) if before a Trial Chamber, act in accordance with Rule 62 (B);

B) If an accused pleads guilty in accordance with Rule 62 (A) (v), or requests to change his plea to guilty, the Trial Chamber shall satisfy itself that the guilty plea:

i) is made freely and voluntarily;
ii) is an informed plea;
iii) is unequivocal; and
iv) is based on sufficient facts for the crime and accused's participation in it, either on the basis of objective indicia or of lack of any material disagreement between the parties about the facts of the case.

Thereafter the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.

Rule 62 *bis*
Plea Agreement Procedure

A) The Prosecutor and the Defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:

i) apply to amend the indictment accordingly;
ii) submit that a specific sentence or sentencing range is appropriate;
iii) not oppose a request by the accused for a particular sentence or sentencing range.

B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A).

C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (A) (v), or requests to change his or her plea to guilty.

Rule 63
Questioning of the Accused

A) Questioning by the Prosecutor of an accused, including after the initial appearance, shall not proceed without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present. If the accused subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the accused's counsel is present.

B) The questioning, including any waiver of the right to counsel, shall be audio-recorded or video-recorded in accordance with the procedure provided for in Rule 43. The Prosecutor shall at the beginning of the questioning caution the accused in accordance with Rule 42 (A) (iii).

Rule 64
Detention on Remand

Upon his transfer to the Tribunal, the accused shall be detained in facilities provided by the host country or by another country. The President may, on the application of a party, request modification of the conditions of detention of an accused.

Rule 65
Provisional Release

A) Once detained, an accused may not be provisionally released except upon an order of a Trial Chamber.

B) Provisional release may be ordered by a Trial Chamber only after giving the host country and the country to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

C) The Trial Chamber may impose such conditions upon the provisional release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused at trial and the protection of others.

[D) Any decision rendered under this Rule by a Trial Chamber shall be subject to appeal. Subject to paragraph (F) below, an appeal shall be filed within seven days of filing of the impugned decision. Where such decision is rendered orally, the appeal shall be filed within seven days of the oral decision unless:][18]

i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision.

E) The Prosecutor may apply for a stay of a decision by the Trial Chamber to release an accused on the basis that the Prosecutor intends to appeal the decision, and shall make such an application at the time of filing his or her response to the initial application for provisional release by the accused.

F) Where the Trial Chamber grants a stay of its decision to release an accused, the Prosecutor shall file his or her appeal not later than one day from the rendering of that decision.

G) Where the Trial Chamber orders a stay of its decision to release the accused pending an appeal by the Prosecutor, the accused shall not be released until either:

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[18] As amended on 10 November 2006.

i) the time-limit for the filing of an application for an appeal by the Prosecutor has expired, and no such application is filed;
ii) the Appeals Chamber dismisses the appeal; or
iii) the Appeals Chamber otherwise orders.][19]

H) If necessary, the Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been provisionally released or is for any other reason at large. The provisions of Section 2 of Part Five shall apply *mutatis mutandis.*

I) Without prejudice to the provisions of Rule 107, the Appeals Chamber may grant provisional release to convicted persons pending an appeal or for a fixed period if it is satisfied that:

i) the appellant, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be;
ii) the appellant, if released, will not pose a danger to any victim, witness or other person, and
iii) special circumstances exist warranting such release.

The provisions of paragraphs (C) and (H) shall apply *mutatis mutandis*.

Rule 65 *bis*
Status Conferences

A) A status conference may be convened by a Trial Chamber or a Judge thereof. Its purpose is to organize exchanges between the parties so as to ensure expeditious trial proceedings.

B) The Appeals Chamber or an Appeals Chamber Judge may convene a status conference.

C) A status conference held pursuant to paragraph (B) of this Rule may be conducted with the participation of counsel via tele-conference or video-conference.

SECTION 3 - Production of Evidence

Rule 66
Disclosure of materials by the Prosecutor

Subject to the provisions of Rules 53 and 69;

A) The Prosecutor shall disclose to the Defence

i) Within 30 days of the initial appearance of the accused copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused, and
ii) No later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; upon good cause shown, a Trial Chamber may order that copies of the statements of additional Prosecution witnesses be made available to the Defence within a prescribed time.

B) At the request of the Defence, the Prosecutor shall, subject to Sub-Rule C, permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are

[19] Ibidem.

material to the preparation of the Defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

C) Where information or materials are in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting *in camera* to be relieved from the obligation to disclose pursuant to Sub-Rule A and B. When making such an application the Prosecutor shall provide the Trial Chamber, and only the Trial Chamber, with the information or materials that are sought to be kept confidential.

Rule 67
Reciprocal Disclosure of Evidence

Subject to the provisions of Rules 53 and 69:

A) As early as reasonably practicable and in any event prior to the commencement of the trial:

i) The Prosecutor shall notify the Defence of the names of the witnesses that he intends to call to establish the guilt of the accused and in rebuttal of any Defence plea of which the Prosecutor has received notice in accordance with Sub-Rule (ii) below;
ii) The Defence shall notify the Prosecutor of its intent to enter:

a) The Defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;
b) Any special Defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special Defence.

B) Failure of the Defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above Defences.

C) If the Defence makes a request pursuant to Rule 66 (B), the Prosecutor shall in turn be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the Defence and which it intends to use as evidence at the trial.

D) If either party discovers additional evidence or information or materials which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or information or materials.

Rule 68
Disclosure of Exculpatory and Other Relevant Material

(A) The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.

(B) Where possible, and with the agreement of the Defence, and without prejudice to paragraph (A), the Prosecutor shall make available to the Defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the Defence can search such collections electronically.

(C) The Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains material referred to in paragraph (A)

above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused.

(D) The Prosecutor shall apply to the Chamber sitting *in camera* to be relieved from an obligation under the Rules to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

(E) Notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (A) above.

Rule 69
Protection of Victims and Witnesses

A) In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.

B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Support Unit.

C) Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the Prosecution and the Defence.

Rule 70
Matters not Subject to Disclosure

A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.

B) If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance.

D) If the Prosecutor calls as a witness the person providing or a representative of the entity providing information under this Rule, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on grounds of confidentiality.

E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to limitations contained in Sub-Rules (C) and (D).

F) Nothing in Sub-Rule (C) or (D) above shall affect a Trial Chamber's power under Rule 89 (C) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

SECTION 4 - Depositions

Rule 71
Depositions

A) At the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial, and appoint, for that purpose, a Presiding Officer.

B) The motion for the taking of a deposition shall be in writing and shall indicate the name and whereabouts of the witness whose deposition is sought, the date and place at which the deposition is to be taken, a statement of the matters on which the person is to be examined, and of the exceptional circumstances justifying the taking of the deposition.

C) If the motion is granted, the party at whose request the deposition is to be taken shall give reasonable notice to the other party, who shall have the right to attend the taking of the deposition and cross-examine the witness.

D) The deposition may also be given by means of a video-conference.

E) The Presiding Officer shall ensure that the deposition is taken in accordance with the Rules and that a record is made of the deposition, including cross-examination and objections raised by either party for decision by the Trial Chamber. He shall transmit the record to the Trial Chamber.

SECTION 5 - Preliminary Motions

Rule 72
Preliminary Motions

A) Preliminary motions, being motions which:

i) challenge jurisdiction;
ii) allege defects in the form of the indictment;
iii) seek the severance of counts joined in one indictment under Rule 49 or seek separate trials under Rule 82 (B); or
iv) raise objections based on the refusal of a request for assignment of counsel made under Rule 45 (C)

shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the Defence of all material and statements referred to in Rule 66 (A) (i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84. The Trial Chamber may rule on such motions based solely on the briefs of the parties, unless it is decided to hear the motion in open Court.

B) Decisions on preliminary motions are without interlocutory appeal, save:

i) in the case of motions challenging jurisdiction, where an appeal by either party lies as of right;
ii) in other cases where certification has been granted by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

C) Appeals under paragraph (B) (i) shall be filed within fifteen days and requests for certification under paragraph (B) (ii) shall be filed within seven days of filing of the impugned decision. Where such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless

i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision.

If certification is given, a party shall appeal to the Appeals Chamber within seven days of the filing of the decision to certify.

D) For purposes of paragraphs (A) (i) and (B) (i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:

i) any of the persons indicated in Articles 1, 5, 6 and 8 of the Statute;
ii) the territories indicated in Articles 1, 7 and 8 of the Statute;
iii) the period indicated in Articles 1, 7, and 8 of the Statute; or
iv) any of the violations indicated in Articles 2, 3, 4 and 6 of the Statute.

[E) Objections to the form of the indictment, included an amended indictment, shall be raised by a party in one motion only, unless otherwise allowed by a Trial Chamber.

F) Failure to comply with the time limits prescribed in this Rule shall constitute a waiver of the rights. The Trial Chamber may, however, grant relief from the waiver upon showing good cause.][20]

Part Six - Proceedings Before Trial Chambers

SECTION 1 - General Provisions

Rule 73
Motions

A) Subject to Rule 72, either party may move before a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused. The Trial Chamber, or a Judge designated by the Chamber from among its members, may rule on such motions based solely on the briefs of the parties, unless it is decided to hear the motion in open Court.

B) Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

C) Requests for certification shall be filed within seven days of the filing of the impugned decision. Where such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless

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[20] As amended on 10 November 2006.

i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

If certification is granted, a party shall appeal to the Appeals Chamber within seven days of the filing of the decision to certify.

D) Where a date has been set for the hearing of a motion, including a preliminary motion, any additional motions to be heard on that date and any supporting material to the motions must be filed at least ten days before the hearing of the motion. Failure to observe this Rule will mean that the later motion will not be considered on the hearing date, nor will any adjournment of the original motion be granted on the basis of subsequent motions filed, save in exceptional circumstances.

E) A responding party shall, thereafter, file any reply within five days from the date on which Counsel received the motion.

F) In addition to the sanctions envisaged by Rule 46, a Chamber may impose sanctions against Counsel if Counsel brings a motion, including a preliminary motion, that, in the opinion of the Chamber, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof.

G) Notwithstanding the time limits in Rule 72 (A), the time limit in the present Rule applies.

Rule 73 *bis*
Pre-Trial Conference

A) The Trial Chamber shall hold a Pre-Trial Conference prior to the commencement of the trial.

B) At the Pre-Trial Conference the Trial Chamber or a Judge, designated from among its members, may order the Prosecutor, within a time limit set by the Trial Chamber or the said Judge, and before the date set for trial, to file the following

i) A pre-trial brief addressing the factual and legal issues;
ii) Admissions by the parties and a statement of other matters not in dispute;
iii) A statement of contested matters of fact and law;
iv) A list of witnesses the Prosecutor intends to call with
a) The name or pseudonym of each witness;
b) A summary of the facts on which each witness will testify;
c) The points in the indictment on which each witness will testify; and
d) The estimated length of time required for each witness;
v) A list of exhibits the Prosecutor intends to offer stating, where possible, whether or not the Defence has any objection as to authenticity.

The Trial Chamber or the Judge may order the Prosecutor to provide the Trial Chamber with copies of written statements of each witness whom the Prosecutor intends to call to testify.

C) The Trial Chamber or the designated Judge may order the Prosecutor to shorten the examination-in-chief of some witnesses.

D) The Trial Chamber or the designated Judge may order the Prosecutor to reduce the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts.

E) After commencement of Trial, the Prosecutor may, if he considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called.

F) At the Pre-Trial Conference, the Trial Chamber or the designated Judge may order the Defence to file a statement of admitted facts and law and a pre-trial brief addressing the factual and legal issues, not later than seven days prior to the date set for trial.

Rule 73 *ter*
Pre-Defence Conference

A) The Trial Chamber may hold a Conference prior to the commencement by the Defence of its case.

B) At that Conference, the Trial Chamber or a Judge, designated from among its members, may order that the Defence, before the commencement of its case but after the close of the case for the prosecution, file the following:

i) Admissions by the parties and a statement of other matters which are not in dispute;
ii) A statement of contested matters of fact and law;
iii) A list of witnesses the Defence intends to call with
a) The name or pseudonym of each witness;
b) A summary of the facts on which each witness will testify;
c) The points in the indictment as to which each witness will testify; and
d) The estimated length of time required for each witness;
iv) A list of exhibits the Defence intends to offer in its case, stating where possible whether or not the Prosecutor has any objection as to authenticity.

The Trial Chamber or the Judge may order the Defence to provide the Trial Chamber and the Prosecutor with copies of the written statements of each witness whom the Defence intends to call to testify.

C) The Trial Chamber or the designated Judge may order the Defence to shorten the estimated length of the examination-in-chief for some witnesses.

D) The Trial Chamber or the designated Judge may order the Defence to reduce the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts.

E) After commencement of the Defence case, the Defence may, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called.

Rule 74
Amicus Curiae

A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to appear before it and make submissions on any issue specified by the Chamber.

Rule 74 *bis*
Medical Examination of the Accused

A Trial Chamber may, *proprio motu* or at the request of a party, order a medical, including psychiatric examination or a psychological examination of the accused. In such case, the Registrar

shall entrust this task to one or several experts whose names appear on a list previously drawn up by the Registry and approved by the Bureau.

Rule 75
Measures for the Protection of Victims and Witnesses

A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Support Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused.

B) A Chamber may hold an *in camera* proceeding to determine whether to order notably:

i) Measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as
a) Expunging names and identifying information from the Tribunal's public records;
b) Non-disclosure to the public of any records identifying the victim;
c) Giving of testimony through image - or voice - altering devices or closed circuit television; and
d) Assignment of a pseudonym;
ii) Closed sessions, in accordance with Rule 79;
iii) Appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

C) The Victims and Witnesses Section shall ensure that the witness has been informed before giving evidence by the party calling that witness that his testimony and his identity may be disclosed at a later date in another case, pursuant to Rule 75 (F).

D) A Chamber shall control the manner of questioning to avoid any harassment or intimidation.

E) When making an order under paragraph (A) above, a Judge or a Chamber shall wherever appropriate state in the order whether the transcript of those proceedings relating to the evidence of the witness to whom the measures relate shall be made available for use in other proceedings before the Tribunal.

F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures:

i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the "second proceedings") unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule; but
ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.

G) A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply:

i) to any Chamber, however constituted, remaining seised of the first proceedings; or
ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings.

H) Before determining an application under paragraph (G) (ii) above, the Chamber seised of the second proceedings shall obtain all relevant information from the first proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Tribunal.

I) An application to a Chamber to rescind, vary or augment protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber, and any reference in this Rule to "a Chamber" shall include a reference to "a Judge of that Chamber".

Rule 76
Solemn Declaration by Interpreters and Translators

Before performing any duties, an interpreter or a translator shall solemnly declare to do so faithfully, independently, impartially and with full respect for the duty of confidentiality.

Rule 77
Contempt of the Tribunal

A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who

i) being a witness before a Chamber, contumaciously refuses or fails to answer a question;
ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber;
iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;
iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness; or
v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber.

B) Any incitement or attempt to commit any of the acts punishable under paragraph (A) is punishable as contempt of the Tribunal with the same penalties.

C) When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may:

i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt;
ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; or
iii) initiate proceedings itself.

D) If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may:

i) in circumstances described in paragraph (C) (i), direct the Prosecutor to prosecute the matter; or
ii) in circumstances described in paragraph (C) (ii) or (iii), issue an order in lieu of an indictment and either direct *amicus curiae* to prosecute the matter or prosecute the matter itself.

E) The rules of procedure and evidence in Parts Four to Eight shall apply *mutatis mutandis* to proceedings under this Rule.

F) Any person indicted for or charged with contempt shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45.

G) The maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding five years, or a fine not exceeding USD 10,000, or both.

H) Payment of a fine shall be made to the Registrar to be held in a separate account.

I) If a counsel is found guilty of contempt of the Tribunal pursuant to this Rule, the Chamber making such finding may also determine that counsel is no longer eligible to represent a suspect or accused before the Tribunal or that such conduct amounts to misconduct of counsel pursuant to Rule 46, or both.

J) Any decision rendered by a Trial Chamber under this Rule shall be subject to appeal. Notice of appeal shall be filed within fifteen days of filing of the impugned decision. Where such decision is rendered orally, the notice shall be filed within fifteen days of the oral decision, unless

i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

K) In the case of decisions under this Rule by the Appeals Chamber sitting as a Chamber of first instance, an appeal may be submitted in writing to the President within fifteen days of the filing of the impugned decision. Such appeal shall be decided by five different Judges as assigned by the President. Where the impugned decision is rendered orally, the appeal shall be filed within fifteen days of the oral decision, unless

i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
ii) the Appeals Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

Rule 78
Open Sessions

All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.

Rule 79
Closed Sessions

A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of

i) Public order or morality;
ii) Safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or
iii) The protection of the interests of justice.

B) The Trial Chamber shall make public the reasons for its order.

Rule 80

Control of Proceedings

A) The Trial Chamber may exclude a person from the proceedings in order to protect the right of the accused to a fair and public trial, or to maintain the dignity and decorum of the proceedings.

B) The Trial Chamber may order the removal of an accused from the proceedings and continue the proceedings in his absence if he has persisted in disruptive conduct following a warning that he may be removed.

Rule 81
Records of Proceedings and Preservation of Evidence

A) The Registrar shall cause to be made and preserve a full and accurate record of all proceedings, including audio recordings, transcripts and, when deemed necessary by the Trial Chamber, video recordings.

B) The Trial Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering the non disclosure no longer exist.

C) The Registrar shall retain and preserve all physical evidence offered during the proceedings.

D) Photography, video-recording or audio-recording of the trial, otherwise than by the Registry, may be authorised at the discretion of the Trial Chamber.

SECTION 2 - Case Presentation

Rule 82
Joint and Separate Trials

A) In joint trials, each accused shall be accorded the same rights as if he were being tried separately.

B) The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

Rule 82 *bis*
Trial in the Absence of Accused

If an accused refuses to appear before the Trial Chamber for trial, the Chamber may order that the trial proceed in the absence of the accused for so long as his refusal persists, provided that the Trial Chamber is satisfied that:

i) the accused has made his initial appearance under Rule 62;
ii) the Registrar has duly notified the accused that he is required to be present for trial;
iii) the interests of the accused are represented by counsel.

Rule 83
Instruments of Restraint

Instruments of restraint, such as handcuffs, shall not be used except as a precaution against escape during transfer or for security reasons, and shall be removed when the accused appears before a Chamber.

Rule 84

Opening Statements

Before presentation of evidence by the Prosecutor, each party may make an opening statement. The Defence may however elect to make its statement after the Prosecutor has concluded presentation of evidence and before the presentation of evidence for the Defence.

Rule 85
Presentation of Evidence

A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

i) Evidence for the Prosecution;
ii) Evidence for the Defence;
iii) Prosecution evidence in rebuttal;
iv) Defence evidence in rejoinder;
v) Evidence ordered by the Trial Chamber pursuant to Rule 98.
vi) Any relevant information that may assist the Trial Chamber in determining an appropriate sentence, if the accused is found guilty on one or more of the charges in the indictment.

B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine him in chief, but a Judge may at any stage put any question to the witness.

C) The accused may, if he so desires, appear as a witness in his own Defence.

Rule 86
Closing Arguments

A) After the presentation of all the evidence, the Prosecutor may present a closing argument. Whether or not the Prosecutor does so, the Defence may make a closing argument. The Prosecutor may present a rebuttal argument to which the Defence may present a rejoinder.

B) A party shall file a final trial brief with the Trial Chamber not later than five days prior to the day set for the presentation of that party's closing argument.

C) The parties shall also address matters of sentencing in closing arguments.

Rule 87
Deliberations

A) After presentation of closing arguments, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. A finding of guilty may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.

B) The Trial Chamber shall vote separately on each count contained in the indictment. If two or more accused are tried together under Rule 48, separate findings shall be made as to each accused.

C) If the Trial Chamber finds the accused guilty on one or more of the counts contained in the indictment, it shall also determine the penalty to be imposed in respect of each of the counts.

Rule 88
Judgement

A) The judgement shall be pronounced in public, on a date of which notice shall have been given to the parties and counsel and at which they shall be entitled to be present.

B) If the Trial Chamber finds the accused guilty of a crime and concludes from the evidence that unlawful taking of property by the accused was associated with it, it shall make a specific finding to that effect in its judgement. The Trial Chamber may order restitution as provided in Rule 105.

C) The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing. Separate or dissenting opinions may be appended.

SECTION 3 - Rules of Evidence

Rule 89
General Provisions

A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

C) A Chamber may admit any relevant evidence which it deems to have probative value.

D) A Chamber may request verification of the authenticity of evidence obtained out of court.

Rule 90
Testimony of Witnesses

A) Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71.

B) Every witness shall, before giving evidence, make the following solemn declaration:

"I solemnly declare that I will speak the truth, the whole truth and nothing but the truth."

C) A child who, in the opinion of the Chamber, does not understand the nature of a solemn declaration, may be permitted to testify without that formality, if the Chamber is of the opinion that the child is sufficiently mature to be able to report the facts of which the child had knowledge and understands the duty to tell the truth. A judgement, however, cannot be based on such testimony alone.

D) A witness, other than an expert, who has not yet testified, shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.

E) A witness may refuse to make any statement which might tend to incriminate him. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than perjury.

F) The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to:

i) Make the interrogation and presentation effective for the ascertainment of the truth; and
ii) Avoid needless consumption of time.

G) i) Cross-examination shall be limited to the subject- matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of the case.

ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.

iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.

Rule 90 *bis*
Transfer of a Detained Witness

A) Any detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the Detention Unit of the Tribunal, conditional on his return within the period decided by the Tribunal.

B) The transfer order shall be issued by a Judge or Trial Chamber only after prior verification that the following conditions have been met:

i) The presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;

ii) Transfer of the witness does not extend the period of his detention as foreseen by the requested State;

C) The Registry shall transmit the order of transfer to the national authorities of the State on whose territory, or under whose jurisdiction or control, the witness is detained. Transfer shall be arranged by the national authorities concerned in liaison with the host country and the Registrar.

D) The Registry shall ensure the proper conduct of the transfer, including the supervision of the witness in the Detention Unit of the Tribunal; it shall remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the length of the detention of the witness in the Detention Unit and, as promptly as possible, shall inform the relevant Judge or Chamber.

E) On expiration of the period decided by the Tribunal for the temporary transfer, the detained witness shall be remanded to the authorities of the requested State, unless the State, within that period, has transmitted an order of release of the witness, which shall take effect immediately.

F) If, by the end of the period decided by the Tribunal, the presence of the detained witness continues to be necessary, a Judge or a Chamber may extend the period, on the same conditions stated in the Sub-Rule (B).

Rule 91
False Testimony under Solemn Declaration

A) A Chamber, *proprio motu* or at the request of a party, may warn a witness of the duty to tell the truth and the consequences that may result from a failure to do so.

B) If a Chamber has strong grounds for believing that a witness has knowingly and wilfully given false testimony, it may:

i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony; or

ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report

back to the Chamber as to whether there are sufficient grounds for instigating proceedings for false testimony.

C) If the Chamber considers that there are sufficient grounds to proceed against a person for giving false testimony, the Chamber may:

i) in circumstances described in paragraph (B) (i), direct the Prosecutor to prosecute the matter; or
ii) in circumstances described in paragraph (B) (ii), issue an order in lieu of an indictment and direct *amicus curiae* to prosecute the matter.

D) The rules of procedure and evidence in Parts Four to Eight shall apply *mutatis mutandis* to proceedings under this Rule.

E) Any person indicted for or charged with false testimony shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45.

F) No Judge who sat as a member of the Trial Chamber before which the witness appeared shall sit for the trial of the witness for false testimony.

G) The maximum penalty for false testimony under solemn declaration shall be a fine of USD 10,000 or a term of imprisonment of five years, or both. The payment of any fine imposed shall be paid to the Registrar to be held in the account referred to in Rule 77 (H).

H) Paragraphs (B) to (G) apply *mutatis mutandis* to a person who knowingly and willingly makes a false statement in a written statement taken in accordance with Rule 92 *bis* which the person knows or has reason to know may be used as evidence in proceedings before the Tribunal.

I) Any decision rendered by a Trial Chamber under this Rule shall be subject to appeal. Notice of appeal shall be filed within fifteen days of filing of the impugned decision. Where such decision is rendered orally, the notice shall be filed within fifteen days of the oral decision, unless:

i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

Rule 92
Confessions

A confession by the accused given during questioning by the Prosecutor shall, provided the requirements of Rule 63 were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved.

Rule 92 *bis*
Proof of Facts Other Than by Oral Evidence

A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.

i) Factors in favour of admitting evidence in the form of a written statement include, but are not limited to, circumstances in which the evidence in question:

a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;

b) relates to relevant historical, political or military background;

c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;

d) concerns the impact of crimes upon victims;

e) relates to issues of the character of the accused; or

f) relates to factors to be taken into account in determining sentence.

ii) Factors against admitting evidence in the form of a written statement include whether:

a) there is an overriding public interest in the evidence in question being presented orally;

b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or

c) there are any other factors which make it appropriate for the witness to attend for cross-examination.

B) A written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and

i) the declaration is witnessed by:

a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or

b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and

ii) the person witnessing the declaration verifies in writing:

a) that the person making the statement is the person identified in the said statement;

b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct;

c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and

d) the date and place of the declaration.

The declaration shall be attached to the written statement presented to the Trial Chamber.

C) A written statement not in the form prescribed by paragraph (B) may nevertheless be admissible if made by a person who has subsequently died, or by a person who can no longer with reasonable diligence be traced, or by a person who is by reason of bodily or mental condition unable to testify orally, if the Trial Chamber:

i) is so satisfied on a balance of probabilities; and

ii) finds from the circumstances in which the statement was made and recorded that there are satisfactory *indicia* of its reliability.

D) A Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused.

E) Subject to any order of the Trial Chamber to the contrary, a party seeking to adduce a written statement or transcript shall give fourteen days notice to the opposing party, who may within seven days object. The Trial Chamber shall decide, after hearing the parties, whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.

Rule 93

Evidence of Consistent Pattern of Conduct

A) Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice.

B) Acts tending to show such a pattern of conduct shall be disclosed by the Prosecutor to the Defence pursuant to Rule 66.

Rule 94
Judicial Notice

A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.

B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.

Rule 94 *bis*
Testimony of Expert Witnesses

A) Notwithstanding the provisions of Rule 66 (A) (ii), Rule 73 *bis* (B) (iv) (b) and Rule 73 *ter* (B) (iii) (b) of the present Rules, the full statement of any expert witness called by a party shall be disclosed to the opposing party as early as possible and shall be filed with the Trial Chamber not less than twenty-one days prior to the date on which the expert is expected to testify.

B) Within fourteen days of filing of the statement of the expert witness, the opposing party shall file a notice to the Trial Chamber indicating whether:

i) It accepts or does not accept the witness's qualification as an expert;
ii) It accepts the expert witness statement; or
iii) It wishes to cross-examine the expert witness.

C) If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

Rule 95
Exclusion of Evidence on the Grounds of the Means by which it was Obtained

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

Rule 96
Rules of Evidence in Cases of Sexual Assault

In cases of sexual assault

i) Notwithstanding Rule 90 (C), no corroboration of the victim's testimony shall be required;
ii) Consent shall not be allowed as a Defence if the victim:
a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or
b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
iii) Before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber *in camera* that the evidence is relevant and credible;
iv) Prior sexual conduct of the victim shall not be admitted in evidence or as Defence.

Rule 97

Lawyer-Client Privilege

A. All communications between lawyer and client shall be regarded as privileged, and consequently disclosure cannot be ordered, unless:

i) The client consents to such disclosure; or
ii) The client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

B. Nothing in this rule shall be interpreted as permitting the use of confidentiality between Counsel and Client to conceal the participation of Counsel in illegal practices such as fee-splitting with client.

Rule 98
Power of Chambers to Order Production of Additional Evidence

A Trial Chamber may *proprio motu* order either party to produce additional evidence. It may itself summon witnesses and order their attendance.

Rule 98 *bis*
Motion for Judgement of Acquittal

If, after the close of the case for the prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment, the Trial Chamber, on motion of an accused filed within seven days after the close of the Prosecutor's case-in-chief, unless the Chamber orders otherwise, or *proprio motu*, shall order the entry of judgement of acquittal in respect of those counts.

SECTION 4 - Sentencing Procedure

Rule 99
Status of the Acquitted Person

A) In case of acquittal, the accused shall be released immediately.

B) If, at the time the judgement is pronounced, the Prosecutor advises the Trial Chamber in open court of his intention to file notice of appeal pursuant to Rule 108, the Trial Chamber may, at the request of the Prosecutor, issue a warrant for the arrest and further detention of the accused to take effect immediately.

Rule 100
Sentencing Procedure on a Guilty Plea

A) If the Trial Chamber convicts the accused on a guilty plea, the Prosecutor and the Defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.

B) The sentence shall be pronounced in a judgement in public and in the presence of the convicted person, subject to Sub-Rule 102 (B).

Rule 101
Penalties

A) A person convicted by the Tribunal may be sentenced to imprisonment for a fixed term or the remainder of his life.

B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 23 (2) of the Statute, as well as such factors as

i) Any aggravating circumstances;
ii) Any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
iii) The general practice regarding prison sentences in the courts of Rwanda;
iv) The extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9 (3) of the Statute.

C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

D) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal.

Rule 102
Status of the Convicted Person

A) Subject to the Trial Chamber's directions in terms of Rule 101, the sentence shall begin to run from the day it is pronounced under Rule 100 (B). However, as soon as notice of appeal is given, the enforcement of the judgement shall thereupon be stayed until the decision on the appeal has been delivered, the convicted person meanwhile remaining in detention, as provided in Rule 64.

B) If, by a previous decision of the Trial Chamber, the convicted person has been provisionally released, or is for any other reason at liberty, and he is not present when the judgement is pronounced, the Trial Chamber shall issue a warrant for his arrest. On arrest, he shall be notified of the conviction and sentence, and the procedure provided in Rule 103 shall be followed.

Rule 103
Place of Imprisonment

A) Imprisonment shall be served in Rwanda or any State designated by the Tribunal from a list of States which have indicated their willingness to accept convicted persons for the serving of sentences. Prior to a decision on the place of imprisonment, the Chamber shall notify the Government of Rwanda.

B) Transfer of the convicted person to that State shall be effected as soon as possible after the time limit for appeal has elapsed.

Rule 104
Supervision of Imprisonment

All sentences of imprisonment shall be served under the supervision of the Tribunal or a body designated by it.

Rule 105
Restitution of Property

A) After a judgement of conviction containing a specific finding as provided in Rule 88 (B), the Trial Chamber shall, at the request of the Prosecutor, or may, at its own initiative, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate.

B) The determination may extend to such property or its proceeds, even in the hands of third parties not otherwise connected with the crime of which the convicted person has been found guilty.

C) Such third parties shall be summoned before the Trial Chamber and be given an opportunity to justify their claim to the property or its proceeds.

D) Should the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.

E) Should the Trial Chamber not be able to determine ownership, it shall notify the competent national authorities and request them so to determine.

F) Upon notice from the national authorities that an affirmative determination has been made, the Trial Chamber shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.

G) The Registrar shall transmit to the competent national authorities any summonses, orders and requests issued by a Trial Chamber pursuant to Sub-Rules (C), (D), (E) and (F).

Rule 106
Compensation to Victims

A) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.

B) Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation.

C) For the purposes of a claim made under Sub-Rule (B) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.

Part Seven - Appellate Proceedings

Rule 107
General Provision

The Rules of Procedure and Evidence that govern proceedings in the Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber.

Rule 107 *bis*
Practice Directions for the Appeals Chamber

The Presiding Judge of the Appeals Chamber may issue Practice Directions, in consultation with the President of the Tribunal, addressing detailed aspects of the conduct of proceedings before the Appeals Chamber.

Rule 108
Notice of Appeal

A party seeking to appeal a judgement or sentence shall, not more than thirty days from the date on which the judgement or the sentence was pronounced, file a notice of appeal, setting forth the grounds. The Appellant should also identify the order, decision or ruling challenged with specific reference to the date of its filing, and/or the transcript page, and indicate the substance of the alleged

errors and the relief sought. The Appeals Chamber may, on good cause being shown by motion, authorise a variation of the grounds of appeal.

Rule 108 *bis*
Pre-Appeal Judge

A) The Presiding Judge of the Appeals Chamber may designate from among its members a Judge responsible for the pre-hearing proceedings (the "Pre-Appeal Judge"

B) The Pre-Appeal Judge shall ensure that the proceedings are not unduly delayed and shall take any measures related to procedural matters, including the issuing of decisions, orders and directions with a view to preparing the case for a fair and expeditious hearing.

C) The Pre-Appeal Judge shall record the points of agreement and disagreement between the parties on matters of law and fact. In this connection, he or she may order the parties to file further written submissions with the Pre-Appeal Judge or the Appeals Chamber.

D) In order to perform his or her functions, the Pre-Appeal Judge may *proprio motu,* where appropriate; hear the parties without the convicted or acquitted person being present. The Pre-Appeal Judge may hear the parties in his or her office, in which case minutes of the meeting shall be taken by a representative of the Registry.

E) A motion made in the course of the proceedings shall be determined before the hearing unless the Pre-Appeal Judge, for good cause, orders that it be deferred for determination by the Appeals Chamber. Failure by a party to raise objections or to make requests which can be made prior to the hearing shall constitute waiver thereof, but the Pre-Appeal Judge for good cause may grant relief from the waiver.

F) The Pre-Appeal Judge shall keep the Appeals Chamber regularly informed, particularly where issues are in dispute and may refer such disputes to the Appeals Chamber.

G) Upon a report of the Pre-Appeal Judge, the Appeals Chamber shall decide, should the case arise, on appropriate sanctions to be imposed on a party which fails to perform its obligations pursuant to the present Section of the Rules.

H) The Appeals Chamber may *proprio motu* exercise any of the functions of the Pre-Appeal Judge.

Rule 109
Record on Appeal

A) The record on appeal shall consist of the trial record, as certified by the Registrar.

B) A certified true copy of the record on appeal shall be promptly transmitted to the Appeals Unit of the Appeals Chamber of the International Criminal Tribunal for Rwanda, located in The Hague.

Rule 110
List of Certified Documents to the Parties

The Registrar shall make available to the parties the list of documents constituting the record on appeal as certified by him and shall provide them with any of these documents on demand.

Rule 111
Appellant's Brief

[A) An Appellant's brief setting out all the arguments and authorities shall be filed within seventy-five days of filing of the notice of appeal pursuant to Rule 108. Where limited to sentencing, an Appellant's brief shall be filed within thirty days of filing of the notice of appeal pursuant to Rule 108.

B) Where the Prosecutor is the Appellant, the Prosecutor shall make a declaration in the Appellant's brief that disclosure has been completed with respect to the material available to the Prosecutor at the time of filing the brief.][21]

Rule 112
Respondent's Brief

[A) A Respondent's brief of argument and authorities shall be field within forty days of filing of the Appellant's brief. Where limited to sentencing, a Respondent's brief shall be filed within thirty days of filing of the Appellant's brief.

B) Where the Prosecutor is the Respondent, the Prosecutor shall make a declaration in the Respondent's brief that disclosure has been completed with respect to the material available to the Prosecutor at the time of filing the brief.][22]

Rule 113
Brief in Reply

[An Appellant may file a brief in reply within fifteen days after the filing of the Respondent's brief. Where limited to sentencing, a brief in reply shall be filed within ten days of filing of the Respondent's brief.][23]

Rule 114
Date of Hearing

After the expiry of the time-limits for filing the briefs provided for in Rules 111, 112 and 113, the Appeals Chamber shall set the date for the hearing and the Registrar shall notify the parties.

Rule 115
Additional Evidence

[A) A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than thirty days from the date for filing of the brief in reply, unless good cause or, after the appeal hearing, cogent reasons are shown for a delay. Rebuttal material may be presented by any part affected by the motion. Parties are permitted to file supplemental briefs on the impact of the additional evidence within fifteen days of the expiry of the time limit set for the filing of rebuttal material, if no such material is filed, or if rebuttal material is filed, within fifteen days of the decision on the admissibility of that material.][24]

B) If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence

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[21] As amended on 10 November 2006.
[22] Ibidem.
[23] Ibidem.
[24] Ibidem.

and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 118.

C) The Appeals Chamber may decide the motion prior to the appeal, or at the time of the hearing on appeal. It may decide the motion with or without an oral hearing.

D) If several defendants are parties to the appeal, the additional evidence admitted on behalf of any one of them will be considered with respect to all of them, where relevant.

Rule 116
Extension of Time Limits

[A) The Appeals Chamber or the Pre-appeal Judge may grant a motion to extend a time limit upon a showing of good cause.

B) Where the ability of the accused to make full answer and Defence depends on the availability of a decision in an official language other than that in which it was originally issued, that circumstance shall be taken into account as a good cause under the present Rule.][25]

Rule 117
Expedited Appeals Procedure

[A) An appeal under Rule 72 or Rule 73 or an appeal from a decision rendered under Rule 11 *bis*, Rule 65, Rule 77 or Rule 91 shall be heard expeditiously on the basis of the original record of the Trial Chamber. Appeals may be determined entirely on the basis of written briefs.

B) Rules 109 to 114 shall not apply to such appeals.

C) The Presiding Judge, after consulting the members of the Appeals Chamber, may decide not to apply Rule 118 (D).][26]

[Rule 117 *bis*
Parties' Books

A) In every appeal before the Appeals Chamber, the Appellant and the Respondent shall each prepare and file an Appeal Book respectively to be entitled "Appellant's Appeal Book" and "Respondent's Appeal Book", in consecutively numbered pages or tabs arranged in the following order:

i) a table of contents describing each document, including each exhibit, by its nature, date, and where applicable, number, with an indication of the page or tab where the document will be found in the Appeal Book, and
ii) a legible copy of the pages of or excerpts from every document in the case to which the party actually refers in the party's briefs or intends to refer in the party's oral arguments.

B) In every appeal before the Appeals Chamber, the Appellant and the Respondent shall each prepare and file a Book of Authorities respectively to be entitled "Appellants Book of Authorities" and "Respondent's Book of Authorities", in consecutively numbered pages or tabs arranged in the following order:

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[25] Ibidem.
[26] *Ibidem*.

i) a table of contents describing each document, including each exhibit, by its nature, date, and where applicable, number, with an indication of the page or tab where the document will be found in the Appeal Book, and

ii) a legible copy of the pages of or excerpts from every reference material, including case law, statutory and regulatory provisions, from international and national sources, to which the party actually refers in the party's briefs or intends to refer in the party's oral arguments.

C) Unless otherwise ordered in any particular case by the Appeals Chamber *proprio motu* or upon a motion by a party, each party shall file sufficient copies of his Appeal Book and of his Book of Authorities at the Registry of the place where the Appeals Chamber is to hold its hearing, four weeks before the date set for the said hearing. The Registry shall advise the parties of the number of copies required.

D) Failure to file the books prescribed above shall not bar the Appeals Chamber from rendering a judgement, a decision or an order as it sees fit in the appeal.][27]

Rule 117 *ter*
Filing of the Trial Records

The notice of Appeal under Rule 108 and, where necessary, the briefs earmarked under Rules 111, 112, 113, 115 and 117 shall be filed, by the parties, either with the Registry or with an officer of the Registry specifically designated by the Registrar at the Appeals Unit of the Appeals Chamber of the International Criminal Tribunal for Rwanda, located in The Hague. Two similar records shall be kept: one at the Registry of the Tribunal and the other in The Hague. [Depending on the place of filing, each record shall consist of the original documents or certified true copies thereof.][28]

Rule 118
Judgement on Appeal

A) The Appeals Chamber shall pronounce judgement on the basis of the record on appeal and on any additional evidence as has been presented to it.

B) The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

C) In appropriate circumstances the Appeals Chamber may order that the accused be re-tried before the Trial Chamber.

D) The judgement shall be pronounced in public, on a date of which notice shall have been given to the parties and counsel and at which they shall be entitled to be present.

E) The written judgement shall be filed and registered with the Registry or with an officer of the Registry specifically designated by the Registrar at the Appeals Unit of the Appeals Chamber of the International Criminal Tribunal for Rwanda, located in The Hague.

Rule 119
Status of the Accused Following Judgement on Appeal

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[27] Following the Tribunal's omission, this paragraph is missing. Nevertheless, we chose to reproduce it as it was included in the Table of Contents.

[28] As amended on 10 November 2006.

A) A sentence pronounced by the Appeals Chamber shall be enforced immediately.

B) Where the accused is not present when the judgement is due to be delivered, either as having been acquitted on all charges or as a result of an order issued pursuant to Rule 65, or for any other reason, the Appeals Chamber may deliver its judgement in the absence of the accused and shall, unless it pronounces his acquittal, order his arrest or surrender to the Tribunal.

Part Eight - Review Proceedings

Rule 120
Request for Review

A) Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber and could not have been discovered through the exercise of due diligence, the Defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement. If, at the time of the request for review, any of the Judges who constituted the original Chamber are no longer Judges of the Tribunal, the President shall appoint a Judge or Judges in their place.

B) Any brief in response to a request for review shall be filed within forty days of the filing of the request.

C) Any brief in reply shall be filed within fifteen days after the filing of the response.

Rule 121
Preliminary Examination

If the Chamber constituted pursuant to Rule 120 agrees that the new fact, if it had been proven, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties.

Rule 122
Appeals

The judgement of a Trial Chamber on review may be appealed in accordance with the provisions of Part Seven.

Rule 123
Return of the Case to the Trial Chamber

If the judgement to be reviewed is under appeal at the time the motion for review is filed, the Appeals Chamber may return the case to the Trial Chamber for disposition of the motion.

Part Nine - Pardon And Commutation Of Sentence

Rule 124
Notification by States

If, according to the law of a State in which a convicted person is imprisoned, he is eligible for pardon or commutation of sentence, the State shall, in accordance with Article 27 of the Statute, notify the Tribunal of such eligibility.

Rule 125

Determination by the President

The President shall, upon such notice, determine, in consultation with the members of the Bureau and any permanent Judges of the sentencing Chamber who remain Judges of the Tribunal, and after notification to the Government of Rwanda, whether pardon or commutation is appropriate.

Rule 126
General Standards for Granting Pardon or Commutation

In determining whether pardon or commutation is appropriate, the President shall take into account, *inter alia*, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor.

Règlement de procédure et de preuve

(Adopté le 29 juin 1995, tel qu'amendé au 10 novembre 2006)

Table Des Matières

[29] Tel que modifié le 10 novembre 2006.

[30] Ibidem.

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[31] Tel que modifié le 10 novembre 2006.
[32] Ibidem.
[33] Tel que modifié le 10 novembre 2006.

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[34] Ibidem.
[35] Ibidem.
[36] Ibidem.
[37] Ibidem.

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[38] Tel que modifié le 10 novembre 2006.
[39] Ibidem.
[40] Tel que modifié le 10 novembre 2006.
[41] Ibidem.
[42] Ibidem.
[43] Ibidem.

Chapitre Premier - Dispositions Générales

Article premier
Entrée en vigueur

Le présent Règlement de procédure et de preuve, adopté conformément aux dispositions de l'article 14 du Statut du Tribunal, entre en vigueur le 5 juillet 1995.

Article 2
Définitions

A) Dans le règlement, sauf incompatibilité tenant au contexte, les expressions suivantes signifient :

Règlement : Le Règlement visé à l'article premier;

Statut : Le Statut du Tribunal adopté par le Conseil de sécurité dans sa résolution 955 du 8 novembre 1994;

Tribunal : Le Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994, créé par le Conseil de sécurité dans sa résolution 955 du 8 novembre 1994;

Accusé : Toute personne physique mise en cause pour un ou plusieurs chefs d'accusation dans un acte d'accusation confirmé conformément à l'article 47;

Arrestation : L'acte par lequel un suspect ou un accusé est appréhendé et placé en garde à vue en vertu d'un mandat d'arrêt ou conformément aux dispositions de l'article 40;

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[44] Ibidem.

Bureau : Organe constitué du Président, du Vice-président et des Présidents des Chambres de première instance;

Enquête : Toutes activités entreprises par le Procureur conformément au Statut et au Règlement afin de rassembler des informations et des éléments de preuve tant avant qu'après la confirmation de l'acte d'accusation;

Juge *ad litem* **:** Un juge nommé en application de l'article 12 *ter* du Statut;

Juge permanent: Un juge élu ou nommé en application de l'article 12 *bis* du Statut;

Opération : Un certain nombre d'actes ou d'omissions survenant à l'occasion d'un seul événement ou de plusieurs événements, en un seul endroit ou en plusieurs endroits, et faisant partie d'un plan, d'une stratégie ou d'un dessein commun;

Partie : Le Procureur ou l'accusé;

Président : Le Président du Tribunal;

Procureur : Le Procureur désigné conformément à l'article 15 du Statut;

Règlement interne : Toute disposition adoptée par le Procureur en application du paragraphe (A) de l'article 37 dans le but d'organiser les activités du Bureau du Procureur;

Suspect : Toute personne physique au sujet de laquelle le Procureur possède des informations fiables qui tendent à montrer qu'elle aurait commis une infraction relevant de la compétence du Tribunal;

Victime : Toute personne physique à l'égard de laquelle aurait été commise une infraction relevant de la compétence du Tribunal.

B) Aux fins du présent Règlement, l'emploi du masculin et du singulier comprend le féminin et le pluriel et inversement.

Article 3
Langues

A) Les langues de travail du Tribunal sont l'anglais et le français.

B) L'accusé ou le suspect a le droit d'employer sa propre langue.

C) Le conseil de l'accusé peut demander à un juge ou à une Chambre l'autorisation d'employer une langue autre que les deux langues de travail ou celle de l'accusé. Si une telle autorisation est accordée, les frais d'interprétation et de traduction sont pris en charge par le Tribunal dans les limites éventuellement fixées par le Président compte tenu des droits de la défense et de l'intérêt de la justice.

D) Toute autre personne comparaissant devant le Tribunal peut employer sa propre langue, si elle n'a pas une connaissance suffisante de l'une ou l'autre des deux langues de travail.

E) Le Greffier prend toute disposition nécessaire pour assurer la traduction et l'interprétation dans les langues de travail.

Article 4
Sessions hors du siège du Tribunal

Une Chambre ou un juge peut, avec l'autorisation du Président, exercer ses fonctions hors du siège du Tribunal, si l'intérêt de la justice le commande.

Article 5
Violation du Règlement

A) Toute exception d'une partie à l'égard d'un acte d'une autre partie, fondée sur une violation du Règlement ou des règlements internes, doit être soulevée dès que possible; la Chambre de première instance accorde réparation si la preuve de la violation présumée est rapportée et si celle-ci a effectivement fait subir un préjudice substantiel à cette partie.

B) Lorsqu'une exception de ce type n'a pas été soulevée aussitôt qu'il était possible, la Chambre de première instance peut décider d'accorder réparation si elle constate que la preuve de la violation présumée est rapportée et que ladite violation a causé un préjudice substantiel à la partie requérante.

C) La réparation accordée par une Chambre de première instance conformément au présent article est une mesure que cette dernière juge de nature à assurer le respect des principes fondamentaux d'équité.

Article 6
Modifications du Règlement

A) Toute proposition de modification du Règlement peut être présentée par un juge, le Procureur ou le Greffier; elle est adoptée si dix juges au moins y sont favorables lors d'une séance plénière du Tribunal réunie après que la proposition de modification a été communiquée à tous les juges.

B) S'il n'est pas procédé comme prévu au paragraphe (A), une modification du Règlement ne peut être adoptée qu'à l'unanimité et par tout moyen approprié constaté ou confirmé par écrit.

C) Une modification entre en vigueur immédiatement, sans préjudice des droits de l'accusé dans les affaires en instance.

Article 7
Textes authentiques

Le texte anglais et le texte français du Règlement font également foi. En cas de divergence, le texte qui reflète le plus fidèlement l'esprit du Statut et du Règlement prévaut.

Article 7 *bis*
Inexécution d'obligations

A) Sauf dans les cas visés aux articles 11, 13, 59 et 61, lorsqu'une Chambre de première instance ou un Juge est convaincu qu'un Etat ne s'est pas acquitté d'une obligation au titre de l'article 28 du Statut en rapport avec une affaire dont ils sont saisis, la Chambre ou le juge peut prier le Président d'en rendre compte au Conseil de sécurité.

B) Si le Procureur convainc le Président qu'un Etat ne s'est pas acquitté d'une obligation au titre de l'article 28 du Statut en réponse à une demande formulée par le Procureur au titre des articles 8 ou 40 du Règlement, le Président en informe le Conseil de sécurité.

Article 7 *ter*
Délais

1. A moins qu'il n'en soit disposé autrement par les Chambres ou le Règlement, lorsque le délai de dépôt d'un acte prescrit par le Règlement ou en vertu du Règlement court à compter de la survenance

d'un événement particulier, ledit délai est suspendu jusqu'à la date à laquelle le conseil de l'accusé ou le Procureur, selon le cas, a reçu notification de l'événement par les canaux normaux de transmission.

2. Les délais exprimés en jours font référence aux jours ordinaires du calendrier, qu'ils soient ouvrables ou non, et qu'il s'agisse d'un samedi, d'un dimanche ou d'un jour férié ou non. Toutefois, lorsque le délai de dépôt expire un samedi, un dimanche ou un jour férié, il est automatiquement prorogé jusqu'au premier jour ouvrable suivant cette date.

Chapitre Deuxième - Primauté Du Tribunal

Article 8
Demande d'informations

Lorsqu'il apparaît au Procureur qu'une infraction relevant de la compétence du Tribunal fait ou a fait l'objet d'enquêtes ou de poursuites pénales devant une juridiction interne, il peut demander à l'Etat dont relève cette juridiction de lui transmettre toutes les informations pertinentes. L'Etat transmet sans délai au Procureur ces informations, en application de l'article 28 du Statut.

Article 9
Requête du Procureur aux fins de dessaisissement

S'il apparaît au Procureur que les crimes qui font l'objet d'enquêtes ou de poursuites pénales engagées devant une juridiction interne

i) font l'objet d'une enquête du Procureur;
ii) devraient faire l'objet d'une enquête du Procureur tenant compte, entre autres
a) de la gravité des infractions;
b) de la qualité de l'accusé au moment des infractions alléguées;
c) de l'importance générale des points soulevés par l'affaire;
iii) font l'objet d'un acte d'accusation devant le Tribunal,

le Procureur peut prier la Chambre de première instance désignée par le Président de demander officiellement le dessaisissement de cette juridiction en faveur du Tribunal.

Article 10
Demande officielle de dessaisissement

A) S'il apparaît à la Chambre de première instance saisie d'une telle requête du Procureur, en vertu de l'article 9, que celle-ci satisfait aux dispositions des alinéas (i), (ii) ou (iii) de l'article 9, elle demande officiellement à l'Etat dont relève la juridiction que celle-ci se dessaisisse en faveur du Tribunal.

B) La demande de dessaisissement porte également sur la transmission des éléments d'enquêtes, des copies du dossier d'audience et, le cas échéant, d'une expédition du jugement.

C) L'Etat auquel la demande officielle de dessaisissement est adressée y répond sans retard conformément à l'article 28 du Statut.

Article 11
Non-respect d'une demande officielle de dessaisissement

Si, dans un délai de soixante jours à compter de la date à laquelle le Greffier a notifié la demande de dessaisissement à l'Etat dont relève la juridiction ayant connu de l'affaire dont il s'agit, l'Etat ne fournit pas à la Chambre de première instance l'assurance qu'il a pris ou qu'il prend les mesures

voulues pour se conformer à cette demande, la Chambre peut prier le Président de soumettre la question au Conseil de sécurité.

Article 11 *bis*
Renvoi de l'acte d'accusation devant une autre juridiction

A) Après la confirmation d'un acte d'accusation, que l'accusé soit placé ou non sous la garde du Tribunal, le Président peut désigner une Chambre de première instance qui détermine s'il y a lieu de renvoyer l'affaire aux autorités de l'Etat:

i) sur le territoire duquel le crime a été commis;

ii) dans lequel l'accusé a été arrêté; ou

iii) ayant compétence et étant disposé et tout à fait prêt à accepter une telle affaire,

afin qu'elles saisissent sans délai la juridiction appropriée pour en juger.

B) La Chambre de première instance peut ordonner ce renvoi d'office ou sur la demande du Procureur, après avoir donné au Procureur et, lorsqu'il est placé sous la garde du Tribunal, à l'accusé, la possibilité d'être entendu.

C) Lorsqu'elle examine s'il convient de renvoyer l'affaire selon les termes du paragraphe A), la Chambre de première instance doit être convaincue que l'accusé recevra un procès équitable devant les juridictions de l'Etat concerné, et qu'il ne sera pas condamné à la peine capitale ni exécuté.

D) Lorsqu'une ordonnance est rendue en application du présent article :

i) L'accusé, s'il a été placé sous la garde du Tribunal, est remis aux autorités de l'Etat concerné ;

ii) La Chambre de première instance peut ordonner que des mesures de protection prises pour certains témoins ou victimes demeurent en vigueur;

iii) Le Procureur doit communiquer aux autorités de l'Etat concerné toutes les informations relatives à l'affaire et qu'il juge appropriées et, notamment, les pièces jointes à l'acte d'accusation;

iv) Le Procureur peut envoyer des observateurs qui suivront, en son nom, l'action devant les juridictions de l'Etat concerné.

E) La Chambre de première instance peut délivrer à l'encontre de l'accusé un mandat d'arrêt, lequel doit spécifier l'Etat vers lequel il sera transféré pour être jugé.

F) A tout moment après qu'une ordonnance soit rendue en application du présent article et avant que l'accusé ne soit déclaré coupable ou acquitté par une juridiction interne, la Chambre de première instance peut, à la demande du Procureur et après avoir donné aux autorités de l'Etat concerné la possibilité d'être entendues, annuler l'ordonnance et demander officiellement le dessaisissement aux termes de l'article 10.

G) Si une ordonnance rendue en vertu du présent article est annulée par la Chambre, celle-ci peut demander officiellement à l'Etat concerné de transférer l'accusé au siège du Tribunal et l'Etat accède à cette demande sans retard, conformément à l'article 28 du Statut. La Chambre de première instance ou un juge peut également émettre un mandat d'arrêt contre l'accusé.

H) L'accusé ou le Procureur peut en droit interjeter appel de la décision de renvoyer ou non une affaire, rendue par la Chambre de première instance. L'acte d'appel doit être déposé dans les quinze jours de la décision à moins que l'accusé n'ait pas été présent ou représenté lors du prononcé de la décision, auquel cas le délai de dépôt court à compter de la notification de ladite décision à l'accusé.

Article 12
Décisions des juridictions internes

Sous réserve du paragraphe (2) de l'article 9 du Statut, les décisions des juridictions internes ne lient pas le Tribunal.

Article 13
Non bis in idem

Si le Président est valablement informé de poursuites pénales engagées contre une personne devant une juridiction interne pour des faits constituant de graves violations du droit international humanitaire au sens du Statut pour lesquels l'intéressé a déjà été jugé par le Tribunal, une Chambre de première instance rend conformément à la procédure visée à l'article 10, *mutatis mutandis*, une ordonnance motivée invitant cette juridiction à mettre fin définitivement aux poursuites. Si cette juridiction s'y refuse, le Président peut soumettre la question au Conseil de sécurité.

Chapitre Troisième - Organisation Du Tribunal

SECTION 1 - *Les juges*

Article 14
Déclaration solennelle

A) Avant de prendre ses fonctions, chaque juge fait la déclaration solennelle suivante :

« Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience. »

B) Le texte de cette déclaration, signé par le juge en présence du Secrétaire général de l'ONU ou de son représentant, est versé aux archives du Tribunal.

Article 14 *bis*

Les membres du Tribunal continuent d'exercer leurs fonctions jusqu'à ce qu'ils soient remplacés.

Article 15
Récusation et empêchement de juges

[A) Un juge ne peut connaître d'une affaire dans laquelle il a un intérêt personnel ou avec laquelle il a ou il a eu un lien quelconque de nature à porter atteinte à son impartialité. En ce cas, il doit se dessaisir de cette affaire. Lorsque le juge renonce à siéger au sein d'une Chambre de première instance, le Président désigne un autre juge de première instance pour siéger à sa place. Lorsqu'un juge renonce à siéger au sein de la Chambre d'appel, le Président de la Chambre d'appel désigne un autre juge pour siéger à sa place.

B) Toute partie peut solliciter du Président de la Chambre qu'un juge de cette Chambre soit dessaisi d'une affaire pour les raisons ci-dessus énoncées. Après concertation entre le Président de la Chambre et le juge concerné, le Bureau statue si nécessaire. Si le Bureau donne suite à la demande, le Président désigne un autre juge pour remplacer le juge dessaisi.

C) Le juge qui examine un acte d'accusation conformément à l'article 18 du Statut et aux articles 47 ou 61 du Règlement peut siéger à la Chambre appelée à juger ultérieurement l'accusé.][45]

Article 15 *bis*

Absence d'un juge

A) Lorsque

i) pour cause de maladie ou d'autres raisons personnelles urgentes, ou d'activités se rapportant au Tribunal et ayant été autorisées, un juge ne peut continuer à siéger dans une affaire en cours pendant une période qui semble devoir être de courte durée et
ii) les autres juges de la Chambre sont convaincus que l'intérêt de la justice le commande,

ces derniers peuvent continuer à entendre l'affaire en l'absence du premier juge durant une période n'excédant pas cinq jours de travail.

B) Lorsque

i) pour cause de maladie ou d'autres raisons personnelles urgentes, ou d'activités se rapportant au Tribunal et ayant été autorisées, un juge ne peut continuer à siéger dans une affaire en cours pendant une période qui semble devoir être de courte durée et
ii) les autres juges de la Chambre ne sont pas convaincus que l'intérêt de la justice commande de continuer à entendre l'affaire en l'absence de celui-ci,

a) les juges présents peuvent toutefois traiter les questions dont ils sont convaincus que l'intérêt de la justice commande de les trancher même en l'absence de ce juge et
b) le Président de la Chambre peut ajourner la procédure.

C) Si, pour raison de décès, de maladie, de démission, de non-réélection, de non-prolongation du mandat, ou d'autres raisons, un juge ne peut continuer à siéger dans une affaire en cours pendant une période qui semble devoir se prolonger, le Président de la Chambre en informe le Président qui peut désigner un autre juge et ordonner soit que l'affaire soit réentendue soit que la procédure reprenne au point où elle s'est arrêtée. Toutefois, après l'audition des déclarations liminaires visées à l'article 84 ou le début de la présentation des éléments de preuve en application de l'article 85, la continuation de la procédure ne peut être ordonnée qu'avec le consentement de l'accusé, sous réserve des dispositions du paragraphe (D).

D) Si, lorsqu'il se trouve dans les conditions énoncées à la dernière phrase du paragraphe (C), l'accusé refuse de donner son consentement, les juges restants peuvent quand même décider de continuer à entendre l'affaire devant une Chambre de première instance avec un juge suppléant pour autant que, au regard de toutes les circonstances, ils estiment à l'unanimité que leur décision sert mieux l'intérêt de la justice. Les deux parties peuvent interjeter appel de cette décision, directement devant la Chambre d'appel entièrement constituée. Si aucun recours n'est formé, ou si la Chambre d'appel confirme la décision de la Chambre de première instance, le Président désigne un autre juge

[45] Tel que modifié le 10 novembre 2006.

pour siéger au sein du collège existant, pour autant que ce juge ait d'abord déclaré qu'il s'est familiarisé avec le dossier de l'affaire concernée. Il ne peut être procédé qu'à un seul remplacement de juge en vertu du présent paragraphe.

E) Les appels prévus au paragraphe (D) doivent être interjetés dans les sept jours du dépôt de la décision contestée. Lorsque pareille décision est rendue oralement, ce délai commence à courir à partir de la date du prononcé de cette décision, sauf dans les cas où

i) la partie qui conteste la décision n'était pas présente ou pas représentée lorsque cette décision a été prononcée, circonstance dans laquelle le délai commence à courir à partir de la date où la partie concernée a reçu notification de la décision orale, ou
ii) la Chambre de première instance a précisé qu'une décision écrite suivrait, circonstance dans laquelle le délai commence à courir à partir du dépôt de la décision écrite.

F) En cas de maladie, de poste vacant non pourvu ou de toute autre circonstance similaire, le Président peut, s'il est convaincu que l'intérêt de la justice le commande, autoriser une Chambre à traiter les affaires courantes, telles que le prononcé de décisions, en l'absence d'un ou de plusieurs de ses membres.

Article 16
Démission

Un juge qui décide de démissionner en informe par écrit le Président qui transmet au Secrétaire général de l'ONU.

Article 17
Préséance

A) Tous les juges sont égaux dans l'exercice de leurs fonctions judiciaires, quels que soient la date de leur élection ou de leur nomination, leur âge ou la durée des fonctions déjà exercées.

B) Après le Président et le Vice-président, les Présidents des Chambres prennent rang entre eux selon la date de leur élection ou de leur nomination comme juges. Les Présidents de Chambre élus ou nommés le même jour prennent rang entre eux selon l'ancienneté d'âge.

C) Les juges élus ou nommés à des dates différentes prennent rang selon la date de leur élection ou de leur nomination; les juges élus ou nommés à la même date prennent rang entre eux selon l'ancienneté d'âge.

D) En cas de réélection, il est tenu compte de la durée totale des fonctions déjà exercées par le juge intéressé.

SECTION 2 - La présidence du Tribunal

Article 18
Election du Président

A) Le Président est élu pour une période de deux ans, dès lors que cette période ne dépasse pas sa durée de fonctions en tant que juge. Le Président est rééligible une fois.

B) Si le Président cesse d'être membre du Tribunal ou démissionne avant l'expiration normale de son mandat, les juges du Tribunal élisent parmi eux son successeur pour le reste de son mandat.

C) Le Président est élu à la majorité des voix des juges du Tribunal. Si aucun juge ne recueille la majorité, il est procédé à un second tour de scrutin entre les deux juges qui ont obtenu le plus de voix

au premier tour. En cas de partage des voix au second tour, est élu le juge qui a préséance conformément à l'article 17.

Article 19
Fonctions du Président

A) Le Président préside toutes les sessions plénières du Tribunal, coordonne les travaux des Chambres, contrôle les activités du Greffe et s'acquitte de toutes les autres fonctions qui lui sont confiées par le Statut et par le Règlement.

B) Le Président peut, en consultation avec le Bureau, le Greffier et le Procureur, émettre des Directives pratiques, compatibles avec le Statut et le Règlement et traitant d'aspects particuliers de la conduite des affaires dont le Tribunal est saisi.

Article 20
Le Vice-Président

A) Le Vice-président est élu pour une période de deux ans, dès lors que cette période ne dépasse pas sa durée de fonctions en tant que juge. Le Vice-président est rééligible une fois.

B) Les dispositions prévues aux paragraphes (B) et (C) de l'article 18 s'appliquent *mutatis mutandis* au Vice-président.

Article 21
Fonctions du Vice-Président

Le Vice-président exerce les fonctions du Président si celui-ci est absent ou empêché.

Article 22
Remplacement du Président et du Vice-président

Si le Président et le Vice-président sont l'un et l'autre empêchés d'exercer la présidence, celle-ci est assurée par le juge doyen des Chambres de première instance conformément à l'article 17.

SECTION 3 - Le fonctionnement interne du Tribunal

Article 23
Le Bureau

A) Le Bureau est constitué du Président, du Vice-président et des Présidents des Chambres de première instance.

B) Le Président consulte les autres membres du Bureau au sujet de toutes les questions importantes liées au fonctionnement du Tribunal.

C) Tout juge peut appeler l'attention d'un membre du Bureau sur les questions qui méritent à son avis d'être examinées par le Bureau ou d'être soumises à une réunion plénière du Tribunal.

Article 23 *bis*
Le Conseil de coordination

A) Le Conseil de coordination est constitué du Président, du Procureur et du Greffier.

B) En vue de réaliser la mission du Tribunal, telle que définie dans le Statut, le Conseil de coordination assure la coordination des activités des trois organes du Tribunal.

C) Le Conseil de coordination se réunit une fois par mois sur convocation du Président. Des réunions additionnelles peuvent être convoquées à tout moment à la demande de l'un des membres. Le Président dirige les réunions.

D) Le Vice-président, le Procureur adjoint et le Greffier adjoint peuvent d'office, représenter respectivement, le Président, le Procureur et le Greffier.

Article 23 *ter*
Le Comité de gestion

A) Le Comité de gestion est constitué du Président, du Vice-président, d'un juge élu par les juges réunis en session plénière pour un mandat renouvelable d'un an, du Greffier, du Greffier adjoint et du Chef de l'administration.

B) Le Comité de gestion apporte son concours au Président dans l'exercice de ses fonctions, telles que précisées par les articles 19 et 33 du Règlement, notamment en ce qui concerne toutes les activités du Greffe liées au soutien administratif et judiciaire des Chambers et des juges. A cette fin, le Comité de gestion coordonne la préparation et l'exécution du budget du Tribunal à l'exception des postes budgétaires liés spécifiquement aux activités du Bureau du Procureur.

C) Le Comité de gestion se réunit une fois par mois sur convocation du Président. Des réunions additionnelles peuvent être convoquées à tout moment à la demande de deux membres. Le Président dirige les réunions.

D) Dans l'accomplissement de ses fonctions, le Comité de gestion peut s'adjoindre un ou plusieurs conseillers ou experts.

Article 24
Sessions plénières du Tribunal

Les juges se réunissent en plénière pour

i) L'élection du Président et du Vice-président;
ii) L'adoption et la modification du Règlement;
iii) L'adoption du Rapport annuel prévu à l'article 32 du Statut;
iv) L'adoption de décisions sur les questions liées au fonctionnement interne des Chambres et du Tribunal;
v) La détermination ou le contrôle des conditions de détention;
vi) L'accomplissement de toute autre tâche prévue dans le Statut ou le Règlement.

Article 25
Réunions plénières

A) En principe, le Tribunal arrête au mois de juillet les dates et la durée de ses réunions plénières ordinaires pour l'année civile suivante.

B) Si au moins huit juges le demandent, le Président doit convoquer d'autres réunions plénières; il peut aussi en convoquer dans tous les cas où l'exigent les fonctions que lui confèrent le Statut ou le Règlement.

Article 26
Quorum et vote

A) Un quorum de dix juges est requis pour chaque réunion plénière du Tribunal.

B) Sous réserve des dispositions des paragraphes (A) et (B) de l'article 6 et du paragraphe (C) de l'article 18, les décisions adoptées par le Tribunal en plénière sont prises à la majorité des juges présents. En cas de partage des voix, celle du Président ou du juge faisant fonction de Président est prépondérante.

SECTION 4 - *Les Chambres*

Article 27
Roulement des juges

A) L'affectation des juges aux Chambres de première instance se fait par roulement périodique, compte tenu de la nécessité d'assurer la bonne expédition des affaires.

B) Les juges prennent leurs fonctions à la Chambre à laquelle ils sont affectés dès que le Président le juge opportun, compte tenu de la nécessité d'expédier les affaires en instance.

C) Le Président peut à tout moment affecter temporairement un membre d'une Chambre de première instance à une autre Chambre de première instance.

Article 28
Permanence des juges

Tous les six mois et après avoir consulté les juges, le Président désigne, pour chaque mois du semestre à venir, un juge dans chaque Chambre de première instance auquel les actes d'accusation, mandats et autres requêtes qui ne concernent aucune affaire dont une Chambre est saisie, seront transmis pour examen. Le tableau de permanence est publié par le Greffier. Toutefois, à titre exceptionnel, un juge de permanence peut demander à un autre juge de la même Chambre de le suppléer, après en avoir informé le Président du Tribunal et le Greffier.

Article 29
Délibéré

Les délibérations des Chambres sont et demeurent secrètes.

SECTION 5 - *Le Greffier*

Article 30
Nomination du Greffier

Avant de consulter le Secrétaire général de l'ONU conformément au paragraphe 3 de l'article 16 du Statut, le Président recueille l'opinion des juges au sujet des candidats à la fonction de Greffier.

Article 31
Nomination du Greffier adjoint et du personnel du Greffe

Après avoir consulté le Président, le Greffier recommande au Secrétaire général de l'ONU la personne à nommer aux fonctions de Greffier adjoint ainsi que les autres membres du personnel du Greffe.

Article 32
Déclaration solennelle

A) Avant son entrée en fonctions, le Greffier fait devant le Président la déclaration suivante

« Je déclare solennellement que je remplirai en toute loyauté, discrétion et conscience les devoirs qui m'incombent en ma qualité de Greffier du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 et que j'observerai fidèlement toutes les prescriptions du Statut et du Règlement du Tribunal. »

B) Le Greffier adjoint fait devant le Président une déclaration semblable avant son entrée en fonctions.

C) Tout membre du personnel du Greffe fait une déclaration semblable devant le Greffier.

Article 33
Fonctions du Greffier

A) Le Greffier apporte son concours aux Chambres et lors des réunions plénières du Tribunal, ainsi qu'aux juges et au Procureur dans l'exercice de leurs fonctions. Sous l'autorité du Président, il est responsable de l'administration et du service du Tribunal et est chargé de toute communication émanant du Tribunal ou adressée à celui-ci.

B) Le Greffier peut, dans l'exécution de ses fonctions, informer les Chambres oralement ou par écrit de toute question relative à une affaire particulière qui affecte ou risque d'affecter l'exécution de ses fonctions, y compris l'exécution des décisions judiciaires, en informant les parties lorsque cela est nécessaire.

C) Le Greffier peut, le cas échéant, avis pris du Président du Tribunal et du Président de la Chambre d'appel, émettre des Directives pratiques traitant de certains aspects des pratiques et des procédures en vigueur au Greffe du Tribunal ainsi que d'autres affaires relevant de la compétence du Greffier.

Article 34
Section d'aide aux victimes et aux témoins

A) Il est créé auprès du Greffier une Section d'aide aux victimes et aux témoins, composée d'un personnel qualifié et chargée de

i) Recommander l'adoption de mesures de protection des victimes et des témoins conformément à l'article 21 du Statut;
ii) Fournir aux victimes et aux témoins l'assistance nécessaire à leur réadaptation physique et psychologique, en particulier par le biais de services de conseils dans les cas de viol et de violences sexuelles; et
iii) Concevoir des plans à court et à long terme pour la protection des témoins qui ont déposé devant le Tribunal et craignent pour leur vie, leur famille ou leurs biens.

B) Aux fins des mesures de protection et d'assistance destinées aux victimes et aux témoins, une politique tenant compte de la dualité homme-femme devrait être adoptée. Il faudra à cet égard dans le cadre du recrutement du personnel de la Section examiner comme il se doit la possibilité d'employer des femmes qualifiées.

Article 35
Procès-verbaux

Hormis les cas de compte rendu intégral prévus à l'article 81, le Greffier ou les fonctionnaires du Greffe désignés par lui établissent les procès-verbaux des réunions plénières du Tribunal et des audiences des Chambres, à l'exception des délibérations à huis clos.

Article 36
Répertoire général

Le Greffier tient un répertoire général indiquant, pour chaque affaire portée devant le Tribunal, sous réserve de l'article 53, tous les renseignements pertinents. Le répertoire général est ouvert au public.

SECTION 6 - Le Procureur

Article 37
Fonctions du Procureur

A) Le Procureur remplit toutes les fonctions prévues par le Statut conformément au Règlement et aux règlements internes qu'il adopte, pour autant que ceux-ci soient compatibles avec le Statut et le Règlement. Toute incompatibilité présumée des règlements internes est portée à la connaissance du Bureau, dont l'opinion prévaut.

B) Les pouvoirs du Procureur tels que définis aux chapitres quatre à huit du Règlement peuvent être exercés par les membres du Bureau du Procureur qu'il autorise à cette fin ou par toute personne mandatée par lui à cet effet.

Article 38
Le Procureur adjoint

A) Le Procureur recommande au Secrétaire général de l'ONU la personne à nommer aux fonctions de procureur adjoint.

B) Le Procureur adjoint remplit les fonctions du Procureur en cas d'absence ou d'incapacité ou sur instructions formelles du Procureur.

Chapitre Quatrième - Enquêtes Et Droits Des Suspects

SECTION 1 - Les enquêtes

Article 39
Déroulement des enquêtes

Aux fins de ses enquêtes, le Procureur est habilité à :

i) Convoquer et interroger les suspects, entendre les victimes et les témoins, enregistrer leurs déclarations, recueillir tous éléments de preuve et enquêter sur les lieux;
ii) Prendre toutes autres mesures jugées nécessaires aux fins de l'enquête et aux fins de soutenir l'accusation au procès, y compris des mesures spéciales nécessaires à la sécurité d'éventuels témoins et informateurs;
iii) Obtenir à ces fins l'aide de toute autorité nationale compétente, ainsi que de tout organisme international, y compris l'Organisation internationale de police criminelle (Interpol); et
iv) Solliciter d'une Chambre de première instance ou d'un juge le prononcé de toute ordonnance nécessaire.

Article 40

Mesures conservatoires

A) En cas d'urgence, le Procureur peut demander à tout Etat :

i) de procéder à l'arrestation et au placement en garde à vue d'un suspect;
ii) de saisir tous éléments de preuve matériels;
iii) de prendre toute mesure nécessaire pour empêcher l'évasion du suspect ou de l'accusé, l'intimidation ou les atteintes à l'intégrité physique des victimes ou des témoins, ou la destruction d'éléments de preuve.

L'Etat concerné s'exécute sans délai, en application de l'article 28 du Statut.

B) Sur démonstration par le Procureur d'un cas d'empêchement majeur pour l'Etat de maintenir le suspect en garde à vue ou de prendre toute mesure nécessaire pour empêcher son évasion, le Procureur peut adresser une requête à un juge désigné par le Président pour obtenir une ordonnance aux fins du transfert du suspect et de sa détention provisoire au siège du Tribunal ou dans tout autre lieu que le Bureau peut fixer. Après consultation du Procureur et du Greffier, le transfert est organisé par les autorités du pays concerné, du pays hôte du Tribunal et le Greffier.

C) Dans les cas visés au paragraphe (B), le suspect, dès son transfert, bénéficie des droits prévus à l'article 42 du Règlement et peut introduire un recours devant une Chambre de première instance du Tribunal. La Chambre statue sur le recours, le Procureur entendu.

D) Le suspect est remis en liberté si (i) la Chambre l'ordonne; ou si (ii) le Procureur ne soumet pas un acte d'accusation dans les vingt jours du transfert.

Article 40 *bis*
Transfert et détention provisoire de suspects

A) Dans le cadre d'une enquête, le Procureur peut transmettre au Greffier, pour ordonnance par un juge désigné conformément à l'article 28, une requête aux fins de transfert et de placement en détention provisoire d'un suspect dans les locaux du centre de détention relevant du Tribunal. Cette requête est motivée et, à moins que le Procureur souhaite seulement interroger le suspect, mentionne un chef d'accusation provisoire et est accompagnée d'un sommaire des éléments sur lesquels s'est appuyé le Procureur.

B) Le juge ordonne le transfert et la détention provisoire du suspect, si les conditions suivantes sont remplies :

(i) Le Procureur a demandé à un Etat de procéder à l'arrestation et au placement en garde à vue du suspect, conformément à l'article 40, ou le suspect est autrement détenu par un Etat;
(ii) Après avoir entendu le Procureur, le juge considère qu'il existe des indices graves et concordants tendant à montrer que le suspect aurait commis une infraction relevant de la compétence du Tribunal;
(iii) Le juge considère la détention provisoire comme une mesure nécessaire pour empêcher l'évasion du suspect, l'intimidation ou les atteintes à l'intégrité physique ou mentale des victimes ou des témoins ou la destruction d'éléments de preuve ou comme autrement nécessaire à la conduite de l'enquête.

C) La détention provisoire du suspect peut être ordonnée pour une durée qui ne saurait être supérieure à 30 jours à compter du lendemain du transfert du suspect au centre de détention du Tribunal.

D) L'ordonnance de transfert et de placement en détention provisoire du suspect doit être signée par le juge et revêtue du sceau du Tribunal. L'ordonnance mentionne les éléments sur lesquels le

Procureur se fonde pour présenter la requête visée au paragraphe (A), y compris le chef d'accusation provisoire, ainsi que les motifs pour lesquels le juge rend l'ordonnance, compte tenu du paragraphe (B). L'ordonnance précise également la durée initiale de la détention provisoire et est accompagnée d'un document rappelant les droits du suspect, tels qu'indiqués par le présent article et les articles 42 et 43.

E) Dès que possible, des copies de l'ordonnance et de la requête du Procureur sont notifiées par le Greffier au suspect et à son conseil.

F) A la demande motivée du Procureur et si les nécessités de l'enquête le justifient, le juge ayant rendu l'ordonnance initiale ou un autre juge appartenant à la même Chambre de première instance peut décider, à la suite d'un débat contradictoire et avant le terme de la période de détention, de prolonger la détention provisoire pour une durée qui ne saurait être supérieure à trente jours.

G) A la demande motivée du Procureur et si des circonstances particulières le justifient, le juge ayant rendu l'ordonnance initiale ou un autre juge appartenant à la même Chambre de première instance peut décider, à la suite d'un débat contradictoire et avant le terme de la période de détention, de prolonger à nouveau la détention provisoire pour une durée qui ne saurait être supérieure à 30 jours.

H) La durée totale de la détention provisoire ne peut en aucun cas excéder 90 jours, à compter du lendemain du transfert du suspect au Tribunal, délai à l'issue duquel, pour le cas où un acte d'accusation n'a pas été confirmé et un mandat d'arrêt signé, le suspect est remis en liberté ou, le cas échéant, remis aux autorités nationales de l'Etat initialement requis.

I) Les dispositions des articles 55 (B) à 59 s'appliquent *mutatis mutandis* à l'exécution de l'ordonnance de transfert et de placement en détention provisoire du suspect.

J) Après son transfert au siège du Tribunal, le suspect assisté de son conseil comparaît sans retard devant le juge ayant rendu l'ordonnance initiale ou un autre juge appartenant à la même Chambre de première instance, qui s'assure du respect de ses droits.

K) Au cours de la détention, le Procureur, le suspect ou son conseil peuvent présenter à la Chambre de première instance à laquelle appartient le juge ayant rendu l'ordonnance initiale toutes requêtes relatives à la régularité de la détention provisoire ou à la mise en liberté du suspect.

L) Sans préjudice des paragraphes (C) à (H), les articles relatifs à la détention préventive de personnes mises en accusation s'appliquent *mutatis mutandis* à la détention provisoire de personnes conformément au présent article.

Article 41
Conservation des informations

A) Le Procureur est responsable de la conservation, de la garde et de la sécurité des informations et des éléments de preuve matériels recueillis au cours des enquêtes.

B) Le Procureur dresse un inventaire des effets saisis de l'accusé, y compris tous documents, livres, papiers et autres objets, et remet une copie à l'accusé. Les effets non susceptibles de servir d'éléments de preuve sont restitués sans retard à l'accusé.

Article 42
Droits du suspect pendant l'enquête

A) Avant d'être interrogé par le Procureur, le suspect est informé de ses droits dans une langue qu'il parle et comprend, à savoir :

i) Le droit à l'assistance d'un conseil de son choix ou, s'il est indigent, à la commission d'office d'un conseil à titre gratuit;
ii) Le droit à l'assistance gratuite d'un interprète s'il ne comprend pas ou ne parle pas la langue utilisée lors de l'interrogatoire;
iii) Le droit de garder le silence et d'être averti que chacune de ses déclarations sera enregistrée et pourra être utilisée comme moyen de preuve.

B) L'interrogatoire d'un suspect ne peut avoir lieu qu'en présence de son conseil, à moins que le suspect n'ait renoncé à son droit à l'assistance d'un conseil. [Au cas où un suspect a renoncé à ce droit, et si par la suite il souhaite s'en prévaloir, l'interrogatoire doit alors cesser et ne reprendre que lorsque le suspect a obtenu un conseil de son chef ou d'office.][46]

Article 43
Enregistrement des interrogatoires des suspects

[Quand le Procureur interroge le suspect, l'interrogatoire est consigné sous forme d'enregistrement sonore ou vidéo selon les modalités suivantes:

i) Le suspect est informé, dans une langue qu'il comprend, de ce que l'interrogatoire est consigné sous forme d'enregistrement sonore ou vidéo;
ii) Si l'interrogatoire est suspendu, le fait et l'heure de la suspension de l'interrogatoire sont mentionnés avant la fin des enregistrements sonore ou vidéo; l'heure de la reprise de l'interrogatoire est aussi mentionnée dans l'enregistrement;
iii) A la fin de l'interrogatoire, on donne au suspect la possibilité de préciser ou de compléter toutes ses déclarations, s'il le souhaite; l'heure de la fin de l'interrogatoire est mentionnée dans l'enregistrement;
iv) La teneur de l'enregistrement est ensuite transcrite dès que possible après la fin de l'interrogatoire et une copie de la transcription est remise au suspect avec une copie de l'enregistrement ou de l'une des bandes originales si un appareil à enregistrements multiples a été utilisé;
v) Après qu'une copie de l'enregistrement a été faite, si nécessaire, pour les besoins de la transcription, la bande originale de l'enregistrement ou l'une des bandes originales est placée, en présence du suspect, sous scellés, contresignée par lui-même et par le Procureur.][47]

SECTION 2 - *Le conseil*

Article 44
Mandat et qualification du conseil

A) Le conseil choisi par un suspect ou un accusé dépose dès que possible son mandat auprès du Greffier. Sous réserve de vérification par le Greffier, tout conseil est considéré comme qualifié pour représenter un suspect ou un accusé dès lors qu'il est habilité à exercer la profession d'avocat dans un Etat ou est professeur de droit dans une université.

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[46] Tel que modifié le 10 novembre 2006.
[47] Ibidem.

B) Dans l'accomplissement de leur tâche, les conseils sont assujettis au respect des dispositions pertinentes du Statut, du Règlement et du Règlement de détention ainsi qu'à celles de tout autre règlement adopté par le Tribunal, sans préjudice de l'Accord de siège, du Code de conduite et des codes de pratique et de déontologie régissant leur profession et, le cas échéant, de la Directive relative à la commission d'office de conseils de la défense.

Article 44 *bis*
Conseils de permanence

A) Le Greffier tient une liste des conseils de permanence qui parlent aux moins une des deux langues de travail du Tribunal et ont fait savoir qu'ils accepteraient d'être commis d'office conformément au présent article.

B) Le conseil de permanence doit remplir les conditions visées à l'article 44 et résider dans une zone raisonnablement proche du centre de détention et du siège du Tribunal.

C) Le Greffier veille, en tout temps, à ce que les conseils de permanence soient prêts à se rendre au centre de détention au cas où ils y seraient convoqués.

D) En cas de non-représentation d'un accusé ou d'un suspect à tout moment après son transfert au Tribunal en application de l'article 40 *bis*, le Greffier convoque, le plus tôt possible, un conseil de permanence pour le représenter, et ce, jusqu'au choix d'un conseil par l'accusé ou le suspect, ou jusqu'à la commission d'office d'un conseil.

E) Dans le cadre de l'assistance juridique initiale qu'il fournit au suspect transféré en vertu de l'article 40 bis, le conseil de permanence l'informe de ses droits, y compris ceux énoncés au paragraphe (A) de l'article 55.

Article 45
Commission d'office d'un conseil

A) Le Greffier tient une liste des conseils qui parlent au moins une des deux langues de travail du Tribunal, remplissent les conditions visées à l'article 44, justifient d'au moins de 10 ans d'expérience pertinente, et ont fait savoir qu'ils accepteraient d'être commis d'office par le Tribunal pour représenter un suspect ou un accusé indigent.

B) Les critères d'indigence sont déterminés par le Greffier et approuvés par les juges.

C) Un conseil est commis d'office pour représenter un suspect ou un accusé indigent conformément à la procédure suivante :

i) Une demande de commission d'un conseil doit être présentée au Greffier;
ii) Le Greffier doit s'enquérir des moyens financiers du suspect ou de l'accusé et apprécier si les critères d'indigence sont réunis;
iii) Dans l'affirmative, il commet un conseil choisi sur la liste; dans le cas contraire, il en informe l'intéressé.

D) En cas de rejet de la demande, le suspect ou l'accusé peut soumettre au Greffier une nouvelle demande motivée par un changement de circonstances.

E) Le Greffier, en consultation avec les juges, détermine le tarif des honoraires à verser au conseil commis d'office.

F) Si un suspect ou un accusé décide d'assurer lui-même sa défense, il en avertit par écrit le Greffier dès que possible.

G) S'il s'avère qu'une personne présumée indigente ne l'est pas, la Chambre peut rendre une ordonnance aux fins de récupérer les frais entraînés par la commission d'un conseil.

H) Dans des circonstances exceptionnelles, à la demande du suspect ou de l'accusé, ou de son conseil, la Chambre peut donner instruction au Greffier de remplacer un conseil commis d'office, pour des raisons jugées fondées et après s'être assurée que la demande ne vise pas à ralentir la procédure.

I) Il est admis que le conseil commis représentera l'accusé et ce jusqu'à la fin de l'affaire. A défaut et en l'absence de justifications approuvées par la Chambre, ses honoraires peuvent ne pas lui être payés en totalité ou en partie. Dans de telles circonstances, la Chambre peut rendre une décision à cet effet. Le conseil n'est autorisé à se retirer de l'affaire qui lui a été assignée que dans les circonstances les plus exceptionnelles.

Article 45 *bis*
Personnes détenues

Les articles 44 et 45 s'appliquent à toute personne détenue sous l'autorité du Tribunal.

Article 45 *ter*
Disponibilité du conseil

A) Qu'ils soient désignés par le Greffe ou choisis par leur client afin de le représenter devant le Tribunal, le conseil et le co-conseil doivent fournir au Greffier à la date de cette désignation ou nomination, un engagement écrit selon lequel ils apparaîtront devant le Tribunal dans un délai raisonnable spécifié par le Greffier.

B) Le défaut pour le conseil ou le co-conseil de se présenter devant le Tribunal, tel qu'ils s'y sont engagés, sera un motif de retrait de leur désignation par le Greffier ou une interdiction de se présenter devant le Tribunal ou toute autre sanction décidée par la Chambre concernée.

Article 45 *quater*
Désignation d'un conseil dans l'intérêt de la justice

La Chambre de première instance peut, si elle estime que l'intérêt de la justice le requiert, ordonner au Greffier de désigner un conseil pour représenter les intérêts de l'accusé.

Article 46
Discipline

A) Une Chambre peut, après un avertissement, prendre des sanctions contre un conseil, si elle considère que son comportement reste offensant ou injurieux, entrave la procédure ou va autrement à l'encontre des intérêts de la justice. Cette disposition s'applique *mutatis mutandis* aux membres du Bureau du Procureur.

B) Un juge ou une Chambre de première instance peut, avec l'accord du Président, signaler tout manquement du conseil à l'Ordre des avocats dans le pays où il est admis à l'exercice de sa profession ou, si l'intéressé est professeur et n'est pas avocat, au conseil d'administration de l'Université dont il relève.

C) Si, en application de l'alinéa (A), elle a sanctionné, en refusant de l'entendre, un conseil commis d'office conformément à l'article 45, la Chambre donne instruction au Greffier de remplacer le conseil.

D) Le Greffier peut élaborer un code de conduite énonçant les principes déontologiques à observer par les conseils appelés à comparaître devant le Tribunal, sous réserve de son approbation par la réunion plénière. Les modifications du Code de conduite sont faites en consultation avec les représentants du Procureur et du conseil de la défense, sous réserve de leur adoption par la réunion plénière. S'il a de bonnes raisons de croire qu'un conseil a commis une violation grave du Code de conduite ainsi adopté, le Greffier peut saisir le Président ou le Bureau de la question aux fins de mesures appropriées, conformément aux dispositions du présent article.

Chapitre Cinquième - Mise En Accusation

SECTION 1 - Les actes d'accusation

Article 47
Présentation de l'acte d'accusation par le Procureur

A) Un acte d'accusation, soumis conformément à la procédure ci-après, est examiné par un juge désigné à cet effet conformément à l'article 28.

[B) Si lors de l'enquête, le Procureur est convaincu qu'il existe des éléments de preuve suffisants qui fournissent des motifs raisonnables de croire qu'un suspect a commis un crime relevant de la compétence du Tribunal, le Procureur prépare et envoie au Greffier un acte d'accusation avec les pièces justificatives, pour qu'il soit confirmé par un juge.

C) L'acte d'accusation indique le nom du suspect et les renseignements personnels le concernant, ainsi qu'un exposé concis des faits de l'affaire et du crime dont le suspect est accusé.

D) Le Greffier transmet l'acte d'accusation et les pièces jointes au juge désigné, lequel informe le Procureur de la date fixée pour l'examen de l'acte d'accusation.

E) Le juge chargé de l'examen vérifie chaque chef d'accusation et tout élément que le Procureur présenterait à l'appui de celui-ci, afin de décider, en application de la norme énoncée à l'Article 18 (1) du Statut, si un procès peut être intenté contre le suspect.

F) Le juge désigné peut :

i) Demander au Procureur de présenter des éléments supplémentaires à l'appui de l'un ou de la totalité des chefs d'accusation, ou de prendre toute autre mesure appropriée;
ii) Confirmer chacun des chefs d'accusation;
iii) Rejeter chacun des chefs d'accusation;
iv) Surseoir à l'examen afin de permettre au Procureur de modifier l'acte d'accusation.

G) L'acte d'accusation tel que confirmé par le juge est conservé par le Greffier qui prépare des copies certifiées conformes revêtues du sceau du Tribunal. Si l'accusé ne comprend aucune des langues officielles du Tribunal et si le Greffier sait quelle langue l'accusé comprend, l'acte d'accusation est également traduit dans cette langue et une copie de la traduction est jointe à toute copie certifiée conforme de l'acte d'accusation.

H) Une fois confirmé l'un quelconque ou l'ensemble des chefs de l'acte d'accusation

i) Le juge peut délivrer un mandat d'arrêt, conformément au paragraphe (A) de l'article 55, et toute ordonnance prévue à l'article 18 du Statut;
ii) Le suspect acquiert le statut d'un accusé.

I) Le rejet d'un chef d'accusation dans un acte d'accusation n'empêche pas le Procureur de soumettre ultérieurement un nouvel acte d'accusation modifié sur la base des faits ayant fondé le chef d'accusation rejeté, si le nouvel acte d'accusation est appuyé par des éléments de preuve supplémentaires.][48]

Article 48
Jonction d'instances

Des personnes accusées d'une même infraction ou d'infractions différentes commises à l'occasion de la même opération peuvent être mises en accusation et jugées ensemble.

Article 48 *bis*
Jonction de procès

Sur autorisation d'une Chambre de première instance, en application de l'article 73, des personnes qui sont inculpées séparément, accusées de la même infraction ou d'infractions différentes commises à l'occasion de la même entreprise criminelle, peuvent être jugées ensemble.

Article 49
Jonction de chefs d'accusation

Plusieurs infractions peuvent faire l'objet d'un seul et même acte d'accusation si les actes incriminés ont été commis à l'occasion de la même opération et par le même accusé.

Article 50
Modifications de l'acte d'accusation

A) (i) Le Procureur peut, sans autorisation préalable, modifier l'acte d'accusation, et ce, à tout moment avant sa confirmation. Ultérieurement, et jusqu'à la comparution initiale de l'accusé devant une Chambre de première instance conformément à l'article 62, il ne peut le faire qu'avec l'autorisation du juge l'ayant confirmé ou, dans des circonstances exceptionnelles, avec l'autorisation d'un juge désigné par le Président. Lors de cette comparution initiale ou par la suite, l'acte d'accusation ne peut être modifié que sur autorisation d'une Chambre de première instance donnée conformément à l'article 73. Les dispositions de l'article 47 (G) et de l'article 53 *bis* s'appliquent *mutatis mutandis* à l'acte d'accusation modifié, dès lors que l'autorisation de modifier est donnée.
(ii) Pour décider s'il est opportun d'autoriser la modification de l'acte d'accusation, la Chambre de première instance ou, le cas échéant, le juge compétent suit la procédure définie aux paragraphes (E) et (F) de l'article 47 *mutatis mutandis*, applique les normes qui y sont fixées et tient compte de tout autre élément d'appréciation pertinent.

B) Lorsque l'acte d'accusation modifié comporte de nouveaux chefs d'accusation et que l'accusé a déjà comparu devant une Chambre de première instance conformément à l'article 62, une nouvelle comparution se tient dès que possible pour permettre à l'accusé de

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[48] Tel que modifié le 10 novembre 2006.

plaider coupable ou non coupable des nouveaux chefs qui lui sont imputés.

C) Un délai supplémentaire de trente jours est accordé à l'accusé pour lui permettre de soulever les exceptions prévues à l'article 72 relativement aux nouveaux chefs qui lui sont imputés et, s'il y a lieu, la date du procès peut être reportée pour accorder à la défense le temps nécessaire à sa préparation.

Article 51
Retrait de l'acte d'accusation

A) Le Procureur peut, sans autorisation préalable, retirer un acte d'accusation à tout moment avant sa confirmation. Ultérieurement, et jusqu'à la comparution initiale de l'accusé devant une Chambre de première instance conformément à l'article 62, il ne peut le faire qu'avec l'autorisation du juge l'ayant confirmé ou, dans des circonstances exceptionnelles, avec l'autorisation d'un juge désigné par le Président. Lors de cette comparution initiale ou par la suite, l'acte d'accusation ne peut être retiré que sur autorisation d'une Chambre de première instance conformément à l'article 73.

B) Le retrait de l'acte d'accusation est notifié sans délai au suspect ou à l'accusé et à son conseil.

Article 52
Caractère public de l'acte d'accusation

Après la confirmation par le juge de première instance, et sous réserve de l'article 53, l'acte d'accusation est rendu public.

Article 53
Non-divulgation au public

A) Lorsque des circonstances exceptionnelles le requièrent, un juge ou une Chambre de première instance peut ordonner dans l'intérêt de la justice la non-divulgation au public de tous documents ou informations, et ce, jusqu'à décision contraire.

B) Lorsqu'il confirme un acte d'accusation, le juge peut, après avis du Procureur, ordonner sa non-divulgation au public jusqu'à sa signification à l'accusé, ou en cas de jonction d'instances, à tous les accusés.

C) Un juge ou une Chambre de première instance peut également, après avis du Procureur, ordonner la non-divulgation au public de tout ou partie de l'acte d'accusation, de toute information et de tout document particuliers, si l'un ou l'autre est convaincu qu'une telle ordonnance est nécessaire pour donner effet à une disposition du Règlement ou pour préserver des informations confidentielles obtenues par le Procureur ou encore que l'intérêt de la justice le commande.

D) Nonobstant les paragraphes (A), (B) et (C) ci-dessus, le Procureur peut divulguer tout ou partie de l'acte d'accusation aux autorités d'un État ou à une autorité compétente ou une institution internationale lorsqu'il l'estime nécessaire pour se ménager une chance d'arrêter un accusé.

Article 53 *bis*
Signification de l'acte d'accusation

A) L'acte d'accusation est signifié à l'accusé en personne lorsqu'il est placé sous la garde du Tribunal ou le plus tôt possible ultérieurement.

B) L'acte d'accusation est signifié à l'accusé lorsque copie certifiée, conformément aux dispositions de l'article 47 (G), lui en est donnée.

SECTION 2 - Les ordonnances et les mandats

Article 54
Disposition générale

A la demande d'une des parties ou de sa propre initiative, un juge ou une Chambre de première instance peut délivrer les ordonnances, citations à comparaître, assignations, injonctions, mandats et ordres de transfert nécessaires aux fins de l'enquête, de la préparation ou de la conduite du procès.

Article 55
Exécution des mandats d'arrêt

A) Un mandat d'arrêt doit être signé par un juge et revêtu du sceau du Tribunal. Il est accompagné d'une copie de l'acte d'accusation et d'un document rappelant les droits de l'accusé. Au titre de ces droits figurent ceux qui sont énoncés à l'article 20 du Statut et, *mutatis mutandis*, aux articles 42 et 43 du Règlement, ainsi que le droit de conserver le silence et la mise en garde selon laquelle toute déclaration faite par l'accusé est enregistrée et peut être retenue contre lui.

B) Le Greffier transmet aux autorités nationales de l'Etat sur le territoire ou sous la juridiction ou le contrôle duquel l'accusé réside ou avait sa dernière résidence connue trois jeux de copies certifiées conformes des documents ci-après

i) Le mandat d'arrêt et l'ordonnance de transfèrement au Tribunal;
ii) L'acte d'accusation confirmé;
iii) Le document rappelant les droits de l'accusé auquel est jointe, s'il y a lieu, une traduction dans une langue que celui-ci comprend.

C) Le Greffier donne instructions auxdites autorités

i) D'arrêter l'accusé et de le transférer au Tribunal;
ii) De notifier à l'accusé les documents susmentionnés;
iii) De donner lecture à l'accusé des documents dans une langue qu'il comprend et de l'informer de ses droits dans cette langue; et
iv) De renvoyer au Tribunal un jeu desdits documents en y joignant la preuve qu'ils ont été notifiés à l'accusé.

D) Lorsqu'un mandat d'arrêt émis par le Tribunal est exécuté, un membre du Bureau du Procureur peut être présent à compter du moment de l'arrestation.

Article 55 *bis*
Mandat d'arrêt à tous les Etats

A) A la demande du Procureur et s'il est convaincu que cela faciliterait l'arrestation d'un accusé susceptible de passer d'un Etat à un autre, ou que l'on ignore où il se trouve, un juge peut, sans recourir à la procédure décrite à l'article 61, et sous réserve du paragraphe (B), adresser un mandat d'arrêt à tous les Etats.

B) Le Greffier transmet un tel mandat aux autorités nationales des Etats pour lesquels le Procureur le requiert.

Article 56
Coopération des Etats

L'Etat auquel est transmis un mandat d'arrêt ou un ordre de transfert d'un témoin, agit sans tarder et avec toute la diligence voulue pour assurer sa bonne exécution, conformément à l'article 28 du Statut.

Article 57
Procédure après l'arrestation

Après l'arrestation de l'accusé, l'Etat concerné détient l'intéressé et en informe sans délai le Greffier. Le transfert de l'accusé au siège du Tribunal ou vers tout autre lieu que le Bureau peut fixer, après consultation du Procureur et du Greffier, est organisé par les autorités nationales intéressées en liaison avec les autorités du pays hôte et le Greffier.

Article 58
Dispositions de droit interne relatives à l'extradition

Les obligations énoncées à l'article 28 du Statut prévalent sur tous obstacles juridiques que la législation nationale ou les traités d'extradition auxquels l'Etat intéressé est partie pourraient opposer à la remise ou au transfert de l'accusé ou d'un témoin au Tribunal.

Article 59
Défaut d'exécution d'un mandat d'arrêt ou d'un ordre de transfert

A) Lorsque l'Etat auquel un mandat d'arrêt ou un ordre de transfert a été transmis n'a pu l'exécuter, il en informe sans délai le Greffier et en indique les raisons.

B) Si, dans un délai raisonnable après que le mandat d'arrêt ou l'ordre de transfert a été transmis à l'Etat, il n'est pas rendu compte des mesures prises, l'Etat est réputé ne pas avoir exécuté le mandat d'arrêt ou l'ordre de transfert et le Tribunal, par l'intermédiaire du Président, peut en informer le Conseil de sécurité.

Article 60
Publication de l'acte d'accusation

A la demande du Procureur, le Greffier transmet aux autorités nationales de l'Etat ou des Etats, aux fins de publication dans des journaux, ou de diffusion par la radio, l'internet ou la télévision, le texte d'une annonce portant publiquement à la connaissance de l'accusé l'existence d'un acte d'accusation établi contre lui, le sommant de se livrer au Tribunal et invitant toute personne qui saurait où l'accusé se trouve à communiquer cette information au Tribunal.

Article 61
Procédure en cas d'inexécution d'un mandat d'arrêt

A) Si, au terme d'un délai raisonnable, le mandat d'arrêt n'a pas été exécuté et que l'acte d'accusation n'a pas été signifié à personne, le juge qui a confirmé l'acte d'accusation invite le Procureur à rendre compte des mesures qu'il a prises. Dès lors que le juge est convaincu que:

i) Le Greffier et le Procureur ont pris toutes les mesures raisonnables pour faire arrêter l'accusé, notamment en s'adressant aux autorités compétentes de l'Etat sur le territoire ou sous la juridiction ou le contrôle duquel l'accusé visé par la signification réside ou avait sa dernière résidence connue; et

ii) Le Procureur et le Greffier ont pris toutes les mesures raisonnables pour établir le lieu de résidence inconnu de l'accusé, y compris par l'insertion d'annonces dans les journaux, conformément à l'article 60,

le juge ordonne que le Procureur présente l'acte d'accusation à la Chambre de première instance à laquelle il est affecté.

B) Dès le prononcé d'une telle ordonnance, le Procureur soumet l'acte d'accusation à la Chambre de première instance en audience publique, en y joignant tous les éléments de preuve présentés au Juge qui a initialement confirmé l'acte d'accusation et tout autre élément de preuve présenté au juge après la confirmation de l'acte d'accusation. Le Procureur peut également citer à comparaître et interroger, devant la Chambre de première instance, tout témoin dont la déclaration a été soumise au Juge ayant confirmé l'acte d'accusation.

C) Si la Chambre de première instance considère, sur la base de ces éléments de preuve ainsi que de tous autres que le Procureur peut produire, qu'il existe des raisons suffisantes de croire que l'accusé a commis une ou toutes les infractions mises à sa charge dans l'acte d'accusation, elle statue en conséquence. La Chambre fait lire par le Procureur les passages pertinents de l'acte d'accusation et lui demande de rendre compte des efforts déployés pour signifier l'acte d'accusation conformément au paragraphe (A).

D) En outre, la Chambre de première instance délivre contre l'accusé un mandat d'arrêt international qui est transmis à tous les Etats. A la demande du Procureur ou de sa propre initiative, le Procureur entendu, la Chambre de première instance peut ordonner à un ou plusieurs Etats d'adopter des mesures conservatoires à l'effet de geler les avoirs de l'accusé, sans préjudice des droits des tiers.

E) Si le Procureur établit à l'audience devant la Chambre de première instance que le défaut de signification à personne de l'acte d'accusation est imputable en tout ou en partie à l'absence ou au refus de coopération d'un Etat avec le Tribunal contrairement à l'article 28 du Statut, la Chambre de première instance en dresse le constat. Le Président en informe le Conseil de sécurité selon les modalités les plus opportunes, après consultation des deux Présidents de Chambre.

Article 62
Comparution initiale de l'accusé

A) Après son transfert au Tribunal, l'accusé comparaît sans délai devant une Chambre de première instance ou devant un juge désigné parmi ses membres et est officiellement mis en accusation. La Chambre de première instance ou le juge désigné:

i) s'assure que le droit de l'accusé à l'assistance d'un conseil est respecté,
ii) donne lecture ou fait donner lecture de l'acte d'accusation à l'accusé, dans une langue qu'il comprend, et s'assure qu'il comprend cet acte d'accusation;
iii) invite l'accusé à plaider coupable ou non coupable sur chaque chef d'accusation et, à défaut pour l'accusé de plaider, inscrit en son nom au dossier qu'il a plaidé non coupable,
iv) donne instruction au Greffier de fixer la date du procès au cas où l'accusé plaide non coupable,
v) lorsque l'accusé plaide coupable,
a) devant un juge, communique cet aveu de culpabilité à la Chambre de première instance,
b) une Chambre de première instance agit conformément au paragraphe (B),

B) Si un accusé plaide coupable conformément au paragraphe (A) (v) ou demande à revenir sur son plaidoyer de non culpabilité, la Chambre doit s'assurer que l'aveu de culpabilité :

i) est fait librement et volontairement,
ii) est fait en connaissance de cause,
iii) est sans équivoque, et

iv) repose sur des faits suffisants pour établir le crime et la participation de l'accusé à sa commission, compte tenu soit d'indices objectifs, soit de l'absence de tout sérieux désaccord entre le Procureur et l'accusé sur les faits de la cause,

la Chambre peut déclarer l'accusé coupable et donner instruction au Greffier de fixer la date de l'audience pour le prononcé de la peine.

Article 62 *bis*
Procédure en cas d'accord sur le plaidoyer

A) Le Procureur et la défense peuvent convenir que, après que l'accusé aura plaidé coupable de l'ensemble des chefs d'accusation, de l'un ou de plusieurs de ces chefs, le Procureur prendra tout ou partie des dispositions suivantes devant la Chambre de première instance :

i) demandera l'autorisation de modifier l'acte d'accusation en conséquence ;
ii) proposera une peine déterminée ou une fourchette de peines qu'il estime appropriées ;
ii) ne s'opposera pas à la demande par l'accusé d'une peine déterminée ou d'une fourchette de peines.

B) La Chambre de première instance n'est pas tenue par l'accord visé au paragraphe (A).

C) Si les parties ont conclu un accord sur le plaidoyer, la Chambre de première instance demande la divulgation de l'accord en question, soit en audience publique soit, si des motifs convaincants ont été présentés, à huis clos, au moment où l'accusé plaide coupable conformément à l'article 62 (A) (v), ou demande à revenir sur son plaidoyer de non-culpabilité.

Article 63
Interrogatoire de l'accusé

A) L'interrogatoire d'un accusé par le Procureur, y compris après la comparution initiale, ne peut avoir lieu qu'en présence de son conseil, à moins que l'accusé n'ait volontairement et expressément renoncé à la présence de celui-ci. Si l'accusé exprime ultérieurement le désir de bénéficier de l'assistance d'un conseil, l'interrogatoire est immédiatement suspendu et ne reprendra qu'en présence du conseil.

B) L'interrogatoire ainsi que la renonciation à l'assistance d'un conseil sont enregistrés sur bande magnétique ou sur cassette vidéo conformément à la procédure prévue à l'article 43. Préalablement à l'interrogatoire, le Procureur informe l'accusé de ses droits conformément à l'article 42 (A) (iii).

Article 64
Détention provisoire

Après son transfert au Tribunal, l'accusé est détenu dans les locaux mis à disposition par le pays hôte ou par un autre pays. Le Président peut, à la requête d'une des parties, demander de revoir les conditions de détention de l'accusé.

Article 65
Mise en liberté provisoire

A) Une fois détenu, l'accusé ne peut être mis en liberté que sur ordonnance d'une Chambre.

B) La mise en liberté provisoire ne peut être ordonnée par la Chambre de première instance qu'après avoir donné au pays hôte, et au pays où l'accusé demande à être libéré la possibilité d'être entendus, et pour autant qu'elle ait la certitude que l'accusé comparaîtra et, s'il est libéré, ne mettra pas en danger une victime, un témoin ou toute autre personne.

C) La Chambre de première instance peut subordonner la mise en liberté provisoire aux conditions qu'elle juge appropriées, y compris le versement d'une caution et, le cas échéant, l'observation des conditions nécessaires pour garantir la présence de l'accusé au procès et la protection d'autrui.

[D) Toute décision rendue par une Chambre de première instance aux termes de cet article sera susceptible d'appel. Sous réserve du paragraphe (F) ci-après, l'appel doit être déposé dans les sept jours du dépôt de la décision contestée. Lorsque cette décision est rendue oralement, l'appel doit être déposé dans les sept jours de ladite décision, à moins que:][49]

i) La partie attaquant la décision n'ait pas été présente ou représentée lors du prononcé de la décision, auquel cas le délai court à compter du jour où la partie reçoit notification de la décision orale qu'elle entend attaquer; ou
ii) La Chambre de première instance ait indiqué qu'une décision écrite suivrait, auquel cas le délai court à compter du dépôt de la décision écrite.

E) Le Procureur peut demander à ce que la Chambre de première instance sursoie à l'exécution de sa décision de libérer un accusé au motif qu'il a l'intention d'interjeter appel de la décision; il présente cette demande en même temps qu'il dépose sa réponse à la requête initiale de l'accusé aux fins de mise en liberté provisoire.

F) Lorsque la Chambre de première instance fait droit au sursis à l'exécution de sa décision de mettre en liberté un accusé, le Procureur dépose son acte d'appel au plus tard le lendemain du prononcé de la décision.

G) Lorsque la Chambre de première instance ordonne le sursis à l'exécution de sa décision de mise en liberté de l'accusé en attendant l'arrêt relatif à l'appel interjeté par le Procureur, l'accusé n'est pas remis en liberté sauf dans les cas suivants:

[i) Le délai de dépôt de l'appel de l'Accusation est écoulé et aucun appel n'a été déposé;
ii) La Chambre d'appel rejette le recours, ou
iii) La Chambre d'appel en décide autrement.][50]

H) Si elle l'estime nécessaire, la Chambre de première instance peut délivrer un mandat d'arrêt aux fins de garantir la comparution d'un accusé mis en liberté provisoire ou laissé en liberté pour toute autre raison. Les dispositions de la section 2 du chapitre V s'appliquent dans ce cas *mutatis mutandis*.

I) Sans préjudice des dispositions de l'article 107 du Règlement, la Chambre d'appel peut accorder la mise en liberté provisoire de condamnés dans l'attente de leur jugement en appel ou pendant une période donnée pour autant qu'elle ait la certitude que:

i) s'il est libéré, l'appelant comparaîtra à l'audience en appel ou, le cas échéant, il se présentera aux fins de détention à l'expiration de la période donnée;
ii) s'il est libéré, l'appelant ne mettra pas en danger une victime, un témoin ou toute autre personne;
iii) des circonstances particulières justifient cette mise en liberté.

Les dispositions des paragraphes (C) et (H) s'appliquent *mutatis mutandis*

Article 65 *bis*

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[49] Tel que modifié le 10 novembre 2006.
[50] Tel que modifié le 10 novembre 2006.

Conférence de mise en état

A) Une conférence de mise en état peut être convoquée par une Chambre de première instance ou par un juge à l'effet d'organiser, entre les parties, des échanges de vues propres à assurer un déroulement rapide de l'instance.

B) La Chambre d'appel ou un juge de la Chambre d'appel peut convoquer une conférence de mise en état.

C) Lorsqu'une conférence de mise en état se tient en application du paragraphe (B) du présent article, les représentants du Bureau du Procureur et les conseils de la défense peuvent y participer par voie d'audioconférence ou de vidéoconférence.

SECTION 3 - La production des moyens de preuve

Article 66
Communication des pièces par le Procureur

Sous réserve des dispositions des articles 53 et 69

A) Le Procureur communique à la défense

i) Dans les trente jours suivant la comparution initiale de l'accusé, copie de toutes les pièces justificatives jointes à l'acte d'accusation lors de la demande de confirmation ainsi que de toutes les déclarations antérieures de l'accusé recueillies par le Procureur;
ii) Au plus tard soixante jours avant la date fixée pour le début du procès, copie des déclarations de tous les témoins que le Procureur entend appeler à la barre. Une Chambre de première instance peut, à condition que le bien-fondé d'une telle mesure lui soit démontré, ordonner que des copies de déclarations de témoins à charge supplémentaires soient remises à la défense dans un délai fixé par la Chambre.

B) A la demande de la défense, le Procureur doit, sous réserve du paragraphe (C), permettre à celle-ci d'examiner tous livres, documents, photographies et autres objets se trouvant en sa possession ou sous son contrôle qui sont nécessaires à la défense de l'accusé, ou seront utilisés par le Procureur comme moyens de preuve au procès, ou ont été obtenus de l'accusé ou lui appartiennent.

C) Dans le cas où la communication d'informations ou de pièces se trouvant en la possession du Procureur pourrait nuire à de nouvelles enquêtes ou à des enquêtes en cours, ou pour toute autre raison pourrait être contraire à l'intérêt public ou porter atteinte à la sécurité d'un Etat, le Procureur peut demander à la Chambre de première instance siégeant à huis clos d'être dispensé de l'obligation de communication visée aux paragraphes (A) et (B). En formulant sa demande le Procureur fournit à la Chambre de première instance, et à elle seule, les informations ou les pièces dont la confidentialité est recherchée.

Article 67
Echange des moyens de preuve

Sous réserve des dispositions des articles 53 et 69:

[A) Dès que possible, et en toute hypothèse avant le début du procès:

i) Le Procureur notifie à la défense les noms des témoins à charge qu'il a l'intention d'appeler pour établir la culpabilité de l'accusé et réfuter tout moyen de défense dont le Procureur a été notifié conformément au paragraphe (ii) ci-dessous;
ii) La défense notifie au Procureur son intention d'invoquer:

a) Un alibi, auquel cas la notification spécifie le ou les lieux où l'accusé prétend s'être trouvé au moment des faits incriminés, les noms et adresses des témoins ainsi que tous autres éléments de preuve sur lesquels l'accusé a l'intention de se fonder pour établir son alibi;

b) Un moyen de défense spécial, notamment la déficience mentale ou la diminution des capacités mentales avec indication des nom et adresse des témoins ainsi que de tous autres éléments de preuve sur lesquels l'accusé a l'intention de se fonder pour établir ce moyen de défense.

B) Le défaut d'une telle notification par la défense, selon le présent article, ne limite pas le droit de l'accusé d'invoquer les moyens de défense susvisés.

C) Si la défense introduit la requête prévue au paragraphe (B) de l'article 66, le Procureur est à son tour autorisé à examiner tous livres, documents, photographies et autres objets se trouvant en la possession ou sous le contrôle de la défense et qu'elle entend produire au procès.

D) Si l'une ou l'autre des parties découvre des éléments de preuve, informations ou documents supplémentaires qui auraient dû être produits plus tôt conformément au Règlement, elle en informe aussitôt l'autre partie et la Chambre de première instance.][51]

Article 68
Communication des éléments de preuve à décharge et autres éléments pertinents

A) Le Procureur communique aussitôt que possible à la défense tous les éléments dont il sait effectivement qu'ils sont de nature à disculper en tout ou en partie l'accusé ou à porter atteinte à la crédibilité des éléments de preuve à charge.

B) Dans la mesure du possible et avec l'accord de la défense, sous réserve du paragraphe (A), le Procureur met à la disposition de la défense, sous forme électronique, les collections de documents pertinents qu'il détient et les logiciels qui permettent à la défense de les passer au crible électroniquement.

C) Si le Procureur obtient des informations confidentielles d'une personne ou entité donnée dans les conditions prévues à l'article 70 et si ces informations contiennent des éléments entrant dans le cadre du paragraphe (A) ci-dessus, il prend les mesures raisonnables pour obtenir le consentement de cette personne ou entité avant de les communiquer à l'accusé ou de l'informer de leur existence.

D) Si le Procureur détient des informations dont la communication pourrait hypothéquer des enquêtes en cours ou ultérieures, ou pourrait, pour toute autre raison, être contraire à l'intérêt public ou porter atteinte à la sécurité d'un État, il peut demander à la Chambre de première instance, siégeant à huis clos, de le dispenser de les communiquer. Ce faisant, le Procureur fournira à la Chambre de première instance (mais uniquement à elle) les informations dont la confidentialité est demandée.

E) À l'issue du procès et de tout appel ultérieur, le Procureur communique à la partie adverse tous les éléments visés au paragraphe (A) ci-dessus.

Article 69
Protection des victimes et des témoins

A) Dans des cas exceptionnels, chacune des deux parties peut demander à la Chambre de première instance d'ordonner la non-divulgation de l'identité d'une victime ou d'un témoin pour empêcher

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[51] Tel que modifié le 10 novembre 2006.

qu'ils ne courent un danger ou des risques, et ce, jusqu'au moment où la Chambre en décidera autrement.

B) Lorsqu'elle arrête des mesures de protection des victimes ou des témoins, la Chambre de première instance peut consulter la Section d'aide aux victimes et aux témoins.

C) Sous réserve de l'article 75, l'identité des victimes ou des témoins doit être divulguée dans des délais prescrits par la Chambre de première instance, pour accorder au Procureur et à la défense le temps nécessaire à leur préparation.

Article 70
Exception à l'obligation de communication

A) Nonobstant les dispositions des articles 66 et 67, les rapports, mémoires ou autres documents internes établis par une partie, ses assistants ou ses représentants dans le cadre de l'enquête ou de la préparation du dossier n'ont pas à être communiqués ou échangés en vertu des dispositions susmentionnées.

B) Si le Procureur possède des informations qui lui ont été communiquées à titre confidentiel et dans la mesure où ces informations n'ont été utilisées que dans le seul but de recueillir des éléments de preuve nouveaux, le Procureur ne peut divulguer ces informations initiales et leur source qu'avec le consentement de la personne ou de l'entité les ayant fournies. Ces informations et leur source ne seront en aucun cas utilisées comme moyens de preuve avant d'avoir été communiquées à l'accusé.

C) Si, après avoir obtenu le consentement de la personne ou de l'organe fournissant des informations au titre du présent article, le Procureur décide de présenter comme éléments de preuve tout témoignage, document ou autres pièces ainsi fournis, la Chambre de première instance ne peut pas, nonobstant les dispositions de l'article 98, ordonner aux parties de produire des éléments de preuve additionnels reçus de la personne ou de l'organe fournissant les informations originelles. Elle ne peut pas non plus, aux fins d'obtenir ces éléments de preuve additionnels, citer cette personne ou un représentant de cet organe comme témoin ou ordonner sa comparution.

D) Si le Procureur cite comme témoin la personne ou un représentant de l'organe fournissant les informations au titre du présent article, la Chambre de première instance ne peut contraindre ledit témoin à répondre aux questions auxquelles il refuse de répondre en raison du caractère confidentiel de ces informations.

E) Le droit de l'accusé de contester les éléments de preuve présentés par le ministère public reste inchangé, sous réserve uniquement des limites figurant aux paragraphes (C) et (D).

F) Les paragraphes (C) et (D) n'empiètent en rien sur le pouvoir qu'a la Chambre de première instance en vertu de l'article 89 (C) d'exclure un élément de preuve dont la valeur probante est nettement inférieure à l'exigence d'un procès équitable.

SECTION 4 - Les dépositions

Article 71
Dépositions

[A) A la requête de l'une des parties, la Chambre peut, dans des circonstances exceptionnelles et dans l'intérêt de la justice, ordonner qu'une déposition soit recueillie en vue du procès, et nommer à cet effet un officier instrumentaire.

B) La requête visant à faire recueillir une déposition est présentée par écrit. Elle mentionne le nom et l'adresse du témoin dont la déposition est requise, la date, le lieu où la déposition sera recueillie,

une déclaration contenant les sujets sur lesquels la personne va être interrogée ainsi que les circonstances exceptionnelles qui justifient la déposition.

C) S'il est fait droit à la requête, la partie ayant demandé la déposition en avise en temps utile l'autre partie, qui a le droit d'assister à la déposition et de contre-interroger le témoin.

D) La déposition peut aussi être recueillie par voie de vidéoconférence.

E) L'officier instrumentaire s'assure que la déposition est recueillie selon les formes prévues au Règlement et qu'un enregistrement est fait de la déposition, incluant le contre-interrogatoire et les objections soulevées par l'une ou l'autre partie en vue de la décision de la Chambre de première instance. Il transmet le dossier à la Chambre de première instance.][52]

SECTION 5 - Les exceptions préjudicielles

Article 72
Exceptions préjudicielles

A) Les exceptions préjudicielles, à savoir :

i) l'exception d'incompétence ;
ii) l'exception fondée sur un vice de forme de l'acte d'accusation ;
iii) l'exception aux fins de disjonction de chefs d'accusation joints conformément à l'article 49 ci-dessus ou aux fins de disjonction d'instances conformément au paragraphe (B) de l'article 82 ci-après ; ou
iv) l'exception fondée sur le rejet d'une demande de commission d'office d'un conseil formulée aux termes de l'article 45 (C) ;

doivent être enregistrées par écrit et au plus tard trente jours après que le Procureur a communiqué à la défense toutes les pièces jointes et déclarations visées à l'article 66 (A) (i). La Chambre se prononce sur ces exceptions préjudicielles dans les soixante jours suivant leur dépôt et avant le début des déclarations liminaires visées à l'article 84. La Chambre de première instance peut statuer sur ces requêtes sur la seule base des mémoires des parties, à moins qu'il ne soit décidé d'entendre la requête en audience publique.

B) Les décisions ainsi rendues ne sont pas susceptibles d'appel en cours de procès à l'exclusion :

i) des exceptions d'incompétence, auquel cas l'appel est de droit ;
ii) des cas où la Chambre de première instance a certifié l'appel, après avoir vérifié que la décision touche une question susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue, et que son règlement immédiat par la Chambre d'appel pourrait concrètement faire progresser la procédure.

C) Les appels visés au paragraphe (B) (i) et les demandes de certification visées au paragraphe (B) (ii) sont déposées respectivement dans les quinze jours et les sept jours de la décision contestée. Lorsque cette décision est rendue oralement, ce délai court à compter du jour du prononcé de ladite décision, à moins que :

i) la partie attaquant la décision n'ait pas été présente ou représentée lors du prononcé de la décision, auquel cas le délai court à compter du jour où la partie reçoit notification de la décision orale qu'elle entend attaquer ; ou que

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[52] Tel que modifié le 10 novembre 2006.

ii) la Chambre de première instance ait indiqué qu'une décision écrite suivrait, auquel cas le délai court à compter du dépôt de la décision écrite.

Dès lors qu'il est fait droit à la demande de certification, la partie concernée dispose de sept jours pour former un recours auprès de la Chambre d'appel.

D) Aux fins des paragraphes (A) (i) et (B) (i) *supra*, l'exception d'incompétence s'entend exclusivement d'une objection selon laquelle l'acte d'accusation ne se rapporte pas :

i) à l'une des personnes mentionnées aux articles 1, 5, 6, et 8 du Statut ;
ii) aux territoires mentionnés aux articles 1, 7 et 8 du Statut ;
iii) à la période mentionnée aux articles 1, 7 et 8 du Statut ;
iv) à l'une des violations définies aux articles 2, 3, 4 et 6 du Statut.

[E) Les exceptions fondées sur les vices de forme de l'acte d'accusation, y compris d'un acte d'accusation modifié, font l'objet d'une seule requête par partie, à moins qu'une Chambre de première instance n'en décide autrement.

F) Le défaut de l'accusé de soulever les exceptions préjudicielles dans les délais prescrits par le présent article vaut renonciation de sa part. La Chambre de première instance peut néanmoins déroger à ces délais pour des raisons jugées valables.][53]

Chapitre Sixième - Le Procès En Première Instance

SECTION 1 - Dispositions générales

Article 73
Requêtes

A) Sous réserve de l'article 72, l'une ou l'autre des parties peut présenter à une Chambre de première instance une ou plusieurs requêtes après la comparution initiale de l'accusé. La Chambre de première instance, ou un juge désigné en son sein par cette dernière, peut rendre une décision sur de telles requêtes sur la seule base des mémoires déposés par les parties, à moins qu'il n'ait été décidé d'entendre la requête en audience publique.

B) Les décisions concernant de telles requêtes ne sont pas susceptibles d'appel interlocutoire, à l'exclusion des cas où la Chambre de première instance a certifié l'appel après avoir vérifié que la décision touche une question susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue, et que son règlement immédiat par la Chambre d'appel pourrait concrètement faire progresser la procédure.

C) Les requêtes aux fins d'autorisation d'interjeter appel doivent être enregistrées dans les sept jours suivant le dépôt de la décision contestée. Lorsque cette décision est rendue oralement, la requête doit être déposée dans les sept jours suivant ladite décision, à moins que :

i) la partie attaquante n'ait pas été présente ou représentée lors du prononcé de la décision, auquel cas le délai court à compter du jour où la partie reçoit notification de la décision orale qu'elle entend attaquer ; ou
ii) la Chambre de première instance ait indiqué qu'une décision écrite suivrait, auquel cas, le délai court à compter du dépôt de la décision écrite.

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[53] Tel que modifié le 10 novembre 2006.

Dès lors qu'il est fait droit à la demande de certification, la partie concernée dispose de sept jours pour former un recours auprès de la Chambre d'appel.

D) Lorsque la date d'audition d'une requête a été fixée, y compris pour une requête soulevant une exception préjudicielle, toute requête supplémentaire et tout document soumis à l'appui desdites requêtes doit être déposé au plus tard dix jours avant la date prévue pour l'audition pour être également entendu à cette date. Toute requête supplémentaire qui n'est pas déposée dans les délais prescrits ne sera pas entendue à la date prévue pour l'audition et il ne sera pas fait droit à une demande de report de l'audition de la requête originale sur la base du dépôt de requêtes ultérieures, sauf dans des circonstances exceptionnelles.

E) La partie défenderesse dépose sa réponse au plus tard cinq jours après la date à laquelle elle a reçu la requête.

F) Outre les sanctions envisagées à l'article 46, une Chambre peut sanctionner un conseil si ce dernier dépose une requête, y compris une exception préjudicielle, qui, de l'avis de la Chambre, est fantaisiste, ou constitue un abus de procédure. La Chambre peut demander qu'il soit sursis au paiement d'une partie ou de la totalité des honoraires qui sont dus au titre de la requête déposée, et/ou des frais y relatifs.

G) Nonobstant les délais prescrits à l'article 72 (A), ceux prescrits au présent article s'appliquent.

Article 73 *bis*
Conférence préalable au procès

A) La Chambre de première instance tient une conférence préalable au procès avant l'ouverture des débats.

B) Durant cette conférence la Chambre, ou un juge désigné en son sein, peut inviter le Procureur à déposer, dans un délai fixé par elle ou par ledit juge et avant la date prévue pour l'ouverture des débats

i) Un mémoire préalable au procès traitant des questions de fait et de droit;
ii) Des accords entre les parties sur des points de fait ou de droit et un exposé sur d'autres points non litigieux;
iii) Un exposé des points de fait et de droit litigieux;
iv) Une liste des témoins que le Procureur entend citer comportant
a) le nom ou le pseudonyme de chacun des témoins;
b) un résumé des faits au sujet desquels chaque témoin déposera;
c) les points de l'acte d'accusation sur lesquels chaque témoin sera entendu; et
d) la durée probable de chaque déposition;
v) Une liste des pièces à conviction que le Procureur entend présenter, en précisant chaque fois que possible si la défense conteste ou non leur authenticité.

La Chambre, ou un juge peut inviter le Procureur à communiquer à la Chambre les copies des déclarations de chacun des témoins que le Procureur entend appeler à la barre.

C) La Chambre de première instance, ou le juge désigné, peut inviter le Procureur à écourter l'interrogatoire principal de certains témoins.

D) Si la Chambre de première instance, ou le juge désigné, considère qu'un nombre excessif de témoins sont appelés à la barre pour établir les mêmes faits, elle peut inviter le Procureur à réduire ce nombre.

E) Après l'ouverture du procès, le Procureur peut, s'il estime que l'intérêt de la justice le commande, saisir la Chambre de première instance d'une requête aux fins d'être autorisé à revenir à sa liste de témoins initiale ou à revoir la composition de sa liste.

F) Durant la conférence préalable au procès, la Chambre de première instance, ou le juge désigné, peut ordonner à la défense de déposer, sept jours au moins avant la date d'ouverture du procès, une liste des points de fait et de droit reconnus ainsi qu'un mémoire préalable au procès traitant des questions de fait et de droit.

Article 73 *ter*
Conférence préalable à la présentation des moyens à décharge

A) Avant que la défense ne présente ses moyens, la Chambre de première instance peut tenir une conférence.

B) Durant cette conférence, la Chambre, ou un juge désigné en son sein, peut inviter la défense à déposer, avant de présenter ses moyens, mais après que l'accusation a fini de présenter les siens,

i) Des accords entre les parties sur des points de fait ou de droit et un exposé sur d'autres points non litigieux;
ii) Un exposé des points de fait et de droit litigieux
iii) Une liste des témoins que la défense entend citer, où sont consignés
a) le nom ou le pseudonyme de chaque témoin;
b) un résumé des faits au sujet desquels chaque témoin déposera;
c) les points de l'acte d'accusation sur lesquels chaque témoin sera entendu; et
d) la durée probable de chaque déposition;
iv) Une liste des pièces à conviction que la défense entend présenter à l'appui des moyens qu'elle invoque, en précisant chaque fois que possible si l'accusation conteste ou non leur authenticité.

La Chambre, ou un juge peut inviter la défense à communiquer à la Chambre et au Procureur les copies des déclarations de chacun des témoins que la défense entend appeler à la barre.

C) La Chambre de première instance, ou le juge désigné, peut inviter la défense à écourter la durée prévue de l'interrogatoire principal de certains témoins.

D) La Chambre de première instance, ou le juge désigné, peut inviter la défense à réduire le nombre de témoins, si elle considère qu'un nombre excessif de témoins sont appelés à la barre pour établir les mêmes faits.

E) Après le début de la présentation des moyens à décharge, la défense peut, si elle estime que l'intérêt de la justice le commande, saisir la Chambre de première instance d'une requête aux fins d'être autorisée à revenir à sa liste de témoins initiale ou à revoir la composition de sa liste.

Article 74
Amicus curiae

Une Chambre peut, si elle le juge souhaitable dans l'intérêt d'une bonne administration de la justice, inviter ou autoriser tout Etat, toute organisation ou toute personne à comparaître devant elle et lui présenter toute question spécifiée par la Chambre.

Article 74 *bis*
Examen médical de l'accusé

Une Chambre de première instance peut, d'office ou à la demande d'une partie, ordonner un examen médical, y compris psychiatrique, ou un examen psychologique de l'accusé. Dans ce cas, le

Greffier confie cette tâche à un ou plusieurs des experts dont le nom figure sur une liste préalablement établie par le Greffe et approuvée par le Bureau.

Article 75
Mesures destinées à assurer la protection des victimes et des témoins

A) Un juge ou une Chambre peut, d'office ou à la demande d'une des parties, de la victime, du témoin intéressé, ou de la Section d'aide aux victimes et aux témoins, ordonner des mesures appropriées pour protéger la vie privée et la sécurité des victimes ou des témoins, à condition toutefois que lesdites mesures ne portent pas atteinte aux droits de l'accusé.

B) Une Chambre peut tenir une audience à huis clos pour déterminer s'il y a lieu d'ordonner :

i) des mesures de nature à empêcher la divulgation au public ou aux médias de l'identité d'une victime ou d'un témoin, d'une personne qui leur est apparentée ou associée, ou du lieu où ils se trouvent, telles que :
a) la suppression, dans les dossiers du Tribunal, du nom de l'intéressé et des indications permettant de l'identifier;
b) l'interdiction de l'accès au public à toute pièce du dossier identifiant la victime;
c) lors des témoignages, l'utilisation de moyens techniques permettant l'altération de l'image ou de la voix, ou l'usage d'un circuit de télévision fermé, et
d) l'emploi d'un pseudonyme;
ii) la tenue d'audiences à huis clos conformément à l'article 79 ci-après ;
iii) les mesures appropriées visant à faciliter le témoignage d'une victime ou d'un témoin vulnérable, par exemple au moyen d'un circuit de télévision fermé unidirectionnel.

C) La Section d'aide aux victimes et aux témoins s'assure qu'avant de comparaître, le témoin a bien été informé que son témoignage et son identité pourront, en application de l'article 75 (F), être divulgués ultérieurement dans une autre affaire.

D) La Chambre assure le cas échéant le contrôle du déroulement des interrogatoires aux fins d'éviter toute forme de harcèlement ou d'intimidation.

E) Lorsqu'un juge ou une Chambre prend une ordonnance en application du paragraphe (A) ci-dessus, il ou elle y précise, le cas échéant, si le compte rendu de la déposition du témoin bénéficiant des mesures de protection peut être communiqué et utilisé dans le cadre d'autres affaires portées devant le Tribunal.

F) Une fois que des mesures de protection ont été ordonnées en faveur d'une victime ou d'un témoin dans le cadre d'une affaire portée devant le Tribunal (la « première affaire »), ces mesures

i) continuent de s'appliquer *mutatis mutandis* dans toute autre affaire portée devant le Tribunal (la « deuxième affaire ») et ce, jusqu'à ce qu'elles soient annulées, modifiées ou renforcées selon la procédure exposée dans le présent article, mais
ii) n'empêchent pas le Procureur de s'acquitter des obligations de communication que lui impose le Règlement dans la deuxième affaire, sous réserve qu'il informe de la nature des mesures de protection ordonnées dans la première affaire les conseils de la défense auxquels il communique les éléments en question.

G) Une partie à la deuxième affaire, qui souhaite obtenir l'annulation, la modification ou le renforcement de mesures ordonnées dans la première affaire, doit soumettre sa demande:

i) à toute Chambre encore saisie de la première affaire, quelle que soit sa composition, ou
ii) à la Chambre saisie de la deuxième affaire, si aucune Chambre n'est plus saisie de la première affaire.

H) Avant de trancher toute demande présentée en vertu du paragraphe (G) (ii) ci-dessus, la Chambre saisie de la deuxième affaire doit obtenir toutes les informations nécessaires concernant la première affaire, et consulter le juge qui a ordonné les mesures de protection dans cette dernière, si celui-ci est toujours en fonction au Tribunal.

I) Toute demande d'annulation, de modification ou de renforcement de mesures de protection ordonnées au bénéfice d'une victime ou d'un témoin doit être tranchée, soit par la Chambre qui en est saisie, soit par un des juges de celle-ci, le terme « Chambre » employé dans le présent article s'entendant également d'« un juge de cette Chambre ».

Article 76
Déclaration solennelle des interprètes et des traducteurs

Avant de prendre ses fonctions, tout interprète ou traducteur prononce une déclaration solennelle aux termes de laquelle il s'engage à accomplir sa tâche en toute loyauté, indépendance et impartialité et dans le plein respect de son devoir de confidentialité.

Article 77
Outrage au Tribunal

A) Dans l'exercice de son pouvoir inhérent, le Tribunal peut déclarer coupable d'outrage les personnes qui entravent délibérément et sciemment le cours de la justice, et notamment toute personne qui :

i) étant témoin devant une Chambre refuse de répondre à une question malgré la demande qui lui en est faite par la Chambre ;
ii) divulgue des informations relatives à ces procédures en violant en connaissance de cause une ordonnance d'une Chambre ;
iii) méconnaît, sans excuse valable, une ordonnance aux fins de comparaître devant une Chambre ou aux fins de produire des documents devant une Chambre ;
iv) menace, intimide, lèse, essaie de corrompre un témoin, ou un témoin potentiel, qui dépose, a déposé ou est sur le point de déposer devant une Chambre ou de toute autre manière fait pression sur lui ; ou
v) menace, intimide, essaie de corrompre ou de toute autre manière cherche à contraindre toute autre personne, dans le but de l'empêcher de s'acquitter d'une obligation découlant d'une ordonnance rendue par un Juge ou une Chambre.

B) Toute incitation à ou tentative de commettre l'un des actes sanctionnés au paragraphe (A) est assimilée à un outrage au Tribunal et est passible de la même peine.

C) Si une Chambre a des motifs de croire qu'une personne s'est rendue coupable d'outrage au Tribunal, elle peut :

i) demander au Procureur d'instruire l'affaire en vue de préparer et de soumettre un acte d'accusation pour outrage ;
ii) si elle estime que le Procureur a un conflit d'intérêts pour ce qui est du comportement en cause, enjoindre au Greffier de désigner un *amicus curiae* qui instruira l'affaire et indiquera à la Chambre s'il existe des motifs suffisants pour engager une procédure pour outrage ; ou
iii) engager une procédure elle-même.

D) Si la Chambre considère qu'il existe des motifs suffisants pour poursuivre une personne pour outrage, elle peut :

i) dans les circonstances décrites au paragraphe (C) (i), demander au Procureur d'engager une procédure, ou

ii) dans les circonstances décrites au paragraphe (C) (ii) ou (iii), rendre une ordonnance au lieu de délivrer un acte d'accusation et soit demander à *l'amicus curiae* d'engager une procédure, soit engager une procédure elle-même.

E) Les règles de procédure et de preuve énoncées aux chapitres quatre à huit du Règlement s'appliquent, *mutatis mutandis*, aux procédures visées au présent article.

F) Toute personne accusée ou inculpée d'outrage se verra commettre d'office un conseil, en application de l'article 45 si elle satisfait aux critères fixés par le Greffier pour être déclarée indigente.

G) La peine maximum qu'encourt une personne convaincue d'outrage au Tribunal est de cinq ans d'emprisonnement ou une amende de 10 000 dollars E.-U., ou les deux.

H) L'amende est payée au Greffier qui la verse sur un compte distinct.

I) Si le Tribunal reconnaît un conseil coupable d'outrage en application du présent article, la Chambre ayant rendu cette conclusion peut également décider que le conseil n'est plus habilité à représenter le suspect ou l'accusé devant le Tribunal et conclure que son comportement constitue une atteinte à la discipline en application de l'article 46, ou des deux.

J) Toute décision rendue par une Chambre de première instance en vertu du présent article est susceptible d'appel. L'acte d'appel doit être déposé dans les quinze jours du dépôt de la décision contestée. Lorsque cette décision est rendue oralement, l'acte d'appel doit être déposé dans les quinze jours de la décision contestée, à moins que

i) la partie attaquant la décision n'ait pas été présente ou représentée lors du prononcé de la décision, auquel cas le délai court à compter du jour où la partie reçoit notification de la décision orale qu'elle entend attaquer ; ou

ii) la Chambre de première instance n'ait indiqué qu'une décision écrite suivrait, auquel cas le délai court à compter du dépôt de la décision écrite.

K) Lorsque, statuant en premier ressort, la Chambre d'appel rend une décision en application du présent article, cette décision peut être attaquée dans les quinze jours de son dépôt, au moyen d'un acte d'appel présenté au Président. Cinq juges désignés par le Président statuent sur cet appel. Lorsque la décision contestée est rendue oralement, l'acte d'appel doit être déposé dans les quinze jours qui suivent, à moins que :

i) la partie attaquant la décision n'ait pas été présente ou représentée lors du prononcé de la décision, auquel cas le délai court à compter du jour où la partie reçoit notification de la décision orale qu'elle entend attaquer ; ou

ii) la Chambre d'appel n'ait indiqué qu'une décision écrite suivrait, auquel cas le délai court à compter du dépôt de la décision écrite.

Article 78
Audiences publiques

Sauf disposition contraire, la procédure devant une Chambre de première instance est publique, à l'exception du délibéré.

Article 79
Audiences à huis clos

A) La Chambre de première instance peut ordonner que la presse et le public soient exclus pendant tout ou partie de l'audience

i) Pour des raisons tenant à l'ordre public ou aux bonnes mœurs;
ii) Pour assurer la sécurité et la protection d'une victime ou d'un témoin ou pour éviter la divulgation de son identité conformément à l'article 75; ou
iii) En considération de l'intérêt de la justice.

B) La Chambre de première instance rend publics les motifs de sa décision.

Article 80
Police de l'audience

A) La Chambre de première instance peut faire expulser une personne de la salle afin de sauvegarder le droit de l'accusé à un procès équitable et public ou afin de conserver la dignité qui sied aux débats.

B) La Chambre de première instance peut ordonner l'expulsion de l'accusé et poursuivre les débats en son absence si l'accusé, après avoir été averti que son comportement risque de justifier son expulsion de la salle d'audience, persiste dans ce comportement.

Article 81
Enregistrement des débats et conservation des preuves

A) Le Greffier établit et conserve un compte rendu fidèle de tous les débats, y compris un enregistrement sonore, sa transcription et, lorsque la Chambre de première instance le juge nécessaire, un enregistrement vidéo.

B) La Chambre de première instance peut ordonner la divulgation de tout ou partie du compte rendu des débats tenus à huis clos, lorsque les raisons qui ont motivé le huis clos ont disparu.

C) Le Greffier assure la conservation et la garde de tous les éléments de preuve matériels produits au cours de l'instance.

D) La Chambre de première instance décide si des photographies, ou des enregistrements vidéo ou sonores peuvent être pris lors de l'audience autrement que par les soins du Greffe.

SECTION 2 - Déroulement du procès

Article 82
Jonction et disjonction d'instances

A) En cas d'instances jointes, chaque accusé a les mêmes droits que s'il était jugé séparément.

B) La Chambre de première instance peut ordonner un procès séparé pour des accusés dont les instances avaient été jointes en application de l'article 48, pour éviter tout conflit d'intérêts de nature à causer un préjudice grave à un accusé, ou pour sauvegarder l'intérêt de la justice.

Article 82 *bis*
Procès en l'absence de l'Accusé

Lorsqu'un accusé refuse de se présenter devant la Chambre de première instance pour son procès, la Chambre peut ordonner la continuation du procès en l'absence de l'accusé pour aussi longtemps qu'il persiste dans son refus, si la Chambre est convaincue que:

i) la comparution initiale de l'accusé s'est tenue conformément aux dispositions de l'article 62;
ii) le Greffier a dûment notifié à l'accusé que sa présence est requise pour le procès;
iii) les intérêts de l'accusé sont représentés par un conseil.

Article 83
Instruments de contrainte

Les instruments de contrainte, tels que les menottes, ne sont utilisés que pour éviter un risque d'évasion au cours du transfert ou pour des raisons de sécurité; elles sont retirées lorsque l'accusé comparaît devant la Chambre.

Article 84
Déclarations liminaires

Avant la présentation par le Procureur de ses moyens de preuve, chacune des parties peut faire une déclaration liminaire. Toutefois, la défense peut décider de faire sa déclaration après que le Procureur a présenté ses moyens de preuve et avant de présenter elle-même ses propres moyens de preuve.

Article 85
Présentation des moyens de preuve

A) Chacune des parties peut appeler des témoins à la barre et présenter des moyens de preuve. A moins que la Chambre n'en décide autrement dans l'intérêt de la justice, les moyens de preuve sont présentés dans l'ordre suivant:

i) Preuves du Procureur;
ii) Preuves de la défense;
iii) Réplique du Procureur;
iv) Duplique de la défense;
v) Moyens de preuve ordonnés par la Chambre de première instance conformément à l'article 98;
vi) Toute information pertinente permettant à la Chambre de première instance de décider de la sentence appropriée, si l'accusé est reconnu coupable d'un ou de plusieurs des chefs figurant dans l'acte d'accusation.

B) Chaque témoin peut, après son interrogatoire principal, faire l'objet d'un contre-interrogatoire et d'un interrogatoire supplémentaire. Le témoin est d'abord interrogé par la partie qui le présente, mais un juge peut également poser toute question au témoin à quelque stade que se soit.

C) L'accusé peut, s'il le souhaite, comparaître en qualité de témoin pour sa propre défense.

Article 86
Réquisitions et plaidoiries

A) Après présentation de tous les moyens de preuve, le Procureur peut prendre ses réquisitions et, qu'il le fasse ou non, la défense peut plaider. S'il le souhaite, le Procureur peut répliquer et la défense présenter une duplique.

B) Les dernières conclusions des parties sont déposées auprès de la Chambre de première instance au plus tard cinq jours avant l'audience consacrée aux réquisitions et aux plaidoiries.

C) Dans leurs réquisitions et plaidoiries, les parties abordent également les questions relatives à la sentence.

Article 87
Délibéré

A) Après les réquisitions et les plaidoiries, le Président de la Chambre de première instance déclare clos les débats et la Chambre se retire pour délibérer à huis clos. L'accusé n'est déclaré coupable que lorsque la majorité de la Chambre considère que la culpabilité a été prouvée au-delà de tout doute raisonnable.

B) La Chambre de première instance vote séparément sur chaque chef visé dans l'acte d'accusation. Si deux ou plusieurs accusés sont jugés ensemble, en application de l'article 48, la Chambre statue séparément sur le cas de chacun d'eux.

C) Si la Chambre de première instance déclare l'accusé coupable d'un ou de plusieurs des chefs visés dans l'acte d'accusation, elle fixe la peine à infliger pour chaque déclaration de culpabilité.

Article 88
Jugement

A) Le jugement est prononcé en audience publique à une date qui a été notifiée aux parties et aux conseils, qui ont le droit d'être présents.

B) Si elle juge l'accusé coupable d'un crime et si à l'examen des preuves il est établi que l'infraction a donné lieu à l'acquisition illicite d'un bien, la Chambre de première instance le constate spécifiquement dans son jugement et peut ordonner la restitution de ce bien conformément à l'article 105.

C) Le Jugement est adopté à la majorité des juges. Une motivation écrite y est jointe ou bien le suit dans les meilleurs délais. Des opinions individuelles ou dissidentes peuvent être jointes.

SECTION 3 - De la preuve

Article 89
Dispositions générales

A) En matière de preuve, les règles énoncées dans la présente section s'appliquent à toute procédure devant les Chambres. Celles-ci ne sont pas liées par les règles de droit interne régissant l'administration de la preuve.

B) Dans les cas où le Règlement est muet, la Chambre saisie applique les règles d'administration de la preuve propres à permettre, dans l'esprit du Statut et des principes généraux du droit, un règlement équitable de la cause.

C) La Chambre peut recevoir tout élément de preuve pertinent dont elle estime qu'il a valeur probante.

D) La Chambre peut demander à vérifier l'authenticité de tout élément de preuve obtenu hors audience.

Article 90
Témoignages

A) En principe, les Chambres entendent les témoins en personne, à moins qu'une Chambre n'ordonne qu'un témoin dépose selon les modalités prévues à l'article 71.

B) Avant de déposer, tout témoin fait la déclaration suivante:

« Je déclare solennellement que je dirai la vérité, toute la vérité et rien que la vérité ».

[C) Un enfant qui, de l'avis de la Chambre ne comprend pas la nature d'une déclaration solennelle, peut être autorisé à témoigner sans cette formalité, si la Chambre estime qu'il est suffisamment mûr pour être en mesure de relater les faits dont il a eu connaissance et qu'il comprend ce que signifie le devoir de dire la vérité. Un jugement ne peut cependant être fondé exclusivement sur ce seul témoignage.

D) Un témoin, autre qu'un expert, qui n'a pas encore témoigné ne peut être présent lors de la déposition d'un autre témoin. Toutefois s'il a entendu cet autre témoignage, le sien n'est pas pour autant irrecevable.

E) Un témoin peut refuser de faire toute déclaration qui risquerait de l'incriminer. La Chambre peut toutefois obliger le témoin à répondre. Aucun témoignage obtenu de la sorte ne peut être utilisé par la suite comme élément de preuve dans une poursuite contre le témoin, hormis le cas de poursuite pour faux témoignage.

F) La Chambre de première instance exerce un contrôle sur les modalités et l'ordre de l'interrogatoire des témoins ainsi que la présentation des éléments de preuve, de manière à:

i) Rendre l'interrogatoire et la présentation des éléments de preuve efficaces pour l'établissement de la vérité; et
ii) Éviter toute perte de temps injustifiée.

G) i) Le contre-interrogatoire se limite aux points évoqués dans l'interrogatoire principal, aux points ayant trait à la crédibilité du témoin et à ceux ayant trait à la cause de la partie procédant au contre-interrogatoire sur lesquels le témoin est en mesure de déposer.
ii) Lorsqu'un conseil procède au contre-interrogatoire d'un témoin qui est en mesure de déposer sur un point portant sur la cause qu'il défend, il doit le confronter aux éléments dont il dispose qui contredisent les dépositions dudit témoin.
iii) La Chambre de première instance peut, dans l'exercice de son pouvoir discrétionnaire, autoriser des questions sur d'autres sujets.][54]

Article 90 *bis*
Transfert d'un témoin détenu

A) Toute personne détenue dont la comparution personnelle en qualité de témoin est ordonnée par le Tribunal sera transférée temporairement au centre de détention relevant du Tribunal, sous condition de son retour au terme du délai fixé par le Tribunal.

B) L'ordre de transfert ne peut être délivré par un juge ou une Chambre qu'après vérification préalable de la réunion des conditions suivantes:

i) La présence du témoin détenu n'est pas nécessaire dans une procédure pénale en cours sur le territoire de l'Etat requis pour la période durant laquelle elle est sollicitée par le Tribunal;
ii) Son transfert n'est pas susceptible de prolonger la durée de sa détention telle que prévue par l'Etat requis;

C) Le Greffe transmet l'ordre de transfert aux autorités nationales de l'Etat sur le territoire ou sous la juridiction ou le contrôle duquel le témoin est détenu. Le transfert est organisé par les autorités nationales intéressées en liaison avec les autorités du pays hôte et le Greffier.

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[54] Tel que modifié le 10 novembre 2006.

D) Il incombe au Greffe de s'assurer du bon déroulement dudit transfert, y compris le suivi de la détention du témoin au centre de détention relevant du Tribunal, de s'informer de toutes modifications pouvant intervenir dans les modalités de la détention telles que prévues par l'Etat requis et pouvant affecter la durée de détention du témoin audit centre de détention, et d'en faire part, dans les plus brefs délais, au juge ou à la Chambre concerné.

E) A l'expiration du délai fixé par le Tribunal pour le transfert temporaire, le témoin détenu sera remis aux autorités de l'Etat requis, à moins que l'Etat n'ait transmis, pendant cette même période, un ordre de mise en liberté du témoin auquel il devra être immédiatement fait suite.

F) Si, au cours du délai fixé par le Tribunal, la présence du témoin détenu demeure nécessaire, un juge ou une Chambre peut proroger le délai, dans le respect des conditions fixées au paragraphe (B).

Article 91
Faux témoignage sous déclaration solennelle

A) D'office ou à la demande d'une partie, la Chambre avertit le témoin de son obligation de dire la vérité et des conséquences pouvant résulter d'un faux témoignage.

B) Si la Chambre a de bonnes raisons de croire qu'un témoin a sciemment et volontairement fait un faux témoignage, elle peut:

i) demander au Procureur d'examiner l'affaire en vue de préparer et de soumettre un acte d'accusation pour faux témoignage ; ou
ii) si elle estime que le Procureur a un conflit d'intérêts pour ce qui est du comportement en cause, enjoindre au Greffier de désigner un *amicus curiae* qui instruira l'affaire et indiquera à la Chambre s'il existe des motifs suffisants pour engager une procédure pour faux témoignage.

C) Si la Chambre considère qu'il existe des motifs suffisants pour poursuivre une personne pour faux témoignage, elle peut:

i) dans les circonstances décrites au paragraphe (B) (i), demander au Procureur d'engager une procédure, ou
ii) dans les circonstances décrites au paragraphe (B) (ii), rendre une ordonnance au lieu de délivrer un acte d'accusation et demander à *l'amicus curiae* d'engager une procédure.

D) Les dispositions de procédure et de preuve prévues aux chapitres quatre à huit du Règlement s'appliquent, *mutatis mutandis*, aux procédures visées au présent article.

E) Toute personne accusée ou inculpée de faux témoignage se verra commettre d'office un conseil, en application de l'article 45 si elle satisfait aux critères fixés par le Greffier pour être déclarée indigente.

F) Un juge ayant siégé à la Chambre de première instance devant laquelle le témoin a comparu, ne peut connaître des procédures pour faux témoignage dont le témoin est l'objet.

G) Le faux témoignage sous déclaration solennelle est passible d'une amende ne pouvant excéder 10 000 dollars E.-U. ou d'une peine d'emprisonnement de cinq ans maximum, ou des deux. L'amende est payée au Greffier qui la verse sur le compte distinct visé au paragraphe (H) de l'article 77 ci-dessus.

H) Les paragraphes (B) à (G) s'appliquent *mutatis mutandis* à une personne qui fait sciemment et volontairement un faux témoignage dans une déclaration écrite recueillie en conformité avec l'article 92 *bis* et dont cette personne sait ou a des raisons de savoir qu'elle peut servir de preuve lors des poursuites devant le Tribunal.

I) Toute décision rendue par une Chambre de première instance en vertu du présent article est susceptible d'appel. L'acte d'appel doit être déposé dans les quinze jours du dépôt de la décision contestée. Lorsque cette décision est rendue oralement, l'acte d'appel doit être déposé dans les quinze jours de la décision contestée, à moins que:

i) la partie attaquant la décision n'ait pas été présente ou représentée lors du prononcé de la décision, auquel cas le délai court à compter du jour où la partie reçoit notification de la décision orale qu'elle entend attaquer ; ou

ii) la Chambre de première instance n'ait indiqué qu'une décision écrite suivrait, auquel cas le délai court à compter du dépôt de la décision écrite.

Article 92
Aveu

Sous réserve du respect rigoureux des conditions visées à l'article 63, l'aveu fait par l'accusé lors d'un interrogatoire par le Procureur est présumé libre et volontaire jusqu'à preuve du contraire.

Article 92 *bis*
Faits prouvés autrement que par l'audition d'un témoin

A) La Chambre de première instance peut admettre, en tout ou en partie, les éléments de preuve présentés par un témoin sous la forme d'une déclaration écrite, en lieu et place d'un témoignage oral, et permettant de démontrer un point autre que les actes et le comportement de l'accusé tels qu'allégués dans l'acte d'accusation.

i) Parmi les facteurs justifiant le versement au dossier d'une déclaration écrite, on compte notamment les cas où lesdits éléments de preuve:

a) Sont cumulatifs, au sens où d'autres témoins déposeront ou ont déjà déposé oralement sur des faits similaires;

b) Se rapportent au contexte historique, politique ou militaire pertinent;

c) Consistent en une analyse générale ou statistique de la composition ethnique de la population dans les lieux mentionnés dans l'acte d'accusation;

d) Se rapportent à l'effet des crimes sur les victimes;

e) Portent sur la moralité de l'accusé; ou

f) Se rapportent à des éléments à prendre en compte pour la détermination de la peine.

ii) Parmi les facteurs s'opposant au versement au dossier d'une déclaration écrite, on compte les cas où:

a) L'intérêt général commande que les éléments de preuve concernés soient présentés oralement;

b) Une partie qui s'oppose au versement des éléments de preuve peut démontrer qu'ils ne sont pas fiables du fait de leur nature et de leur source, ou que leur valeur probante est largement inférieure à leur effet préjudiciable; ou

c) Il existe tout autre facteur qui justifie la comparution du témoin pour contre-interrogatoire.

B) Une déclaration écrite soumise au titre du présent article est recevable si le déclarant a joint une attestation écrite selon laquelle le contenu de la déclaration est, pour autant qu'il le sache et s'en souvienne, véridique et exact et

i) La déclaration est recueillie en présence:

a) D'une personne habilitée à certifier une telle déclaration en conformité avec le droit et la procédure d'un Etat; ou

b) Un officier instrumentaire désigné à cet effet par le Greffier du Tribunal international; et

ii) La personne qui procède à la certification de la déclaration atteste par écrit:

a) Que le déclarant est effectivement la personne identifiée dans ladite déclaration;

b) Que le déclarant a affirmé que le contenu de la déclaration est, pour autant qu'il le sache et s'en souvienne, véridique et exact;

c) Que le déclarant a été informé qu'il pouvait être poursuivi pour faux témoignage si le contenu de la déclaration n'était pas véridique; et

d) La date et le lieu de la déclaration.

L'attestation est jointe à la déclaration écrite soumise à la Chambre de première instance.

C) Une déclaration écrite ne se présentant pas sous la forme prévue au paragraphe (B) peut néanmoins être recevable si elle provient d'une personne décédée par la suite, d'une personne qui ne peut plus être retrouvée malgré des efforts raisonnables ou d'une personne qui n'est pas en mesure de témoigner oralement en raison de son état de santé physique ou mentale, sous réserve que la Chambre de première instance:

i) En décide ainsi sur la base des preuves les plus concluantes; et

ii) Estime que les circonstances dans lesquelles la déclaration a été faite et enregistrée présentent des indices suffisants de fiabilité.

D) La Chambre peut verser au dossier le compte rendu d'un témoignage entendu dans le cadre de procédures menées devant le Tribunal et qui tend à prouver un point autre que les actes et le comportement de l'accusé.

E) Sous réserve de toute ordonnance contraire, une partie qui entend soumettre une déclaration écrite ou le compte rendu d'un témoignage le notifie quatorze jours à l'avance à la partie adverse, qui peut s'y opposer dans un délai de sept jours. La Chambre de première instance décide, après audition des parties, s'il convient de verser la déclaration ou le compte rendu au dossier, en tout ou en partie, et s'il convient d'ordonner que le témoin comparaisse pour être soumis à un contre-interrogatoire

Article 93
Existence d'une ligne de conduite délibérée

A) Les éléments de preuve permettant d'établir l'existence d'une ligne de conduite délibérée, dans laquelle s'inscrivent des violations graves du droit international humanitaire aux termes du Statut, sont recevables dans l'intérêt de la justice.

B) Les actes qui tendent à démontrer l'existence d'une telle ligne de conduite font l'objet d'une communication à la défense par le Procureur, conformément à l'article 66.

Article 94
Constat judiciaire

A) La Chambre de première instance n'exige pas la preuve de ce qui est de notoriété publique, mais en dresse le constat judiciaire.

B) Une Chambre de première instance peut, d'office ou à la demande d'une partie, et après audition des parties, décider de dresser le constat judiciaire de faits ou de moyens de preuve documentaires admis lors d'autres affaires portées devant le Tribunal et en rapport avec l'instance**.**

Article 94 *bis*
Déposition de témoins experts

[A) Nonobstant les dispositions des articles 66 (A) (ii), 73 *bis* (B) (iv) (b) et 73 *ter* (B) (iii) (b) du présent Règlement le rapport complet de tout témoin expert cité par une partie est communiqué à la partie adverse dès que possible et en tout état de cause, déposé auprès de la Chambre, au plus tard vingt et un jours avant la date prévue pour la déposition de cet expert.

B) Dans les quatorze jours suivant le dépôt du rapport du témoin expert, la partie adverse fait savoir à la Chambre de première instance si:

i) Elle accepte ou non la qualification du témoin en tant qu'expert;
ii) Elle accepte le rapport du témoin expert;
iii) Elle souhaite procéder à un contre-interrogatoire du témoin expert.

C) Si la partie adverse fait savoir qu'elle accepte le rapport du témoin expert, celui-ci peut être admis comme élément de preuve par la Chambre de première instance sans que le témoin soit appelé à déposer en personne.][55]

Article 95
Irrecevabilité des éléments de preuve en raison des procédés par lesquels ils ont été obtenus

N'est recevable aucun moyen de preuve obtenu par des procédés qui entament fortement sa fiabilité ou dont l'admission irait à l'encontre de l'intégrité de la procédure et lui porterait gravement atteinte.

Article 96
Administration de la preuve en matière de violences sexuelles

En cas de violences sexuelles

i) Nonobstant les dispositions prévues au paragraphe (C) de l'article 90, la corroboration du témoignage de la victime par des témoins n'est pas requise;
ii) Le consentement ne pourra être utilisé comme moyen de défense, si la victime:
a) a subi, a été menacée de subir ou a eu des raisons de craindre de subir des violences, la contrainte, la détention ou des pressions psychologiques; ou
b) a estimé raisonnablement que, si elle ne se soumettait pas, une autre personne pourrait subir, être menacée de subir ou avoir des raisons de craindre de subir un tel traitement;
iii) Avant d'être admis à établir le consentement de la victime, l'accusé doit démontrer à la Chambre de première instance siégeant à huis clos que les moyens de preuve qu'il entend produire sont pertinents et crédibles;
iv) Le comportement sexuel antérieur de la victime ne peut être invoqué comme moyen de preuve ou de défense.

Article 97
Secret des communications entre avocat et client

A) Toutes les communications échangées entre un avocat et son client sont considérées comme couvertes par le secret professionnel, et, conséquemment, leur divulgation ne peut pas être ordonnée à moins que:

i) Le client ne consente à leur divulgation;
ii) Le client n'en ait volontairement divulgué le contenu à un tiers et que ce tiers n'en fasse état au procès.

B) Aucune disposition du présent article ne peut être interprétée comme permettant au conseil de se prévaloir du principe de la confidentialité qui préside à ses communications avec son client pour

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[55] Tel que modifié le 10 novembre 2006.

dissimuler sa participation à des pratiques illicites telles que le partage de ses honoraires avec son client.

Article 98
Pouvoir des Chambres d'ordonner la production de moyens de preuve supplémentaires

La Chambre de première instance peut, de sa propre initiative, ordonner la production de moyens de preuve supplémentaires par l'une ou l'autre des parties. Elle peut de sa propre initiative citer des témoins à comparaître.

Article 98 *bis*
Demande d'acquittement

Si, à l'issue de la présentation par le Procureur de ses moyens de preuve, la Chambre de première instance conclut que ceux-ci ne suffisent pas à justifier une condamnation pour un ou plusieurs des chefs visés dans l'acte d'accusation, elle prononce, sur requête de l'accusé déposée dans les sept jours suivant la fin de la présentation des moyens à charge, à moins que la Chambre n'en décide autrement, ou d'office, l'acquittement en ce qui concerne lesdits chefs.

SECTION 4 - *Sentence*

Article 99
Statut de la personne acquittée

A) En cas d'acquittement, l'accusé est immédiatement mis en liberté.

B) Si, lors du prononcé du jugement, le Procureur informe la Chambre de première instance, en audience publique, de son intention d'interjeter appel conformément à l'article 108, la Chambre peut, sur la demande du Procureur, émettre contre l'accusé un mandat d'arrêt et de maintien en détention avec effet immédiat.

Article 100
Prononcé de la sentence lorsque l'accusé a plaidé coupable

A) Si le plaidoyer de culpabilité d'un accusé est retenu par la Chambre de première instance, le Procureur et la défense peuvent présenter toutes informations pertinentes permettant à la Chambre de première instance de décider de la sentence appropriée.

B) La sentence est prononcée en audience publique et en présence de la personne reconnue coupable, sous réserve du paragraphe (B) de l'article 102.

Article 101
Peines

A) Toute personne reconnue coupable par le Tribunal est passible d'une peine d'emprisonnement d'une durée déterminée pouvant aller jusqu'à l'emprisonnement à vie.

B) Lorsqu'elle prononce une peine, la Chambre de première instance tient compte des facteurs visés au paragraphe (2) de l'article 23 du Statut, ainsi que d'autres facteurs comme:

i) L'existence de circonstances aggravantes;
ii) L'existence de circonstances atténuantes, y compris l'importance de la coopération que l'accusé a fournie au Procureur avant ou après la déclaration de culpabilité;
iii) La grille générale des peines d'emprisonnement appliquée par les tribunaux du Rwanda;

iv) La mesure dans laquelle la personne reconnue coupable a déjà purgé toute peine qui pourrait lui avoir été infligée par une juridiction nationale pour le même fait, conformément au paragraphe (3) de l'article 9 du Statut.

C) En cas de multiplicité des peines, la Chambre de première instance décide si celles-ci doivent être purgées de façon consécutive ou si elles doivent être confondues.

D) La durée de la période pendant laquelle la personne reconnue coupable a été placée en détention provisoire à vue en attendant d'être remise au Tribunal ou en attendant d'être jugée par une Chambre de première instance ou par la Chambre d'appel est, le cas échéant, déduite de la durée totale de sa peine.

Article 102
Statut du condamné

A) Sous réserve des décisions arrêtées par la Chambre de première instance conformément à l'article 101, la sentence est exécutoire dès son prononcé conformément au paragraphe B de l'article 100. Toutefois, dès le dépôt d'un acte d'appel, il est sursis à l'exécution de la sentence jusqu'au prononcé de la décision rendue sur l'appel, le condamné restant néanmoins détenu comme prévu à l'article 64.

B) Si, conformément à une décision antérieure de la Chambre de première instance, le condamné a été mis en liberté provisoire ou est laissé en liberté pour toute autre raison, et s'il n'est pas présent lors du prononcé du jugement, la Chambre émet un mandat d'arrêt à son encontre. Lors de son arrestation, notification lui est donnée de la déclaration de culpabilité et de la sentence, après quoi il est procédé conformément à l'article 103.

Article 103
Lieu d'emprisonnement

A) La peine de prison est exécutée au Rwanda ou dans un Etat désigné par le Tribunal sur une liste d'Etats ayant indiqué leur volonté d'accueillir des personnes condamnées pour l'exécution de leur peine. Avant qu'une décision ne soit prise concernant le lieu de l'emprisonnement, la Chambre informe officiellement le Gouvernement rwandais.

B) Le transfert du condamné vers cet Etat est effectué aussitôt que possible après expiration du délai d'appel.

Article 104
Contrôle de l'emprisonnement

L'exécution de toute peine d'emprisonnement est soumise au contrôle du Tribunal ou d'un organe désigné par lui.

Article 105
Restitution de biens

A) Après jugement de culpabilité contenant le constat spécifique prévu au paragraphe (B) de l'article 88, la Chambre de première instance doit, sur requête du Procureur, ou peut, de sa propre initiative, tenir une audience spéciale pour déterminer les conditions spécifiques dans lesquelles devra être restitué le bien en question ou le produit de son aliénation. La Chambre peut ordonner dans l'intervalle les mesures conservatoires qu'elle juge appropriées pour la préservation et la protection du bien ou du produit de son aliénation.

B) La décision de restitution s'étend au bien ou au produit de l'aliénation du bien lors même qu'il se trouve entre les mains de tiers n'ayant aucun rapport avec le crime dont l'accusé a été reconnu coupable.

C) Les tiers sont cités à comparaître devant la Chambre de première instance et ont la possibilité de justifier leur possession du bien ou du produit de son aliénation.

D) Si la Chambre de première instance peut, à l'examen des preuves et de leur force probante, déterminer qui est le propriétaire légitime, elle ordonne la restitution à ce dernier du bien ou du produit de son aliénation, ou prend toute autre mesure qu'elle juge appropriée.

E) Si la Chambre de première instance ne peut pas déterminer qui est le propriétaire légitime du bien, elle en informe les autorités nationales compétentes et leur demande de le déterminer.

F) Après notification par les autorités nationales qu'elles ont procédé à cette détermination, la Chambre de première instance ordonne la restitution du bien ou du produit de son aliénation, selon le cas, ou prend toute autre mesure qu'elle juge appropriée.

G) Le Greffier transmet aux autorités nationales compétentes les citations, ordonnances et demandes émanant d'une Chambre de première instance conformément aux paragraphes (C), (D), (E) et (F) du présent article.

Article 106
Indemnisation des victimes

A) Le Greffier transmet aux autorités compétentes des Etats concernés le jugement par lequel l'accusé a été reconnu coupable d'un crime qui a causé un préjudice à une victime.

B) La victime ou ses ayants droit peuvent, conformément à la législation nationale applicable, intenter une action devant une juridiction nationale ou toute autre institution compétente pour obtenir réparation du préjudice.

C) Aux fins d'obtenir réparation du préjudice conformément au paragraphe (B), le jugement du Tribunal est définitif et déterminant quant à la responsabilité pénale de la personne condamnée, du fait de ce préjudice.

Chapitre Septième - Procédures D'appel

Article 107
Disposition générale

Les dispositions du Règlement en matière de procédure et de preuve devant les Chambres de première instance s'appliquent, *mutatis mutandis*, à la procédure devant la Chambre d'appel.

Article 107 *bis*
Directives pratiques pour la Chambre d'appel

Le Président de la Chambre d'appel, en consultation avec le Président du Tribunal, émet des directives pratiques traitant d'aspects particuliers de la conduite des affaires dont la Chambre d'appel est saisie.

Article 108
Acte d'appel

Une partie qui entend interjeter appel d'un jugement ou d'une sentence doit, dans les trente jours de son prononcé, déposer un acte d'appel exposant ses moyens d'appel. L'appelant précise également l'ordonnance ou la décision attaquée, la date de son dépôt et/ou la page du compte rendu d'audience, la nature des erreurs relevées et la mesure sollicitée. La Chambre d'appel peut, s'il est fait état dans la requête de motifs valables, autoriser une modification des moyens d'appel.

Article 108 *bis*
Le juge de la mise en état en appel

A) Le Président de la Chambre d'appel peut désigner au sein de ladite Chambre un juge chargé de la mise en état (le « juge de la mise en état en appel »).

B) Le juge de la mise en état en appel s'assure que la procédure ne prend aucun retard injustifié et prend toutes les mesures relatives aux questions de procédure, y compris des décisions, ordonnances et directives, afin que l'affaire soit en état pour une procédure équitable et rapide.

C) Le juge de la mise en état en appel prend acte des points de droit et de fait litigieux et non litigieux entre les parties. A cet égard, il peut enjoindre les parties d'adresser, soit à lui-même soit à la Chambre d'appel, des conclusions écrites supplémentaires.

D) Le juge de la mise en état en appel peut, si nécessaire, dans l'exercice de ses fonctions, entendre d'office les parties. Le Juge de la mise en état en appel peut entendre les parties dans son bureau hors la présence de la personne condamnée ou acquittée, auquel cas un représentant du Greffe dresse un procès-verbal de la réunion.

E) Une requête présentée au cours de la mise en état en appel doit être tranchée avant l'audience, sauf si le juge de la mise en état en appel, pour des motifs valables, ordonne qu'elle soit déférée pour être tranchée par la Chambre d'appel. Le fait pour une partie de ne pas soulever d'objections ou de présenter des requêtes qui peuvent l'être avant l'audience vaut renonciation; le juge de la mise en état en appel peut néanmoins, pour des raisons valables, lever cette renonciation.

F) Le juge de la mise en état en appel tient la Chambre d'appel régulièrement informée, notamment en cas de litiges, et peut lui renvoyer ces derniers.

G) Sur le rapport du juge de la mise en état en appel, la Chambre d'appel décide, le cas échéant, des sanctions appropriées à imposer à la partie qui ne respecte pas ses obligations au titre de la présente Section du Règlement.

H) La Chambre d'appel peut, de sa propre initiative, exercer les fonctions du juge de la mise en état en appel.

Article 109
Dossier d'appel

A) Le dossier d'appel est constitué du dossier de première instance, tel que certifié par le Greffier.

B) Une copie certifiée conforme du dossier d'appel est transmise sans tarder à l'unité de soutien à la Chambre d'appel du Tribunal pénal international pour le Rwanda, établie à La Haye.

Article 110
Communication de la liste des documents certifiés aux parties

Le Greffier communique aux parties la liste des documents constitutifs du dossier d'appel tels qu'il les a certifiés et, sur leur demande, tout document figurant dans ce dossier.

Article 111
Mémoire de l'appelant

[A) Le mémoire de l'appelant, qui expose tous les arguments et références correspondantes, est déposé dans un délai de soixante-quinze jours à compter du dépôt de l'acte d'appel conformément à l'Article 108. Lorsque l'appel ne concerne que la peine, le mémoire de l'appelant est déposé dans les trente jours du dépôt de l'acte d'appel conformément à l'article 108.

B) Lorsque le Procureur fait appel, il déclare dans le mémoire de l'appelant qu'il a transmis, au moment du dépôt de celui-ci, tous les documents en sa possession qui devaient être communiqués.][56]

Article 112
Mémoire de l'intimé

[A) Le mémoire de l'intimé, qui expose tous les arguments et références correspondantes, est déposé dans un délai de quarante jours à compter du dépôt du mémoire de l'appelant. Lorsque l'appel ne concerne que la peine, le mémoire de l'intimé est déposé dans les trente jours du dépôt du mémoire de l'appelant.

B) Lorsque le Procureur est l'intimé, il déclare dans son mémoire de l'intimé qu'il a transmis, au moment du dépôt de celui-ci, tous les documents en sa possession qui devaient être communiqués.][57]

Article 113
Mémoire en réplique

[L'appelant peut déposer un mémoire en réplique dans un délai de quinze jours à compter du dépôt du mémoire de l'intimé. Lorsque l'appel ne concerne que la peine, le mémoire en réplique est déposé dans les dix jours du dépôt du mémoire de l'intimé.][58]

Article 114
Date de l'audience

Après l'expiration des délais de dépôt des mémoires prévus aux Articles 111, 112 et 113 ci-dessus, la Chambre d'appel fixe la date de l'audience et le Greffier en informe les parties.

Article 115
Moyens de preuve supplémentaires

[A) Une partie peut demander à pouvoir présenter devant la Chambre d'appel des moyens de preuve supplémentaires. Une telle requête, qui doit indiquer clairement et précisément la constatation de la Chambre de première instance à laquelle le moyen de preuve supplémentaire se rapporte, doit être déposée auprès du Greffier et signifiée à l'autre partie au plus tard trente jours après le dépôt du mémoire en réplique, à moins qu'il existe des motifs valables ou, après l'audience d'appel, des raisons impérieuses d'accorder un délai supplémentaire. Toute partie concernée par la requête peut présenter des moyens de preuve en réfutation. Les parties sont autorisées à présenter des mémoires complémentaires sur l'incidence des moyens de preuve supplémentaires dans les quinze jours de

[56] Tel que modifié le 10 novembre 2006.
[57] Ibidem.
[58] Ibidem.

l'expiration du délai imparti pour le dépôt des moyens de preuve en réfutation si aucun moyen en réfutation n'est présenté et, dans le cas contraire, dans les quinze jours de la décision relative à l'admissibilité desdits moyens.

B) Si la Chambre d'appel conclut à la pertinence, à la fiabilité et à l'indisponibilité au procès des moyens de preuve supplémentaires, elle détermine si leur présentation au procès en aurait peut-être changé l'issue. Le cas échéant, elle en tient compte, ainsi que de toutes les autres pièces du dossier et de tout moyen de preuve contraire présenté, en réfutation pour rendre son arrêt définitif en conformité avec l'article 118.][59]

C) La Chambre d'appel peut statuer sur la requête avant ou pendant les débats en appel, et avec ou sans audition des parties.

D) Dans les procès à plusieurs appelants, tout moyen de preuve supplémentaire admis au nom de l'un d'entre eux sera, pour peu qu'il soit pertinent, pris en compte dans l'examen du cas de chacun des autres appelants.

Article 116
Report des délais

[A) La Chambre d'appel ou le juge de la mise en état peut faire droit à une demande de report de délais si elle considère que des motifs valables le justifient.

B) Le fait que pour pouvoir répondre et se défendre correctement, l'accusé doive avoir accès à une décision dans une langue officielle autre que celle de l'original constitue un motif valable au sens de cet article.][60]

Article 117
Procédure d'appel simplifiée

[A) Tout appel interjeté en vertu des Articles 72 ou 73 ou tout recours introduit contre une décision rendue en vertu des Articles 11 *bis*, 65, 77 ou 91 du présent Règlement fait l'objet d'une procédure simplifiée sur la base du dossier d'audience de la Chambre de première instance. L'appel peut être entièrement tranché sur la base des conclusions écrites des parties.

B) Les Articles 109 à 114 ne trouvent pas application dans le cas de cette procédure.

C) Le Président de la Chambre d'appel, après consultation des membres de la Chambre d'appel, peut décider de ne pas appliquer le paragraphe (D) de l'Article 118.][61]

[Article 117 *bis*
Les Livres des parties

A) Pour tout appel auprès de la Chambre d'appel, l'appelant et l'intimé doivent établir et déposer un livre d'appel intitulé respectivement « Livre d'appel de l'appelant » et « Livre d'appel de l'intimé », dont les pages ou les intercalaires sont numérotés consécutivement dans l'ordre suivant :

i) Une table des matières indiquant pour chaque document, y compris les pièces à conviction, sa nature et sa date ou, le cas échéant son numéro, ainsi que la page ou l'intercalaire correspondant, et

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[59] Ibidem.
[60] Ibidem.
[61] Ibidem.

ii) Une copie lisible des pages ou des extraits de chaque document de l'affaire auquel la partie se réfère effectivement dans ses mémoires ou entend se référer dans ses exposés.

B) Pour tout appel auprès de la Chambre d'appel, l'appelant et l'intimé doivent établir et déposer un Livre de sources juridiques intitulé respectivement « Livre de sources juridiques de l'appelant » et « Livre de sources juridiques de l'intimé », dont les pages ou les intercalaires sont numérotés consécutivement dans l'ordre suivant :

i) Une table des matières décrivant chaque document et indiquant la page ou l'intercalaire correspondant, et
ii) Une copie lisible des pages ou extraits de chaque document de référence, y compris la jurisprudence et les dispositions légales et réglementaires, internes et internationales, auquel la partie se réfère effectivement ou entend se référer dans ses exposés.

C) À moins que la Chambre d'appel, de sa propre initiative ou sur demande d'une partie, n'en décide autrement, chaque partie dépose auprès du Greffe du lieu de la tenue de l'audience de la Chambre d'appel un nombre suffisant de copies de son Livre d'appel et de son Livre de sources juridiques, quatre semaines avant la tenue de l'audience. Le Greffe indique aux parties le nombre de copies requis.

D) Nonobstant l'absence de dépôt des Livres prévu ci-dessus, la Chambre d'appel peut rendre un arrêt, une décision ou une ordonnance si elle le juge approprié.][62]

Article 117 *ter*
Dépôt du dossier de première instance

L'acte d'appel prévu à l'article 108 et, si nécessaire, les mémoires visés aux articles 111, 112, 113, 115 et 117 sont déposés, par les Parties, soit auprès du Greffe, soit auprès d'une personne mandatée à cet effet par le Greffe à l'Unité d'appel de la Chambre d'appel du TPIR établie à La Haye. Deux dossiers semblables sont conservés: l'un, au Greffe du Tribunal et l'autre, dans les locaux de l'Unité d'appel de la Chambre d'appel du Tribunal Pénal International pour le Rwanda, établie à La Haye. [Selon le lieu de dépôt, chaque dossier est constitué des originaux des actes de procédure ou de copies certifiées conformes de ces derniers.][63]

Article 118
Arrêt d'appel

A) La Chambre d'appel rend son arrêt en se fondant sur le dossier d'appel et, le cas échéant, sur les nouveaux éléments de preuve qui lui ont été présentés.

B) L'arrêt est adopté à la majorité des juges et est motivé par écrit dans les meilleurs délais possibles. Des opinions individuelles ou dissidentes peuvent y être jointes.

C) Lorsque les circonstances le requièrent, la Chambre d'appel peut renvoyer l'affaire devant la Chambre de première instance pour un nouveau procès.

D) L'arrêt est prononcé en audience publique à une date qui a été notifiée aux parties et aux conseils. Ces derniers sont en droit d'être présents.

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[62] Suite à un oubli du Tribunal, ce paragraphe fait défaut. Figurant toutefois dans la Table des Matières, les éditeurs ont choisi de le reproduire.
[63] Tel que modifié le 10 novembre 2006.

E) L'arrêt écrit est déposé et enregistré soit auprès du Greffe, soit auprès d'une personne mandatée à cet effet par le Greffe à l'Unité d'appel de la Chambre d'appel du TPIR établie à La Haye.

Article 119
Statut de l'accusé après l'arrêt d'appel

A) En cas de condamnation, l'arrêt est exécutoire immédiatement.

B) Si l'accusé n'est pas présent au jour du prononcé de l'arrêt, soit en raison de son acquittement en première instance, soit en raison d'une ordonnance prise conformément à l'article 65 ou pour toute autre cause, la Chambre d'appel rend son arrêt en son absence et ordonne son arrestation et sa mise à disposition du Tribunal, hormis le cas de l'acquittement.

Chapitre Huitième - Révision

Article 120
Demande en révision

A) S'il est découvert un fait nouveau qui n'était pas connu de la partie intéressée lors de la procédure devant une Chambre de première instance ou la Chambre d'appel ou dont la découverte n'avait pu intervenir malgré toutes les diligences effectuées, la défense ou, dans l'année suivant le prononcé du jugement définitif, le Procureur peut soumettre à la même Chambre, une demande en révision du jugement. Si, à la date de la demande en révision, un ou plusieurs juges de la Chambre initiale n'est plus en fonction au Tribunal, le Président nomme un ou plusieurs juges en remplacement.

B) Tout mémoire en réponse à une demande en révision est déposé dans les quarante jours du dépôt de la demande.

C) Tout mémoire en réplique est déposé dans les quinze jours du dépôt de la réponse.

Article 121
Examen préliminaire

Si la Chambre, constituée en application de l'article 120 du Règlement, convient que le fait nouveau, s'il avait été établi, aurait pu être un élément décisif de la décision, la Chambre révise le jugement et prononce un nouveau jugement après audition des parties.

Article 122
Appel

Après révision, le jugement prononcé par la Chambre de première instance peut faire l'objet d'un appel conformément au chapitre VII.

Article 123
Renvoi de l'affaire devant la Chambre de première instance

Si le jugement à réviser est frappé d'appel lors du dépôt de la demande en révision, la Chambre d'appel peut renvoyer l'affaire à la Chambre de première instance pour qu'elle statue sur la demande.

Chapitre Neuvième - Grâce Et Commutation De Peine

Article 124
Notification par les Etats

Si, selon la législation de l'Etat sur le territoire duquel est incarcéré le condamné, ce dernier peut faire l'objet d'une grâce ou d'une commutation de peine, l'Etat en informe le Tribunal conformément à l'article 27 du Statut.

Article 125
Appréciation du Président

Le Président, au vu de cette notification, apprécie en consultation avec les membres du Bureau et les juges permanents de la Chambre ayant prononcé la peine qui siègent encore au Tribunal, et après notification adressée au Gouvernement rwandais, s'il y a lieu d'accorder une grâce ou une commutation de peine.

Article 126
Critères d'octroi de la grâce ou de la commutation de peine

Aux fins d'apprécier l'opportunité d'une grâce ou d'une commutation de peine, le Président tient compte, entre autres, de la gravité de l'infraction commise, du traitement réservé aux condamnés se trouvant dans la même situation, de la volonté de réinsertion sociale dont fait preuve le condamné ainsi que du sérieux et de l'étendue de la coopération qu'il a fournie au Procureur.

The Prosecutor v. Emmanuel BAGAMBIKI, Samuel IMANISHIMWE and André NTAGERURA

Case N° ICTR-99-46

Case History: Emmanuel Bagambiki

- Name: BAGAMBIKI
- First Name: Emmanuel
- Date of Birth: 1948
- Sex: male
- Nationality: Rwandan
- Former Official Function: *Préfet* of Cyangugu
- Date of Indictment's Confirmation: 10 October 1997
- Date of the decision to joint Trials (*Cyangugu* Case): 11 October 1999 – Ntagerura and Imanishimwe (Case N° ICTR-99-46)
- Counts: genocide, complicity in the genocide, conspiracy to commit genocide, crimes against humanity, serious violations of Article 3 common of the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date and Place of Arrest: 5 June 1998, in Togo
- Date of Transfer: 10 July 1998
- Date of Initial Appearance: 19 April 1999
- Pleading: not guilty
- Date Trial Began: 18 September 2000
- Date and content of the Sentence: 25 February 2004, acquittal (conditional release)
- Appeal: 8 February 2006, dismissed, acquittal

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Case History: Samuel Imanishimwe

• Name: IMANISHIMWE

• First Name: Samuel

• Date of Birth: 25 October 1961

• Sex: male

• Nationality: Rwandan

• Former Official Function: Lieutenant in the *Forces armées rwandaises* (FAR)

• Date of Indictment's Confirmation: 10 October 1997

• Date of the decision to joint Trials (*Cyangugu* Case): 11 October 1999 – Bagambiki and Ntagerura (Case N° ICTR-99-46)

• Counts: genocide, complicity in the genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, crimes against humanity, serious violations of Article 3 common of the 1949 Geneva Conventions and of 1977 Additional Protocol II

• Date and Place of Arrest: 11 August 1997, in Kenya

• Date of Transfer: 11 August 1997

• Date of Initial Appearance: 27 November 1997

• Pleading: not guilty

• Date Trial Began: 18 September 2000

• Date and content of the Sentence: 25 February 2004, sentenced to 27 years imprisonment

• Appeal: 7 July 2006, sentence reduced to 12 years imprisonment

***

Case History: André Ntagerura

• Name: NTAGERURA

• First Name: André

• Date of Birth: 2 January 1950

• Sex: male

• Nationality: Rwandan

• Former Official Function: Minister of Transport

• Date of Indictment's Confirmation: 10 August 1996

• Date of the decision to joint Trials (*Cyangugu* Case): 11 October 1999 – Imanishimwe and Bagambiki (case N° ICTR-99-46)

• Date of Indicment's Amendments: 29 January 1998

• Counts: genocide, conspiracy to commit genocide, complicity in genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

• Date and Place of Arrest: 27 March 1996, in Cameroon

• Date of Transfer: 23 January 1997

• Date of Initial Appearance: 20 February 1997

• Pleading: not guilty

• Date Trial Began: 18 September 2000

• Date and content of the Sentence: 25 February 2004, acquittal (conditional release)

• Appeal: 8 February 2006, dismissed, acquittal

Judgement
7 July 2006 (ICTR-99-46-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron ; Wolfgang Schomburg

Emmanuel Bagambiki, Samuel Imanishimwe and André Ntagerura – Law applicable to Indictments, Preliminary question : analysis of the conclusions of the Trial Chamber regarding the defects of the Indictment, Reasoning of the Appeals Chamber based on the Judgment solely, Error of the Trial Chamber which does not warn the Accused they are going to be prosecuted on the basis of recognized defected Indictments, Contradictory debate necessary, No reading of the Indictments as a unique document, Curing of defects Indictments, Error of the Trial Chamber while not saying if the defects were cured, Burden on the Prosecutor to prove that the Trial was not unfair, Conviction for acts not pleaded in the Indictment, Duty of the Prosecutor to present the essential facts supporting the counts, Obligation of the Prosecutor to state all material facts underpinning each of the charges if it intends to plead several forms of responsibility, No possible sentence for accusations absent of the Indictment – Application of the criminal standard of proof beyond a reasonable doubt, Proof beyond a reasonable doubt of each element of the offence or issue, Duty of the Trial Chamber to consider all the evidence, Stages of the fact-finding process, Linked evidences, Distinction between a fact and a evidence, Proof of a related fact – Presumption of innocence – Accomplice evidence, Analysis of the testimonies with caution, Research of the specific motive of the accomplice to testify, Preliminary qualification of the witness as an accomplice, Responsibility of the Trial Chamber to exercise control over the mode and order of witnesses, Possibility to questions the credibility of a witness during cross-examination – Reliability of the testimony presumed to be credible at the time it is admitted – Power of the Trial Chamber to determine of whether the admission of a particular piece of evidence is precluded under the circumstances by the need to ensure a fair trial, Standard of proof applicable to circumstantial evidence : guilt inferred only if it is the only reasonable conclusion available – Emmanuel Bagambiki's Criminal Responsibility, Distinction between his general obligation to ensure the safety of the population of the prefecture and his obligation to assist individual persons in danger having explicitly asked for his assistance, No criminal responsibility for omissions under Article 6 (1) of the Statute, Superior responsibility under Article 6 (3) of the Statute, Effective control on the gendarmes : material ability to prevent the commission of the offence or to punish the principal offenders, Interpretation of the "knew or had reason to know" test – Nature of Samuel Imanishimwe's Criminal Responsibility, No responsibility for participation in a joint criminal enterprise on the ground that the Prosecution had not pleaded this form of responsibility in the Indictment, Responsibility for ordering the commission of crimes, Definition of the Actus reus and of the Mens rea, No analysis of the Trial Chamber of the agreement of the Accused on the acts of the authors, Conclusion to the existence of an order regarding : the pattern and frequency of civilians, the nature of a military command structure and hierarchy, the size of the camp, Imanishimwe's presence at the camp, Imanishimwe's testimony that he had control over the Karambo camp soldiers, the absence of any evidence suggesting that he lacked control over the soldiers and the absence of any evidence of Imanishimwe preventing soldiers from mistreating civilians or punishing them for their abuse – Cumulative convictions entered under different provisions of the Statute but based on the same facts are permissible only if each of the provisions involved has a materially distinct constitutive element not contained in the other – Joint Criminal Enterprise, Theory invoked on the First Day of the Trial in the Opening Statement of the Prosecutor : late invocation – Allegation of Conspiracy to commit genocide, No factual basis supporting the existence of an agreement – Sentence, Partial review of the verdict : sentence of Samuel Imanishimwe reduced to 12 years of imprisonment

International Instruments cited :

Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005, para. 4 (b) (ii) ; Rules of Procedure and Evidence, rules 2, 47, 47 (B), 47 (C), 48, 50, 66 (A) (ii), 72 (A) (ii), 87 (A), 88 (C), 89 (C), 90 (E), 90 (G) (i), 98 bis, 101, 101 (B) (ii), 103 (B), 107, 118 and 119 ; Statute, art. 2, 3 (b), 4 (a), 6 (1), 6 (3), 17, 17 (4), 18, 19, 19 (3), 20, 20 (2), 20 (3), 20 (4) (a), 20 (4) (b), 22 (2), 23, 24

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. André Ntagerura, Decision on the Preliminary Motion filed by the Defence Based on Defects in the Form of the Indictment, 28 November 1997 (ICTR-96-10) ; Trial Chamber, The Prosecutor v. André Ntagerura, Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment, 1 December 1997 (ICTR-96-10) ; Trial Chamber, The Prosecutor v. Emmanuel Bagambiki, Samuel Imanishimwe and Yussuf Munyakazi, Decision on the Defence Motion on Defects in the Form of the Indictment, 25 September 1998 (ICTR-97-36) ; Appeals Chamber, The Prosecutor v. André Ntagerura, Decision on the Defence Motion for a Ruling that the Amended Indictment Filed on 29 January 1998 Does Not Comply With the Trial Chamber's Decision of 28 November 1997, 17 June 1999 (ICTR-96-10); Trial Chamber, The Prosecutor v. Ntagerura, Prosecutor v. Emmanuel Bagambiki, Samuel Imanishimwe and Yussuf Munyakazi, Decision on the Prosecutor's Motion for Joinder, 11 October 1999 (ICTR-96-10 and ICTR-97-36) ; Appeals Chamber; The Prosecutor v. Emmanuel Bagambiki, Decision (Appeal Against Trial Chambers III's Decision of 11 October 1999), 13 April 2000 (ICTR-96-10 and ICTR-97-36) ; Appeals Chamber, The Prosecutor v. Emmanuel Bagambiki, Decision (Motion to Re-Open Deliberations), 7 September 2000 (ICTR-97-36) ; Appeals Chamber, The Prosecutor v. Clément Kayishema and Obed Ruzindana, Judgement (Reasons), 1 June 2001 (ICTR-95-1) ; Appeals Chamber, The Prosecutor v. Alfred Musema, Judgement, 16 November 2001 (ICTR-96-13) ; Trial Chamber, The Prosecutor v. André Ntagerura et al., Defence Motion for Judgement of Acquittal on Count of Conspiracy to Commit Genocide Pursuant To Rule 98 bis, 13 March 2002 (ICTR-99-46) ; Appeals Chamber, The Prosecutor v. Ignace Bagilishema, Judgement (Reasons), 3 July 2002 (ICTR-95-1A) ; Trial Chamber, The Prosecutor v. Eliezer Nyitegeka, Judgement, 16 May 2003 (ICTR-96-14) ; Trial Chamber, The Prosecutor v. André Ntagerura, et al., Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rules 54, 73 and 85 (A) (iii) of the Rules of Procedure and Evidence, 21 May 2003 (ICTR-99-46) ; Appeals Chamber, The Prosecutor v. Georges Rutaganda, Judgement, 26 May 2003 (ICTR-96-3) ; Appeals Chamber, The Prosecutor v. Eliezer Niyitegeka, Judgement, 9 July 2004 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and ICTR-96-17) ; Appeals Chamber, The Prosecutor v. Laurent Semanza, Judgement, 20 May 2005 (ICTR-97-20) ; Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgement, 23 May 2005 (ICTR-98-44A) ; Appeals Chamber, The Prosecutor v. Jean de Dieu Kamuhanda, Judgement, 19 September 2005 (ICTR-99-54)

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Amend, 26 June 2001 (IT-99-36) ; Appeals Chamber, The Prosecutor v. Zoran Kupreškić, Judgement, 23 October 2001 (IT-95-16) ; Appeals Chamber, The Prosecutor v. Stanislav Galić, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001 (IT-98-29) ; Trial Chamber, The Prosecutor v. Momčilo Krajišnik and Biljana Plavšić, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, 4 March 2002 (IT-00-39 and IT-00-40) ; Appeals Chamber, The Prosecutor v. Stanislav Galić, Judgement, 7 June 2002 (IT-98-29) ; Trial Chamber, The Prosecutor v. Željko Mejakić et al., Decision on Dusko Kneževic's Preliminary Motion on the Form of the Indictment, 4 April 2003 (IT-02-65) ; Trial Chamber, The Prosecutor v. Milomir Stakić, Judgement, 31 July 2003 (IT-97-24) ; *Appeals Chamber,* The Prosecutor v. Milorad Krnojelac, Judgment, 17 September 2003 (IT-97-25) ; Trial Chamber, The Prosecutor v. Predrag Banović, Judgement, 28 October 2003 (IT-02-65/1) ; Trial Chamber, The Prosecutor v. Jovica Stanišić, Decision on Defence Preliminary Motions, 14 November 2003 (IT-03-69) ; Trial Chamber, The Prosecutor v. Radoslav Brđanin, Decision on Motion for Acquittal Pursuant to Rule 98 bis, 28 November 2003 (IT-99-36) ; Appeals Chamber, The Prosecutor v. Mitar Vasiljević, Judgement, 25 February 2004 (IT-98-32) ; Appeals Chamber, The Prosecutor v. Radislav Krstić, Judgement, 19 April 2004 (IT-98-33) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Judgement, 29 July 2004 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Judgement, 17 December 2004 (IT-95-14/2) ; Appeals Chamber, The Prosecutor v. Miroslav Kvočka, Judgement, 28 February 2005 (IT-98-30/1) ; Appeals Chamber, The Prosecutor v. Milan Babić, Judgment on Sentencing Appeal, 18 July 2005 (IT-03-72) ; Appeals Chamber, The Prosecutor v. Mladen Naletilić and Vinko Martinović, Judgement, 3 May 2006 (IT-98-34)

National Cases cited :

Canada : Supreme Court of Canada, Nadeau v. The Queen, 13 December 1984, [1984] 2 S.C.R. 570 ; Supreme Court of Canada, R. v. Morin, 17 November 1988, [1988] 2 S. C. R. 345

Contents

I. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal," respectively) is seized of appeals by Samuel Imanishimwe ("Imanishimwe") and by the Prosecution, against the Judgement rendered by Trial Chamber III in the case of *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe* on 25 February 2004 (the "Trial Judgement").

A. ANDRÉ NTAGERURA, EMMANUEL BAGAMBIKI AND SAMUEL IMANISHIMWE

2. André Ntagerura ("Ntagerura") was born on 2 January 1950 in Cyangugu *préfecture*, Rwanda. From March 1981 through July 1994 Ntagerura served as a minister in the Rwandan Government, his last appointment being Minister of Transport and Communications in the Interim Government.[1]

3. Emmanuel Bagambiki ("Bagambiki") was born on 8 March 1948 in Cyangugu *préfecture*, Rwanda. From 4 July 1992 to 17 July 1994, Bagambiki served as the prefect of Cyangugu.[2]

4. Samuel Imanishimwe ("Imanishimwe") was born on 25 October 1961 in Gisenyi *préfecture*, Rwanda. Imanishimwe, a lieutenant in the Rwandan Armed Forces, served as the acting commander of the Cyangugu military camp, which is also referred to as the Karambo military camp, from October 1993 until he left Rwanda in July 1994.[3]

B. THE TRIAL JUDGEMENT

5. The trial was based on two separate indictments. The first indictment, filed on 9 August 1996 and amended on 29 January 1998, charged Ntagerura with genocide, conspiracy to commit genocide, extermination as a crime against humanity, serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II and two counts of complicity in genocide, both as an individual pursuant to Article 6 (1) and as a superior under Article 6 (3) of the Statute of the Tribunal (the "Statute"). Another indictment, filed on 9 October 1997 and amended on 10 August 1999, charged Bagambiki and Imanishimwe with genocide, complicity in genocide, conspiracy to commit genocide, murder, extermination and imprisonment as crimes against humanity and serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II. Imanishimwe was, in addition, charged with torture as a crime against humanity.

6. The trial of Ntagerura, Bagambiki and Imanishimwe was based on the following facts:

On the evening of 6 April 1994, after receiving notification of President Habyarimana's death, Imanishiwme addressed the soldiers of the Karambo military camp and immediately placed his camp on alert.[4]

On 7 April, refugees began to arrive at the parishes of Shangi and Mibilizi.[5]

On 8 April, predominantly Tutsi refugees fleeing the violence in their neighbourhoods began gathering at Cyangugu Cathedral and eventually numbered 5,000. The prefectural authorities provided at least two to four gendarmes to protect the refugees at the cathedral.[6] On the same day, Bagambiki sent *gendarmes* to guard Shangi Parish at the request of parish authorities.[7] Still on the same day, Hutu assailants began attacking Tutsi homes in Gisuma *commune* and, after several days of clashes, a number of refugees gathered at the Gashirabwoba football field.[8]

Between 9 and 11 April 1994, four *gendarmes* were posted at Mibilizi Parish.[9]

On 10 April, daily attacks began at Shangi Parish. The sub-prefect went to the the parish to examine the situation.[10]

On 11 April, a group of *Interahamwe* came to the cathedral shooting into the air, creating disorder and panic among the refugees. Bagambiki came to the cathedral after this attack to speak briefly to the refugees.[11] On the same day, soldiers arrested seven refugees in the vicinity of the cathedral and took

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[1] Trial Judgement, para. 5.
[2] *Ibid*., para. 12.
[3] *Ibid*., para. 13.
[4] *Ibid*., para. 389.
[5] *Ibid*., para. 478 (Shangi) and 529 (Mibilizi).
[6] *Ibid*., para. 309.
[7] *Ibid*., para. 478.
[8] *Ibid*., para. 435.
[9] *Ibid*., para. 529.
[10] *Ibid*., paras. 480-481.
[11] *Ibid*., para. 309.

them to the Karambo military camp, where they were maltreated in Imanishimwe's presence.[12] Some other refugees who had been arrested were returned to the cathedral after Witness LY asked Bagambiki to intervene.[13] Still on the same day, the *gendarmes* posted at the cathedral deterred two attacks on the refugees gathered there.[14]

By 11 April 1994, about 500 refugees had gathered at the Gashirabwoba football field. On the morning of this day, they repulsed an attack. During the afternoon, Bagambiki and Imanishimwe arrived at the football field and took away Côme Simugomwa, the local head of the PL party. After the genocide, Côme Simugomwa's body was found by a river in Karengera *commune*. In the evening, soldiers arrived at the football field.[15]

On 11 and 12 April, local *Interahamwe* attacked Mibilizi Parish, but the refugees warded off the attacks.[16]

On 11 April, a delegation including a sub-prefect visited Nyamasheke Parish, where a number of Tutsi had sought refuge.[17] On the same day, soldiers killed a number of civilians detained at the Karambo military camp.[18]

On 12 April, Sub-Prefect Munyangabe delivered medicine to Shangi Parish.[19] On the same day, the refugee population at the Gashirabwoba football field had swelled to nearly 3,000. That morning, thousands of assailants began attacking the refugees at the football field. Bagambiki and Nsabimana, the director of the Shagasha tea factory, came to the football field and Bagambiki promised to send soldiers to protect the refugees. An hour later, armed factory guards and soldiers arrived at the football field and started firing and throwing grenades at the refugees. *Interahamwe* then killed the survivors and looted their personal possessions.[20]

On the same day, *Interahamwe* attacked Nyamasheke Parish. No one was killed during that attack. The next day, the assailants returned and engaged in a similar attack. During the attack, a *gendarme* fired and killed three *Interahamwe*, ending the attack. After Bagambiki had been informed about the attack, he went to Nyamasheke Parish to intervene.[21]

On 13 April 1994, the *préfecture* made available *gendarmes* and a vehicle to take a shipment of food to Shangi Parish. Either on the same day or on the next day, there was a massive assault on the parish, which by one estimate resulted in the death of 800 refugees.[22]

Either on the same day or the next day, Bagambiki prevented an attack against the refugees at Cyangugu Cathedral when he personally stopped an armed crowd of assailants heading to the cathedral. On 14 April, the church authorities convened a meeting with Bagambiki and Imanishimwe because the church authorities felt that they could no longer ensure the refugees' safety. Bagambiki determined that the refugees should be transferred to Kamarampaka Stadium.[23] On the same day, a number of refugees tried to seek refuge at Kamarampaka Stadium, but were stopped by soldiers. Some of the soldiers then fetched Bagambiki, who briefly addressed the refugees. After he left the refugees, *Interahamwe* emerged from the bush and killed some of them.[24]

On 14 April, Bagambiki and others went to Mibilizi Parish to discuss the situation with delegations of local *Interahamwe* and refugees.[25]

On 15 April 1994, refugees from Cyangugu cathedral were transferred to the Kamarampaka Stadium. Bagambiki and the bishop accompanied the procession of refugees that was protected by

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[12] *Ibid*., para. 310.
[13] *Ibid*., para. 311.
[14] *Ibid*., para. 313.
[15] *Ibid*., para. 435.
[16] *Ibid*., para. 530.
[17] *Ibid*., paras. 577, 579.
[18] *Ibid*., para. 408.
[19] *Ibid*., para. 479.
[20] *Ibid*., para. 437.
[21] *Ibid*., paras. 580-581.
[22] *Ibid*., paras. 479-480.
[23] *Ibid*., paras. 313-314.
[24] *Ibid*., para. 594.
[25] *Ibid*., para. 530.

gendarmes.[26] The refugees joined between 50 and 100 refugees who had been at the stadium since 9 April 1994. A number of other refugees from various locations throughout the *préfecture* arrived later.[27] The refugees at the stadium were guarded by gendarmes.[28]

On the same day, there was another clash between the refugees and the local attackers at Mibilizi Parish.[29] Also at Nyamasheke Parish, assailants launched a massive assault against the parish, killing most of the refugees there.[30]

On 16 April, Bagambiki and Imanishimwe received a list of names of people with suspected ties to RPF from assailants who were threatening to attack Kamarampaka Stadium.[31] Bagambiki and Imanishimwe then searched for and took away 17 refugees from the Cyangugu Cathedral and Kamarampaka Stadium. Bagambiki addressed the refugees at the stadium, stating that the authorities were going to remove and question the 17 refugees in order to ensure the safety of the other refugees. Out of the 17 refugees, 16 were killed that evening or during the following night.[32]

On the same day, Nyamasheke Parish was attacked again. Most of the refugees who had survived the attack of 15 April were killed. After the attack, Bagambiki suspended *Bourgmestre* Kamana because of his involvement in the attack.[33]

On 18 April, Miblizi Parish suffered several attacks. Sub-Prefect Munyangabe was sent there and tried to negotiate with the assailants. He did not succeed in preventing a massive assault in which the assailants killed many refugees.[34] On 20 April, the assailants returned to the parish, removed between 60 and 100 refugees and killed them.[35]

On 26 April, Bagambiki was informed about an imminent massive attack against the refugees at Shangi Parish. At Bagambiki's insistence, Munyangabe went to the parish to try to prevent the attack. Munyangabe negotiated with the attackers and agreed that he would remove about 40 refugees from the parish if the assailants agreed not to attack the remaining refugees there. The selected refugees were taken to the Kamarampaka Stadium. On the way, they were attacked and mistreated, and one of them was killed. The others finally arrived at the stadium.[36]

Around 27 April, a number of refugees were selected and removed from the Kamarampaka Stadium. One of them was killed, while the fate of the others was unknown.[37]

On 28 or 29 April, a massive attack was launched on Shangi Parish, killing most of the refugees there.[38]

On 30 April, *gendarmes* tried in vain to prevent an attack on Mibilizi Parish. Between 60 and 80 refugees were killed.[39]

In May, the prefectural authorities transferred the refugees from Kamarampaka Stadium to a new camp at Nyarushishi, where the conditions were better. The camp was guarded by *gendarmes*, who pushed back at least one attempted attack between 11 May 1994 and the arrival of the French *Opération Turquoise* forces on 23 June 1994.[40] The surviving refugees from Shangi and Mibilizi Parishes were also transferred to this camp.[41]

On 6 June 1994 in Kamembe city, soldiers arrested approximately 300 people in the presence of Bagambiki and Imanishimwe. Some of the arrested persons were killed on Imanshimwe's orders.

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[26] *Ibid*., para. 316.
[27] *Ibid*., paras. 316-317, 335.
[28] *Ibid*., para. 329.
[29] *Ibid*., para. 530.
[30] *Ibid*., para. 584.
[31] *Ibid*., para. 614.
[32] *Ibid*., paras. 318, 320.
[33] *Ibid*., paras. 585-586.
[34] *Ibid*., para. 534.
[35] *Ibid*., para. 536.
[36] *Ibid*., para. 481.
[37] *Ibid*., para. 325.
[38] *Ibid*., para. 482.
[39] *Ibid*., para. 538.
[40] *Ibid*., paras. 609-611.
[41] *Ibid*., para. 482 (Shangi) and para. 539 (Mibilizi).

Subsequently, a number of detainees were held at the Karambo military camp, where they were questioned and mistreated in Imanishimwe's presence.[42]

7. The Trial Chamber acquitted Ntagerura and Bagambiki on all the counts in the Indictment.[43] Pursuant to Article 98 *bis* of the Rules of Procedure and Evidence of the Tribunal (the "Rules"), the Trial Chamber had already acquitted Imanishimwe of conspiracy to commit genocide during the trial.[44] In the Trial Judgement, Imanishimwe was by majority found guilty of genocide (Count 7), extermination as a crime against humanity (Count 10) and serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 13) under Article 6 (3) of the Statute.[45] The Trial Chamber unanimously found him not guilty of complicity in genocide, but guilty of murder (Count 9), imprisonment (Count 11), and torture (Count 12) as crimes against humanity and serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 13) under Article 6 (1) of the Statute. Having convicted Imanishimwe on Counts 7 and 10, the Chamber sentenced him to two terms of 15 years' imprisonment, to be served concurrently.[46] For the convictions under Counts 9, 11, 12 and 13 the Trial Chamber imposed sentences of 10, 3, 10 and 12 years' imprisonment respectively, to be served concurrently.[47] The Trial Chamber found that the concurrent sentences for Counts 9, 11, 12, and 13 should be served consecutively to the concurrent sentences for Counts 7 and 10. Accordingly, Imanishimwe's total sentence was 27 years' imprisonment.[48]

C. THE APPEALS

8. The Prosecution raises 11 grounds of appeal, two of which relate exclusively to Imanishimwe. In the other nine grounds of appeal, the Prosecution objects to the Trial Chamber's conclusions on the form of the Indictments. In addition, the Prosecution avers that the Trial Chamber's assessment of the evidence was erroneous and that Bagambiki should have been held criminally responsible for several crimes that the Trial Chamber found established. The Prosecution further submits that Imanishimwe should have been held criminally responsible under Article 6 (1) for the crimes committed at the Gashirabwoba football field, and that the sentence imposed by the Trial Chamber was too lenient.

9. Imanishimwe has lodged six grounds of appeal. They relate to defects in the form of the Indictment, his conviction under Article 6 (3) of the Statute for the Gashirabwoba events, multiple convictions, the application of Article 4 of the Statute, evidentiary matters and sentencing.

10. The Appeals Chamber recalls that it unanimously dismissed the grounds of appeal raised by the Prosecutor in respect of André Ntagerura and Emmanuel Bagambiki and affirmed their acquittal in the disposition of the Judgement concerning the Prosecutor's appeal against the acquittal of André Ntagerura and Emmanuel Bagambiki, delivered at the close of the hearings on 8 February 2006. The present Judgement now sets on the reasons for the decision and rubs on the grounds of appeal raised by the Prosecutor in relation to Imanishimwe and Imanishimwe's appeal.

D. STANDARDS FOR APPELLATE REVIEW

11. The Appeals Chamber recalls the standards for appellate review pursuant to Article 24 of the Statute, as summarised in the *Kamuhanda* Appeal Judgement.[49] Article 24 addresses errors of law

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[42] *Ibid*., paras. 394-395.
[43] *Ibid*., para. 829.
[44] *Ibid*., para. 807; T.6 March 2002 p. 54.
[45] *Ibid*., para. 806.
[46] *Ibid*., paras. 822-823.
[47] *Ibid*., paras. 825-826.
[48] *Ibid*., para. 827.
[49] *Kamuhanda* Appeal Judgement, paras. 6-7.

which invalidate the decision and errors of fact which occasion a miscarriage of justice. A party alleging an error of law must advance arguments in support of the submission and explain how the error invalidates the decision. However, even if the appellant's arguments do not support the contention, the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[50]

12. As regards errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by a Trial Chamber. Where an erroneous finding of fact is alleged, the Appeals Chamber will give deference to the Trial Chamber that received the evidence at trial, as it is best placed to assess the evidence, including the demeanour of witnesses. The Appeals Chamber will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, an erroneous finding of fact will be quashed or revised only if the error occasioned a miscarriage of justice.[51]

13. Arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[52] The appealing party must provide precise references to relevant transcript pages or paragraphs in the Judgement to which the challenge is being made.[53] Further, "the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies".[54]

14. Finally, it should be recalled that the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing.[55] The Appeals Chamber will dismiss arguments which are evidently unfounded without providing detailed reasoning.[56]

II. GROUNDS OF APPEAL RELATED TO THE INDICTMENT

A. INTRODUCTION

15. The Prosecution submits under its third ground of appeal that the Trial Chamber erred in law in finding that joint criminal enterprise was not pleaded in the Ntagerura Indictment and the Bagambiki/Imanishimwe Indictment (the "Indictments") and, as a result, in refusing to allow the Prosecution to rely on this mode of liability as the basis for the individual criminal responsibility of the Accused.[57] Under its fourth ground of appeal, the Prosecution submits that the Trial Chamber erred in (1) refusing to consider whether the Pre-Trial Brief and other disclosures cured any defects in the Indictments;[58] (2) making a post-trial finding that the Indictments were defective, despite its earlier

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[50] See *Semanza* Appeal Judgement, para. 7; *Kamuhanda* Appeal Judgement, para. 6.
[51] *Niyitegeka* Appeal Judgement, para. 8; *Semanza* Appeal Judgement, para. 8; *Kamuhanda* Appeal Judgement, para. 7; see also *Tadić* Appeal Judgement, para. 64; *Aleksovski* Appeal Judgement, para. 63; *Čelebići* Appeal Judgement, para. 434; *Krnojelac* Appeal Judgement, paras. 11-13; *Vasiljević* Appeal Judgement, para. 8; *Kristić* Appeal Judgement, para. 40.
[52] *Kajelijeli* Appeal Judgement, para. 6. See also, e.g., *Rutaganda* Appeal Judgement, para. 18; *Blaškić* Appeal Judgement, para. 13; *Ntakirutimana* Appeal Judgement, para. 13.
[53] Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005, para. 4 (b) (ii). See also *Kajelijeli* Appeal Judgement, para. 7; *Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 10; *Ntakirutimana* Appeal Judgement, para. 14; *Vasiljević* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137.
[54] *Vasiljević* Appeal Judgement, para. 12. See also, e.g., *Kajelijeli* Appeal Judgement, para. 7; *Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 10; *Kunarac et al*. Appeal Judgement, paras. 43, 48.
[55] *Kajelijeli* Appeal Judgement, para. 8. See also, e.g., *Niyitegeka* Appeal Judgement, para. 11; *Ntakirutimana* Appeal Judgement, para. 15; *Rutaganda* Appeal Judgement, para. 19; *Semanza* Appeal Judgement, para. 11; *Kunarac et al*. Appeal Judgement, para. 47.
[56] *Kajelijeli* Appeal Judgement, para. 8. See also, e.g., *Niyitegeka* Appeal Judgement, para. 11; *Ntakirutimana* Appeal Judgement, para. 15; *Semanza* Appeal Judgement, para. 11; *Kunarac et al*. Appeal Judgement, para. 48.
[57] Prosecution Notice of Appeal, paras. 15-16.
[58] *Ibid*., paras. 20, 22 and 24, with reference to Trial Judgement, paras. 64-70.

finding that they were not defective;[59] (3) failing to read the Indictments as a consolidated whole, despite their joinder;[60] and (4) reading the paragraphs of the Indictment in isolation to one another, rather than considering them in the context of the counts of the Indictment.[61]

16. Imanishimwe submits under his first ground of appeal that the Trial Chamber erred in convicting him for the events at Gashirabwoba football field, which events, he argues, were not pleaded in the Indictment against him.[62]

17. Before examining in detail the grounds of appeal related to the Indictment, the Appeals Chamber wishes to briefly recall the main procedural developments during the pre-trial phase. At the pre-trial stage, the Trial Chamber ruled on a preliminary motion by Imanishimwe, ordering the Prosecution to clarify paragraph 3.14 of the Bagambiki/Imanishimwe Initial Indictment.[63] The amended paragraph 3.14, together with the Bagambiki/Imanishimwe Initial Indictment, contained the final version of the charges against Imanishimwe and Bagambiki ("Bagambiki/Imanishimwe Indictment").[64]

18. Upon a preliminary motion by Ntagerura, the Trial Chamber ordered the Prosecution to specify several parts of the Ntagerura Initial Indictment.[65] The amended Indictment contained the final version of the charges against Ntagerura ("Ntagerura Indictment").[66]

19. On 11 October 1999, the Trial Chamber, pursuant to Rule 48, granted the Prosecution's motion for joinder of Ntagerura with Bagambiki and Imanishimwe.[67]

20. The Appeals Chamber will now outline the law governing the form of an indictment.

B. THE LAW APPLICABLE TO INDICTMENTS

21. The jurisprudence of this Tribunal and the International Criminal Tribunal for the Former Yugoslavia ("ICTY") on the law applicable to indictments is well established and consistent. Both Tribunals have held that Articles 17 (4), 20 (2), 20 (4) (a) and 20 (4) (b) of the Statute and Rule 47 (C) of the Rules place a clear obligation on the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such facts are to be proven.[68]

22. If an accused is not properly notified of the material facts of his alleged criminal activity until the Prosecution files its Pre-Trial Brief or until the trial itself, it will be difficult for his Defence to

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[59] *Ibid*., para. 26.
[60] *Ibid*., para. 29, with reference to Trial Judgement, paras. 41-48, 51-70, 82 and 202.
[61] *Ibid*., paras. 36 and 38, with reference to Trial Judgement, paras. 41-48, 50-56 and 62-70.
[62] Imanishimwe Notice of Appeal, paras. 8-14.
[63] *The Prosecutor v. Emmanuel Bagambiki, Samuel Imanishimwe and Yussuf Munyakazi*, Case N°ICTR-97-36-I, Decision on the Defence Motion on Defects in the Form of the Indictment, 25 September 1998 ("Decision on Bagambiki/Imanishimwe Initial Indictment"), Disposition.
[64] Trial Judgement, para. 15.
[65] *The Prosecutor v. André Ntagerura*, Case N°ICTR-96-10-I, Decision on the Preliminary Motion filed by the Defence Based on Defects in the Form of the Indictment, 28 November 1997 ("Decision on Ntagerura Initial Indictment").
[66] Trial Judgement, para. 10.
[67] *The Prosecutor v. Ntagerura*, Case N°ICTR-96-10-I, *Prosecutor v. Emmanuel Bagambiki, Samuel Imanishimwe and Yussuf Munyakazi*, Case N°ICTR-97-36-I, Decision on the Prosecutor's Motion for Joinder, 11 October 1999 ("Decision on Joinder"). An Appeal against this decision was rejected as filed out of time: *Prosecutor v. Emmanuel Bagambiki*, Case N°ICTR-96-10-A and ICTR-97-36-A, Decision (Appeal Against Trial Chambers III's Decision of 11 October 1999), 13 April 2000; *Prosecutor v. Emmanuel Bagambiki*, Case N°ICTR-97-36-AR72, Decision (Motion to Re-Open Deliberations), 7 September 2000. Yussuf Munyakazi, the other accused, remained at large at the time of trial: Trial Judgement, footnote N° 13.
[68] *Ntakirutimana* Appeal Judgement, para. 470. See also *Semanza* Appeal Judgement, para. 85; *Kvočka et al*. Appeal Judgement, para. 27; *Kupreškić et al*. Appeal Judgement, para. 88; *Naletilić* and *Martinović* Appeal Judgement, para. 23.

conduct a meaningful investigation prior to the commencement of the trial.[69] The question of whether an indictment is pleaded with sufficient particularity is therefore dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform an accused clearly of the charges against him so that he may prepare his defence.[70] An indictment which fails to plead material facts in sufficient detail is defective.[71]

23. Whether particular facts are "material" depends on the nature of the Prosecution case. The Prosecution's characterization of the alleged criminal conduct and the proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice.[72] For example, where the Prosecution alleges that an accused personally committed the criminal acts in question, it must plead the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed "with the greatest precision".[73] However, less detail may be acceptable if the "sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes".[74]

24. Where the Prosecution relies on a theory of joint criminal enterprise, the Prosecution must specifically plead this mode of responsibility in the indictment; failure to do so will result in a defective indictment.[75] Although joint criminal enterprise is a means of "committing", it is insufficient for an indictment to merely make broad reference to Article 6 (1) of the Statute.[76] The Prosecution must also plead the purpose of the enterprise, the identity of the participants, the nature of the accused's participation in the enterprise and the period of the enterprise.[77] In order for an accused charged with joint criminal enterprise to fully understand which acts he is allegedly responsible for, the indictment should clearly indicate which form of joint criminal enterprise is being alleged.[78]

25. Where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, the Prosecution is required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question.[79]

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[69] *Niyitegeka* Appeal Judgement, para. 194.
[70] *Kupreškić et al*. Appeal Judgement, para. 88; *Ntakirutimana* Appeal Judgment, para. 470.
[71] *Kupreškić et al*. Appeal Judgement, para. 114; *Niyitegeka* Appeal Judgement, para. 195; *Kvočka et al*. Appeal Judgement, para. 28.
[72] *Kvočka et al*. Appeal Judgement, para. 28.
[73] *Kupreškić et al*. Appeal Judgement, para. 89; *Blaškić* Appeal Judgement, para. 213.
[74] *Kupreškić et al*. Appeal Judgement, para. 89. The Appeals Chamber recalls that : "the inability to identify victims is reconcilable with the right of the accused to know the material facts of the charges against him because, in such circumstances, the accused's ability to prepare an effective defence to the charges does not depend on knowing the identity of every single alleged victim. The Appeals Chamber recalls that the situation is different, however, when the Prosecution seeks to prove that the accused personally killed or harmed a particular individual. […] [T]he Prosecution cannot simultaneously argue that the accused killed a named individual yet claim that the 'sheer scale' of the crime made it impossible to identify that individual in the Indictment. Quite the contrary: the Prosecution's obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual": *Ntakirutimana* Appeal Judgement, paras. 73-74.
[75] *Kvočka et al*. Appeal Judgement, para. 42.
[76] Idem.
[77] *Ibid*., para. 28, citing *Prosecutor v. Stanisic,* Case N°IT-03-69-PT, Decision on Defence Preliminary Motions, 14 November 2003, p. 5; *Prosecutor v. Mejakić et al.,* Case N°IT-02-65-PT, Decision on Dusko Kneževic's Preliminary Motion on the Form of the Indictment, 4 April 2003, p. 6; *Prosecutor v. Momčilo Krajišnik and Biljana Plavšić*, Case N°IT-00-39&40-PT, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, 4 March 2002, para. 13.
[78] *Kvočka et al*. Appeal Judgement, para. 28.
[79] *Blaskic* Appeal Judgement, para. 213. See also *Prosecutor v. Milorad Krnojelac*, Case N°IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 13; *Prosecutor v. Milorad Krnojelac,* Case N°IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 18;

26. In relation to an allegation of superior responsibility under Article 6 (3) of the Statute, the material facts which must be pleaded in the indictment are: (1) that the accused is the superior of certain persons sufficiently identified, over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible;[80] (2) the criminal acts of such persons, for which he is alleged to be responsible;[81] (3) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates;[82] and (4) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[83]

27. An indictment may also be defective when the material facts are pleaded without sufficient specificity, for example, when the times mentioned refer to broad date ranges, the places are only vaguely indicated, and the victims are only generally identified.[84] It is of course possible that material facts are not pleaded with the requisite degree of specificity in an indictment because the necessary information was not in the Prosecution's possession. In this respect, the Appeals Chamber emphasises that the Prosecution is expected to know its case before proceeding to trial and may not rely on the weaknesses of its own investigation in order to mould the case against the accused in the course of the trial depending on how the evidence unfolds.[85] Other defects in an indictment may arise at a later stage of the proceedings because the evidence turns out differently than expected. In such circumstances, the Trial Chamber must consider whether a fair trial requires an amendment of the indictment, an adjournment, or the exclusion of evidence outside the scope of the indictment.[86]

28. In reaching its judgement, a Trial Chamber can only convict the accused of crimes which are charged in the indictment.[87] If the indictment is found to be defective because of vagueness or ambiguity, then the Trial Chamber must consider whether the accused was nevertheless accorded a fair trial, or, in other words, whether the defect caused any prejudice to the Defence.[88] In some instances, a defective indictment may be deemed "cured" and a conviction entered if the Prosecution provides the accused with timely, clear and consistent information from the Prosecution detailing the factual basis underpinning the charges against him or her.[89] Where the failure to give sufficient notice of the legal and factual reasons for the charges against the accused has violated the right to a fair trial, no conviction may result.[90]

29. When challenges to an indictment are raised on appeal, amendment of the indictment is no longer possible and so the question is whether the error of trying the accused on a defective indictment

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Prosecutor v. Radoslav Brdanin and Momir Talic, Case N°IT-99-36-PT, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001 ("*Brdanin and Talic* 23 February 2001 Decision"), para. 20.

[80] *Blaskic* Appeal Judgement, para. 218 (a).

[81] *Naletilic and Martinovic* Appeal Judgement, para. 67.

[82] *Blaskic* Appeal Judgement, para. 218 (b). The Appeals Chamber notes that "the facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior, although the Prosecution remains obliged to give all the particulars which it is able to give, will usually be stated with less precision because the detail of those acts are often unknown, and because the acts themselves are often not very much in issue": *Blaskic* Appeal Judgement, para. 218 and accompanying references. See also *Naletilic and Martinovic* Appeal Judgement, para. 67.

[83] *Blaskic* Appeal Judgement, para. 218 (c). See also *Naletilic and Martinovic* Appeal Judgement, para. 67.

[84] *Kvočka et al*. Appeal Judgement, para. 31.

[85] *Niyitegeka* Appeal Judgement, para. 194; *Kvočka et al*. Appeal Judgement, para. 30; see also *Kupreskic et al*. Appeal Judgement, para. 92.

[86] *Kupreškić et al*. Appeal Judgement, para. 92; *Niyitegeka* Appeal Judgement, para. 194; *Kvočka et al*. Appeal Judgement, para. 31.

[87] *Kvočka et al*. Appeal Judgement, para. 33; *Naletilic* and *Martinovic* Appeal Judgement, para. 33.

[88] *Ntakirutimana* Appeal Judgement, para. 27; see also *Kvočka et al*. Appeal Judgement, para. 33.

[89] *Kupreškić et al*. Appeal Judgement, para. 114; *Kvočka et al*. Appeal Judgement, para. 33.

[90] *Kvočka et al*. Appeal Judgement, para. 33; *Naletilic and Martinovic* Appeal Judgement, para. 26.

"invalidat[ed] the decision" and warrants the Appeals Chamber's intervention.[91] In making this determination, the Appeals Chamber does not exclude the possibility that, in some instances, the prejudicial effect of a defective indictment can be "remedied" if the Prosecution has provided the accused with clear, timely and consistent information detailing the factual basis underpinning the charges against him or her,[92] which compensates for the failure of the indictment to give proper notice of the charges.[93]

30. The questions whether the Prosecution has cured a defect in the indictment and whether the defect has caused any prejudice to the accused are both aimed at assessing whether the trial was rendered unfair.[94] In this regard, the Appeals Chamber reiterates that a vague or an ambiguous indictment, not cured by timely, clear and sufficient notice, constitutes a prejudice to the accused.[95] The defect may only be deemed harmless through demonstrating that the accused's ability to prepare his defence was not materially impaired.[96]

31. When an appellant raises a defect in the indictment for the first time on appeal, then the appellant bears the burden of showing that his ability to prepare his defence was materially impaired.[97] Where, however, an accused had already raised the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecution to demonstrate on appeal that the accused's ability to prepare a defence was not materially impaired.[98] All of this is subject to the inherent jurisdiction of the Appeals Chamber to do justice in the case.[99]

32. The Appeals Chamber emphasizes that the possibility to cure defects in the indictment is not unlimited. A clear distinction has to be drawn between vagueness in the indictment and an indictment omitting certain charges altogether. While it is possible to remedy the vagueness of an indictment by providing the defendant with timely, clear and consistent information detailing the factual basis underminning the charges, omitted charges can be incorporated into the indictment only by a formal amendment pursuant to Rule 50 of the Rules.

C. Alleged Refusal of the Trial Chamber to Consider Joint Criminal Enterprise (Prosecution's 3rd Ground of Appeal)

33. At paragraph 34 of the Trial Judgement, the Trial Chamber held:

> If the Prosecutor intends to rely on the theory of joint criminal enterprise to hold the accused criminally responsible as a principal perpetrator of the underlying crimes rather than as an accomplice, the indictment should plead this in an unambiguous manner and specify upon which form of joint criminal enterprise the Prosecutor will rely. In addition to alleging that the accused participated in a joint criminal enterprise, the Prosecutor must also plead the purpose of the enterprise, the identity of the co-participants, and the nature of the accused's participation in the enterprise. For these reasons, the Chamber will not consider the Prosecutor's arguments, which were advanced for the first time during the presentation of closing arguments, to hold the accused criminally responsible based on this theory [footnotes omitted].

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[91] Article 24 (1) (a) of the Statute; *Niyitegeka* Appeal Judgement, para. 196.
[92] *Niyitegeka* Appeal Judgement, para. 195; *Ntakirutimana* Appeal Judgement, para. 27. See also *Kupreškić et al*. Appeal Judgement, para. 114.
[93] *Kvočka* Appeal Judgement, para. 34.
[94] *Ntakirutimana* Appeal Judgement, para. 27; *Kordic and Cerkez* Appeal Judgement, para. 143; see *Kupreškić et al*. Appeal Judgement, para. 122.
[95] *Ntakirutimana* Appeal Judgement, para. 58.
[96] *Idem*; *Kupreškić et al*. Appeal Judgement, para. 122.
[97] *Niyitigeka* Appeal Judgement, para. 200; *Kvočka et al*. Appeal Judgement, para. 35.
[98] Idem.
[99] *Niyitigeka* Appeal Judgement, para. 200.

34. The Prosecution submits that the Trial Chamber erred in law in refusing to allow the Prosecution to rely on joint criminal enterprise as a basis for establishing the individual criminal responsibility of the Accused.[100] More specifically, the Prosecution alleges in its Notice of Appeal and Appeal Brief that the Trial Chamber erred in law in finding that the Prosecution had failed to plead joint criminal enterprise in the Indictments.[101] Relying on the jurisprudence of the Tribunal and the ICTY,[102] the Prosecution argues that it was not obliged to expressly plead joint criminal enterprise in the Indictments.[103] However, during the Appeal hearings, the Prosecution clarified that it had abandoned this argument in view of the recent decision issued by the ICTY Appeals Chamber in *Kvočka et al*.[104] The Prosecution acknowledges that the Indictments did not plead Joint Criminal Enterprise with sufficient specificity, but maintains nonetheless that the Indictments had been cured of this defect. The Prosecution argues, indeed, that the Accused were provided with clear and coherent information of the Prosecution's intention to invoke joint criminal enterprise as a theory of liability.[105]

35. Since the Prosecution has acknowledged that it did not specifically plead joint criminal enterprise in the Indictments, the Appeals Chamber will straightaway focus on the question whether the Accused were nevertheless provided with timely, clear and consistent notice by the Prosecution that this mode of responsibility was being alleged. The Appeals Chamber will limit its examination to the parts of the trial record relied upon by the Prosecution for its argument, namely the Decision on Joinder, the Prosecution Pre-Trial Brief, its Opening Statement and its Final Trial Brief.

36. In the first place, the Prosecution submits that the Trial Chamber in its Decision on Joinder recognised that the Prosecution had given adequate notice of its intention to rely on the theory of joint criminal enterprise.[106] In this respect, the Prosecution also refers to its oral pleadings on joinder in August 1999 in which it argued that

> "there was one genocide in Rwanda, *one criminal enterprise*, and all of [the Accused] were part of that enterprise and on that basis should be charged and tried in one single proceeding".[107]

37. Ntagerura and Bagambiki submit that the Decision on Joinder made no reference to the Prosecution's intention to rely on the theory of joint criminal enterprise.[108] Bagambiki argues that the Prosecutor's motion for joinder was not likely to inform the Accused of the Prosecution's intention since a motion for joint trials does not pursue the same objective as an indictment.[109]

38. The Decision on Joinder concerned the issue of whether the Accused were charged with crimes "committed in the course of the same transaction", which is a condition under Rule 48 of the

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[100] Prosecution Notice of Appeal, para. 15; Prosecution Appeal Brief, paras. 40, 41 and 51. While admitting that it did not explicitly plead joint criminal enterprise in the Indictments, the Prosecution argued that it provided adequate notice of its intention to rely on the theory of joint criminal enterprise, and that such information was conveyed to each of the Accused in the charges and facts alleged in the Indictments, in the evidence as set forth in the Prosecution's Pre-Trial Brief, in the Prosecution's Opening Statements, in the arguments presented in the Prosecution's Closing Brief, in the evidence presented at trial and also in the Trial Chamber's Decision to join the Indictments.

[101] Prosectorat Notice of Appeal, para. 15; Prosecution Appeal Brief, para. 40.

[102] Prosecution Appeal Brief, paras. 45, 46 and 48.

[103] Prosecution Appeal Brief, paras. 61, 64-65.

[104] AT. 6 February 2006, p. 32, referring to *Kvočka* Appeal Judgement, para. 42.

[105] *Ibid*., p. 33.

[106] Prosecution Notice of Appeal, para. 15 (a); Prosecution Appeal Brief, paras. 70, 72, citing Decision on Joinder, para. 6 where the Trial Chamber summarised the Prosecution's arguments as being that: "the accused allegedly committed crimes separately and jointly as part of the same series of events and as part of a common scheme, strategy or plan" and para. 43 where the Trial Chamber held that: "to establish the existence of a conspiracy […] [i]t is sufficient to establish that the accused had a common purpose or design, that they planned to carry out that purpose or design and that they executed that plan".

[107] Prosecution Appeal Brief, para. 72, citing T.11 August 1999, p. 99 (emphasis in the original).

[108] *Ntagerura* Response Brief, paras. 51-55, citing the Decision on Joinder, paras. 31, 53 and 60; *Bagambiki* Response Brief, paras. 107-109.

[109] Bagambiki Response Brief, para. 107, citing Rule 82 of the Rule and Article 20 (4) of the Statute.

Rules for granting a joint trial. The term "transaction" is defined in Rule 2 of the Rules as "[a] number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan". The Trial Chamber's statements in the decision were squarely confined to the legal test set out in Rule 48.[110] As such, it would be incorrect to suggest that the Trial Chamber intended through these statements to recognise the Prosecution's intention to argue joint criminal enterprise as a mode of liability. Similarly, the Decision on Joinder did not serve to put the Accused on notice that that mode of liability was being alleged.

39. Furthermore, it is apparent from the Prosecution's oral arguments on the joinder motion that the said arguments were made in relation to the "same transaction" test, and not to clarify the modes of liability argued in the Indictments. In any event, the broad reference to "one genocide in Rwanda", coupled with the failure to specify the nature of the Accused's participation in such "criminal enterprise", did not provide the Accused with clear and consistent information which might have compensated for the ambiguity in the Indictments relating to joint criminal enterprise.

40. In the second place, the Prosecution submits that its Pre-Trial Brief put the Accused on notice that it would rely on joint criminal enterprise.[111] The Appeals Chamber agrees with the Prosecutor[112] that the Prosecution Pre-Trial Brief contained factual allegations that the Accused participated in the recruiting, arming and training of the *Interahamwe* and that they planned the genocide in Cyangugu *préfecture*[113] The Accused were also alleged to have participated in meetings, to have been present together during massacres and to have played a part in relation to massacres.[114] However, it is the Appeals Chamber's opinion that the Prosecution Pre-Trial Brief, particularly in the parts relating to the individual criminal responsibility of the Accused,[115] makes no specific mention of a joint criminal enterprise, a common criminal plan or any other synonym of that mode of criminal liability. It was therefore not obvious that the aforementioned factual allegations were meant to underpin a charge of joint criminal enterprise.

41. The Prosecution further argues that

> "throughout the trial, [it] consistently pursued its theory of joint criminal enterprise against all three of the [Accused]".[116]

In support of this, the Prosecution refers to its Opening Statement, which states that the Accused "acted in concert for the realisation of a single and the same criminal enterprise",[117] and to its Final Trial Brief which mentions the common purpose doctrine – in other words, the joint criminal enterprise doctrine –in relation to Article 6 (1) of the Statute.[118] It further submits that, given that the Accused called 82 witnesses to controvert the Prosecution case, it is inappropriate for them to claim that the preparation of their defence was impaired.[119]

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[110] Decision on Joinder, para. 46.
[111] Prosecution Appeal Brief, paras. 77, 79 and 80, citing the Prosectorat Pre-Trial Brief, paras. 2.16, 2.45, 2.47, 2.60, 2.64, 2.87, 2.88, 2.98, 2.99, 2.105-2.108, 2.110-2.112, 2.114 and 2.116.
[112] Prosecution Appeal Brief, paras. 76-77, citing Prosecution Pre-Trial Brief, para. 2.4. The Prosecution alleged in support that the Respondents were present together at occasions involving weapons distribution and training: *ibid*., para. 77, citing Prosecution Pre-Trial Brief, paras. 2.8, 2.12-2.13.
[113] Prosecution Pre-Trial Brief, paras. 2.8, 2.12, 2.13 and 2.16.
[114] *Ibid*., para. 78, citing Prosecution Pre-Trial Brief, paras. 2.17-2.28, 2.33, 2.34, 2.36-2.38, 2.45, 2.64, 2.102, 2.105-2.110, 2.112 and 2.114.
[115] Prosecution Pre-Trial Brief, paras. 3.1-3.37.
[116] *Ibid*., para. 82.
[117] *Ibid*., para. 83, citing T.18 September 2000, pp. 41-42.
[118] Prosecution Appeal Brief, para. 83, citing Prosecution Final Trial Brief, para. 57.
[119] *Ibid*., para. 68.

42. The Appeals Chamber notes that, contrary to the Trial Chamber's view,[120] the Prosecution did not mention joint criminal enterprise for the first time in its closing arguments. The Prosecution alluded to this mode of liability in its Opening Statement in the following terms:

> Whether they acted severally or jointly depending on the circumstances, André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe acted in concert for the realisation of a single and the same criminal enterprise; namely, the elimination of the Tutsi ethnic group from the population map of Rwanda and particularly from the *Préfecture* of Cyangugu, and all of this in flagrant and deliberate violation of all the duties imposed on them by the laws of Rwanda. It thus appears that to achieve this goal, each of the Accused persons made his active, effective and crucial contribution, the contribution in terms of their intelligence, experience, professional skills, their authority or influence, each and every one of them in their specific roles, and all of them together in exemplary coordination and complementarity [*sic*]. By the same token, the Prosecutor will be presenting to you each of the Accused and their respective roles in the execution of the massacres in Cyangugu.[121]

43. Then, in its Final Trial Brief the Prosecution clarified its intention to rely upon the theory of joint criminal enterprise under the section on individual criminal responsibility pursuant to Article 6 (1).[122]

44. The Appeals Chamber however recalls that if the material facts of an accused's alleged criminal activity are not disclosed to the Defence until the trial itself, it will be difficult for the Defence to conduct a meaningful investigation prior to the commencement of the trial.[123] In the present case, the Prosecution waited until the first day of trial, when it gave its Opening Statement, to allude to its intention of relying upon joint criminal enterprise. It then waited until it delivered its Final Trial Brief to develop its arguments on this mode of liability as it directly related to the Accused's individual criminal responsibility. In neither its Opening Statement nor its Final Trial Brief did the Prosecution specify which form of joint criminal enterprise it had relied upon. The Prosecution's argument that the Accused called 82 witnesses during trial[124] is not indicative of the Accused's ability to prepare their defence against the specific allegation of participation in a joint criminal enterprise. As a result, the Appeals Chamber finds that the Accused were not provided with timely, clear and consistent notice that their individual criminal responsibility would be invoked under the theory of joint criminal enterprise.

45. The Trial Chamber thus correctly declined to consider the criminal responsibility of the Accused under the theory of joint criminal enterprise. As a result, it is unnecessary for the Appeals Chamber to deal with the Prosecution's submission that the Accused

> "acted pursuant to a joint criminal enterprise and therefore should have been held individually criminally responsible under Article 6 (1) of the Statute".[125]

46. The Prosecution's third ground of appeal is therefore dismissed.

D. THE TRIAL CHAMBER FINDINGS ON THE INDICTMENTS (PROSECUTION'S 4TH GROUND OF APPEAL)

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[120] Trial Judgement, para. 34. See also Prosecution Appeal Brief, para. 40.
[121] T.18 September 2000, pp. 41-42.
[122] Prosecution Final Trial Brief, paras. 52-57.
[123] *Niyitegeka* Appeal Judgement, para. 194. In the *Kvočka* case, which was cited by the Prosecution during the appeals hearing (AT., 6 February 2006, p. 37), the accused had been informed well before the opening of the trial; *Kvočka* Appeal Judgement, paras. 44-45.
[124] Prosecution Appeal Brief, para. 68.
[125] *Ibid*., paras. 84-95.

47. Under its fourth ground of appeal, the Prosecution submits that the Trial Chamber committed four errors of law, as follows: (1) refusing to consider whether the Prosecution's post-indictment submissions cured any defects in the Indictments;[126] (2) finding the Indictments defective after the conclusion of the trial, given that it had previously found that they were not defective;[127] (3) failing to read the Indictments as a whole, despite their having been joined;[128] and (4) reading the paragraphs of the Indictments in isolation from one another and without due regard for the counts charged.[129] The Prosecution contends that this ground of appeal impacts on all the verdicts returned in relation to the Accused.[130]

48. The Appeals Chamber recalls that the Trial Chamber had, in its Judgement, found that some paragraphs of the two Indictments, namely paragraphs 9.1, 9.2, 9.3, 11, 12.1, 13, 14.1, 14.3 and 16 to 19 of the Ntagerura Indictment,[131] and paragraphs 3.12 to 3.28, 3.30 and 3.31 of the Bagambiki/Imanishimwe Indictment[132] were defective. The Appeals Chamber notes that the Trial Chamber nevertheless considered that it would make factual findings with respect to paragraphs 9.1, 9.2, 9.3, 14.1, 17, 18 and 19 of the Ntagerura Indictment and paragraphs 3.16 to 3.28, 3.30 and 3.31 of the Bagambiki/Imanishimwe Indictment.[133]

49. The Appeals Chamber considers that the issue of whether the Trial Chamber erred in finding the Indictments defective after the conclusion of the trial, despite its earlier conclusion that they were not, is a preliminary question.

1. Finding the Indictments defective after the conclusion of the trial

50. The Prosecution submits that the Trial Chamber erred in law in finding the Indictments defective after the close of the trial after having found in "an earlier decision" that the Indictments were not defective.[134] The Prosecution refers in this regard to the Separate and Concurring Opinion of Judge Williams to the Rule 98 *bis* Decision to emphasize that the Indictments were found to be adequate at both the confirmation and the preliminary objection stages.[135]

51. In its Decision on the form of the Bagambiki/Imanishimwe Initial Indictment, the Trial Chamber found that a link was established in paragraph 3.22 of the Bagambiki/Imanishimwe Initial Indictment between the events alleged therein and Imanishimwe, through his authority over the gendarmes.[136] Paragraph 3.22 remained unaltered in the Bagambiki/Imanishimwe Indictment. However, in the Trial Judgement, the Trial Chamber found that it failed to allege a connection between the principal perpetrators of the crimes and Bagambiki and Imanishimwe.[137]

52. The Trial Chamber also considered paragraph 3.14, which underpinned the charge of conspiracy (Count 19) and found that Imanishimwe participated in meetings. The Trial Chamber considered that paragraph 3.14 was vague and ordered the Prosecution to:

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[126] Prosecution Notice of Appeal, paras. 20, 22, 24, citing Trial Judgement, paras. 64-70.
[127] Prosecution Notice of Appeal, para. 26.
[128] *Ibid*., para. 29, citing Trial Judgement, paras. 41-48, 51-70, 82, 202; Decision on the Prosecution's Motion for Joinder, 11 October 1999.
[129] *Ibid*., paras. 36, 38, citing Trial Judgement, paras. 41-48, 50-56, 62-70.
[130] Prosecution Notice of Appeal, paras. 19, 25, 27 and 28.
[131] Trial Judgement, paras. 40-48.
[132] *Ibid*., paras. 49-63.
[133] *Ibid*., para. 69.
[134] Prosecution Appeal Brief, para. 169.
[135] Prosecution Appeal Brief, para. 169, citing *The Prosecution v. Ntagerura et al*., Case N°ICTR-99-46-T, Separate and Concurring Decision of Judge Williams on Imanishimwe's Defence Motion for Judgement of Acquittal on Count of Conspiracy to Commit Genocide Pursuant to Rule 98 *bis*, 13 March 2002 ("Separate Concurring Opinion of Judge Williams to the Rule 98 *bis* Decision").
[136] Decision on the Form of the Bagambiki/Imanishimwe Initial Indictment, para. 10.
[137] Trial Judgement, para. 56 (emphasis added).

> clarify […] the meetings referred to in that paragraph, [specifically] the approximate dates, locations and the purpose of these meetings, so far as possible, and also clarify whether the accused persons and others named in the indictment were the only persons present at these meetings or if others, not named in the indictment, were present also.[138]

The Prosecution filed the amended paragraph 3.14 on 10 August 1999 which, together with the Bagambiki/Imanishimwe Initial Indictment, contained the final version of the charges against Bagambiki and Imanishimwe.[139] In the Trial Judgement, the Trial Chamber found that the amended paragraph 3.14 failed to:

> allege facts that would constitute material elements of the crime of conspiracy [and] also d[id] not particularise the nature of Bagambiki's and Imanishimwe's participation in the meetings.[140]

The question therefore is: Why did the Trial Chamber not direct the Prosecution to further clarify paragraph 3.14, particularly with respect to the material elements of the crime that paragraph 3.14 was to underpin?

53. In a preliminary motion, Ntagerura submitted that the Ntagerura Initial Indictment was too vague in certain respects.[141] Ruling on this preliminary motion in its Decision on the form of the Ntagerura Initial Indictment, the Trial Chamber ordered the Prosecution to specify certain allegations in the Indictment, for example, with respect to the time-frames in paragraphs 9 to 16 and dismissed Ntagerura's preliminary motion on all other points.[142] It subsequently confirmed that the amendments filed by the Prosecution complied with the said order.[143]

54. In the Trial Judgement, however, imprecise date ranges were enumerated as one of the defects in the Ntagerura Indictment.[144] Moreover, having dismissed Ntagerura's preliminary motion with regard to the lack of specificity concerning the locations and the description of the alleged events, his personal participation in the events, as well as the identity of his subordinates and his *mens rea* under Article 6 (3) of the Statute, the Trial Chamber nevertheless found in the Trial Judgement that the Ntagerura Indictment was defective in these respects.[145]

55. It is apparent from the foregoing that the Trial Chamber reconsidered in the Trial Judgement some of the findings it had made in certain pre-trial decisions on the form of the Indictments. This does not in itself constitute an error, as it is within the discretion of a Trial Chamber to reconsider a decision it has previously made[146] if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.[147] However, the Appeals Chamber emphasises that "where such a decision is changed, there will be a need in every case for the Trial Chamber to consider with great care and to deal with the consequences of the change upon the proceedings which have in the

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[138] Decision on the Form of the Bagambiki/Imanishimwe Initial Indictment, para. 11; see also the Disposition.
[139] Trial Judgement, para. 15.
[140] Trial Judgement, para. 51.
[141] *The Prosecutor v. André Ntagerura*, Case N°ICTR-96-10A-I, Preliminary Motions (Defects in the Indictment), 21 April 1997 ("Objection to the Ntagerura Initial Indictment"), paras. 54-98.
[142] *The Prosecutor v. André Ntagerura*, Case N°ICTR-96-10-I, Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment, 1 December 1997 ("Decision on the Form of the Ntagerura Initial Indictment"), Disposition.
[143] *The Prosecutor v. André Ntagerura*, Case N°ICTR-96-10 A-I, Decision on the Defence Motion for a Ruling that the Amended Indictment Filed on 29 January 1998 Does Not Comply With the Trial Chamber's Decision of 28 November 1997, 17 June 1999, p. 3.
[144] Trial Judgement, paras. 41, 43, 45 and 46.
[145] Trial Judgement, paras. 41, 43, 45 (location of the events); *ibid*., paras. 41, 42, 45, 47 (description of the events); *ibid*., paras. 41, 43, 44, 46 (Ntagerura's personal participation); *ibid*., paras. 42, 47 (Ntagerura's responsibility under Article 6 (3) of the Statute, in particular in relation to Count 6).
[146] *Prosecutor v. Stanislav Galic*, Case N°IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001, at para. 13.
[147] *Kajelijeli* Appeal Judgement, paras. 203 and 204.

meantime been conducted in accordance with the original decision".[148] In the present case, the Appeals Chamber considers that, once the Trial Chamber decided to reconsider its pre-trial decisions relating to the specificity of the Indictments at the stage of deliberations, it should have interrupted the deliberation process and reopened the hearings. At such an advanced stage of the proceedings, after all the evidence had been heard and the parties had made their final submissions, the Prosecution could not move to amend the Indictment. On the other hand, reopening the hearings would have allowed the Prosecution to try to convince the Trial Chamber of the correctness of its initial pre-trial decisions on the form of the Indictment, or to argue that any defects had since been remedied. The Appeals Chamber finds that the Trial Chamber erred in remaining silent on its decision to find the abovementioned parts of the Indictments defective until the rendering of the Trial Judgement.

56. The question of whether this error invalidated the decision will be examined below, in the light of the Appeals Chamber's conclusions as to the other errors alleged by the Prosecution under this ground of appeal. The Appeals Chamber will first address the question of whether the two Indictments should have been read together.

2. Alleged failure to read the Indictments together as a whole

57. The Prosecution submits that the Trial Chamber erred in not reading the two Indictments together because, as per the Decision on Joinder, the Indictments "became, in law, a single Indictment".[149] It further submits that the Trial Chamber in that Decision "expressly accepted arguments in support of reading the two Indictments as one document".[150] The Prosecution generally contends that each Indictment supported the other in relation to the charges of conspiracy to commit genocide, but restricts its detailed arguments to the Trial Chamber's findings on the Ntagerura Indictment.[151]

58. Imanishimwe responds that the fact that the trials of the Accused were joined did not also cause the charges against them to be joined.[152] Bagambiki for his part responds that the Trial Chamber did not recognise in its Decision on Joinder that the charges in any one of the Indictments could be brought against any one of the Accused, nor did it modify any of the references to the factual allegations underpinning the charges in the Indictments.[153] He argues that it would run contrary to the right of the accused to be informed of the charges brought against him for a Trial Chamber to consider factual allegations in an indictment other than his own.[154] Ntagerura responds that the Trial Chamber and the accused should not have to turn to a second indictment to understand the allegations made in the first indictment.[155]

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[148] *Prosecutor v. Stanislav Galic*, Case N°IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001, at para. 13.
[149] Prosecution Appeal Brief, paras. 173-174.
[150] *Ibid*., para. 173, citing Decision on Joinder para. 30, where the Trial Chamber cited the Separate and Concurring Opinion of Judge Tieya and Judge Nieto-Navia in the *Kanyabashi* case: "permission for joint charging under [Rule 48] does not necessarily require the bringing of a new, substitute indictment in lieu of the existing ones because by adding names to one of the existing indictments which concern the same facts or transactions, the case may become a joint trial of several accused on different charges found in one single indictment, subject to, of course, any request for amendment": *The Prosecutor v. Kanyabashi*, Case N°ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdictions of Trial Chamber I, 3 June 1999, Separate and Concurring Opinion of Judge Wang Tieya and Judge Nieto-Navia, para. 6.
[151] It argues in this regard that the following paragraphs should have been read together: (i) paragraph 13 of the Ntagerura Indictment with paragraph 3.16 of the Bagambiki/Imanishimwe Indictment; (ii) paragraph 16 of the Ntagerura Indictment with paragraph 3.29 of the Bagambiki/Imanishimwe Indictment; and (iii) paragraphs 17, 18 and 19 of the Ntagerura Indictment with paragraphs 3.16 and 3.23 of the Bagambiki/Imanishimwe Indictment: Prosecution Appeal Brief, paras. 176-178.
[152] Imanishimwe Response Brief, paras. 70, 74-75.
[153] Bagambiki Response Brief, paras. 159, 161.
[154] *Ibid*. Response Brief, para. 160.
[155] Ntagerura Response Brief, para. 115.

59. The Prosecution replies that its object is not to "confuse the charges against accused A with those against accused B", but to point to the error committed by the Trial Chamber in disregarding the particulars relating to the charges against Accused A when they appear in the indictment against Accused B.[156]

60. The Appeals Chamber notes that in the Indictments, the Prosecution informed the Accused of the factual allegations which underpinned the charges by listing the relevant paragraphs in the Indictments which corresponded to each Count. However, the Prosecution did not, in this way, cross-reference between the Indictments. Therefore, the factual allegations made in each of the Indictments remained inherently linked to the charges in the respective Indictments. The mere fact that the Accused were joined "for the purposes of a joint trial"[157] (as opposed to having their charges joined) did not serve to notify the Accused that the factual allegations underpinning the charges in one Indictment would also underpin the charges in the other Indictment. Therefore, although Ntagerura was mentioned in the Bagambiki/Imanishimwe Indictment, the Appeals Chamber cannot conclude that he was put on notice that the allegations in that Indictment would underpin the charges in the Indictment against him.

61. The Prosecution further argues that reading the Indictments separately with regard to the factual allegations "negates the rationale for creating the joinder in the first place".[158] This argument cannot prosper. It is not self-evident that distinct indictments should be read together as a whole, in case of a joinder. In joint trials, each accused shall be accorded the same rights as if he were being tried separately.[159] The Prosecution thus remains under an obligation to plead, in each indictment brought, the material facts underpinning the charges against each accused.[160] The Prosecution's argument that the Indictment "became, in law, a single indictment" is dismissed. It was up to the Prosecutor to submit a new, joint and single Indictment against the three Accused.

62. For these reasons, the Appeals Chamber finds that the Prosecution's argument that the Indictments should have been read together as a whole is without merit. Insofar as the Appeals Chamber concludes that the Trial Chamber did not err by refusing to read the Indictments together, it is not necessary to examine the effect that a combined reading of the two Indictments might have had.

63. Turning to the Prosecution's other grounds of appeal, the Appeals Chamber concedes that it would be logical to now consider whether the Trial Chamber erred in determining that the Indictments were defective. To avoid a double analysis of each contested paragraph – to see whether it was defective and, if it was defective, whether the defect was cured – the Appeals Chamber will first examine whether the Trial Chamber erred in not considering whether the defects identified in the Indictments were cured.[161] Only after this analysis will the Appeals Chamber proceed to examine each Indictment paragraph by paragraph.

3. Curing of defects in the Indictments

(a) Did the Trial Chamber err in not considering whether the defects had been cured?

64. The Trial Chamber concluded that

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[156] Prosecution Brief in Reply, paras. 24, 31.
[157] Decision on Joinder, para. 60 (emphasis added). The Trial Chamber's reference to the Separate and Concurring Opinion of Judge Tieya and Judge Nieto-Navia in the *Kanyabashi* case, referred to by the Prosecution, was made in support of the Trial Chamber's conclusion that "accused persons can be jointly tried, even if they were not jointly charged": Decision on Joinder, para. 30.
[158] Prosecution Brief in Reply, para. 24.
[159] Rule 82 (A) of the Rules.
[160] *Cf. Ntakirutimana* Appeal Judgement, para. 470; *Kupreskic et al.* Appeal Judgement, para. 88.
[161] Prosecution Notice of Appeal, para. 20; Prosecution Appeal Brief, paras. 107-111.

> "the operative paragraphs underpinning the charges against Ntagerura, Bagambiki and Imanishimwe, as well as the charges themselves, [were] unacceptably vague".

Moreover, the Chamber finds no justifiable reason for the Prosecutor to have pleaded the allegations or charges in such a generic manner.[162] The Trial Chamber took note of the ICTY Appeal Judgement in *Kupreskic et al.* and the possibility that, in a limited number of cases, a defective indictment may be cured of its defects.[163] The Trial Chamber went on to note that:

> the supporting materials to the Ntagerura and to the Bagambiki/Imanishimwe Indictments, other pre-trial disclosure, and the Pre-Trial Brief provide additional information concerning the possible evidence to be introduced at trial and the theory of the Prosecution's case. However, pre-trial submissions and disclosure are not adequate substitutes for a properly pleaded indictment, which is the only accusatory instrument mentioned in the Statute and the Rules. The indictment must plead all material facts. The Trial Chamber and the accused should not be required to sift through voluminous disclosures, witness statements, and written or oral submissions in order to determine what facts may form the basis of the accused's alleged crimes, in particular, because some of this material is not made available until the eve of trial.[164]

65. The Appeals Chamber recalls that it is well established in the jurisprudence of both this Tribunal and the ICTY that, in a limited number of cases, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.[165] In the present case, it is apparent from the Trial Judgement that the Trial Chamber did not consider whether the defects in the Indictments were cured. The Appeals Chamber recalls that, if an indictment is found to be defective because of vagueness or ambiguity, then the Trial Chamber must determine whether the accused has nevertheless been accorded a fair trial.[166] In view of the Trial Chamber's statement that some of Prosecution's post-indictment submissions

> "provide[d] additional information concerning the possible evidence to be introduced at trial and the theory of the Prosecution's case",[167]

the Appeals Chamber considers that the Trial Chamber, in fulfilling its obligation to consider whether or not the trial was fair, should have evaluated whether the defects were cured. The Trial Chamber erred in failing to do so. As a result, where applicable, the Appeals Chamber will consider the Prosecution's argument that the defects in the Indictments were cured.

(b) The "Strong Evidence Passage" in the *Kupreskic et al.* Appeal Judgement

66. After having concluded that the Indictments were defective and declining to consider whether the defects were cured, the Trial Chamber held that:

> "in *Kupreskic* the Appeals Chamber intimated that it "might understandably be reluctant to allow a defect in the form of the indictment to determine finally the outcome of a case in which there is strong evidence pointing towards the guilt of the accused." The Chamber will thus consider the Prosecutor's evidence against Ntagerura, Bagambiki, and Imanishimwe to see if such strong evidence exists. "[168]

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[162] Trial Judgement, para. 64. The Trial Chamber noted that paragraphs 9.1, 9.2, 9.3, 11, 12.1, 13, 14.1, 14.3, 16, 17, 18 and 19 of the Ntagerura Indictment and paragraphs 3.12-3.28, 3.30 and 3.31 of the Bagambiki/Imanishimwe Indictment were defective in one way or the other.
[163] Trial Judgement, para. 65.
[164] *Ibid.*, para. 66 (footnotes omitted).
[165] See *supra*, para. 28.
[166] *Kvocka et al.*, Appeal Judgement, para. 33.
[167] Trial Judgement, para. 66.
[168] *Ibid.*, para. 68.

67. The Appeals Chamber considers that the statement made by the ICTY Appeals Chamber in *Kupreskic et al*. that

> "it might understandably be reluctant to allow a defect in the form of the indictment to determine finally the outcome of a case in which there is strong evidence pointing towards the guilt of the accused"

does not permit a Trial Chamber to consider material facts of which the accused was not adequately put on notice. The "strong evidence passage" arose in relation to whether, having upheld the appellants' objections that the indictment was too vague, the appropriate remedy on appeal was to remand the matter for retrial.[169] This question does not arise at trial. The Appeals Chamber emphasises that if the indictment is found to be defective at trial, then the Trial Chamber must consider whether the accused was nevertheless accorded a fair trial. No conviction may be pronounced where the accused's right to a fair trial has been violated because of a failure to provide him with sufficient notice of the legal and factual grounds underpinning the charges against him.[170]

4. Reading the paragraphs of the Indictments in isolation from one another and conclusions of the Trial Chamber on the defects affecting certain paragraphs of the Indictments

68. The Appeals Chamber notes that the Prosecution's argument that the Trial Chamber erred in reading the paragraphs of each Indictment in isolation from one another mainly relates to the Trial Chamber's finding that several paragraphs of the Indictments failed to describe the criminal conduct of the Accused that was being alleged.[171] With respect to the Trial Chamber's finding that the dates, venues and circumstances of the alleged events were insufficiently pleaded in the Indictments, the Prosecution argues that its post-indictment submissions cured any defects in the Indictments.[172] In order to simplify the analysis, the Appeal Chamber will examine these two arguments together.

69. The Appeals Chamber notes that despite having found defects in some paragraphs of the Indictments, the Trial Chamber continued to make factual findings on the basis of such paragraphs.[173] Accordingly, the Trial Chamber's conclusions on the validity of the Indictments did not have any impact on its final judgement as regards a certain number of allegations. Rather than having been rejected for reasons relating to the form of the Indictments, these allegations were rejected because the Trial Chamber considered them to be unfounded. Although the Prosecution submits that it is not satisfied with the findings the Trial Chamber made in relation to these paragraphs, it does not develop this point. Given that the arguments raised by the Prosecution under its fourth ground of appeal relating to those paragraphs on which the Trial Chamber made factual findings cannot succeed, the Appeals Chamber will limit its discussion to the consideration of Prosecution arguments relating to the paragraphs on which the Trial Chamber did not make any factual findings. These are paragraphs 11, 12.1, 13 and 16 of the Ntagerura Indictment and paragraphs 3.12 through 3.15 of the Bagambiki/Imanishimwe Indictment. The Appeals Chamber will also examine paragraph 3.28 of the Bagambiki/Imanishimwe Indictment which was only partly discussed.

(a) Ntagerura Indictment

70. The Appeals Chamber recalls that the Trial Chamber made factual findings in relation to paragraphs 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 and 19 of the Ntagerura Indictment, and will, accordingly, examine only the alleged errors with regard to paragraphs 11, 12.1, 13 and 16.

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[169] *Kupreskic et al*. Appeal Judgement, para. 125.
[170] *Kvocka et al.,* Appeal Judgement, para. 33. See also para. 30.
[171] Prosecution Appeal Brief, paras. 179-181.
[172] Prosecution Notice of Appeal, para. 20; Prosecution Appeal Brief, paras. 107-111; Prosecution Notice of Appeal, para. 22; Prosecution Appeal Brief, para. 126.
[173] To wit, paragraphs 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 and 19 of the Ntagerura Indictment and paragraphs 3.16 to 3.31 of the Bagambiki/Imanishimwe Indictment. See Trial Judgement, para. 69.

(i) Paragraph 11

71. Paragraph 11 of the Ntagerura Indictment reads:

> From 1 January to 31 July 1994 and particularly in February, March and April 1994, André Ntagerura allowed and/or authorized the use of government vehicles, specifically buses for the transport of militiamen, armed *Interahamwe* militiamen and civilians, including Tutsis, as well as for the transport of weapons and ammunition to and throughout Cyangugu *préfecture*, particularly through Karengera, Bugarama, Nyakabuye and other *communes* as well as in Butare, Ruhengeri and Kibuye *préfectures* and elsewhere.

72. The Trial Chamber found that this paragraph failed to allege any instance when Ntagerura allowed or authorised the use of government vehicles or any circumstance in which they were used. It further held that, because the paragraph did not set out the intended purpose of the transports or Ntagerura's knowledge of such a purpose, it failed to allege the elements of a criminal act. The Prosecution particularly sought to use this paragraph in support of Ntagerura's Article 6 (3) superior responsibility as alleged in Count 6.[174] The Trial Chamber found in that respect that paragraph 11, like the Ntagerura Indictment as a whole, failed to identify Ntagerura's subordinates who actually approved the use of the buses and the other material facts necessary to make out an allegation of superior responsibility.[175]

73. The Prosecution submits that the summary of Witness MF's statement included details of Ntagerura's authorisation, on several occasions, for the use of government vehicles for purposes such as the transport of arms, ammunition and *Interahamwe*, as well as details of the vehicles used, such as the ONATRACOM buses, and the persons to whom the authorisation was given.[176]

74. The summary of Witness MF's statement specified one incident when Ntagerura allegedly ordered the use of a government vehicle, namely vehicle A-7058, which he ordered to be given to the sub-prefect of Busengo in March 1994. However, the summary provides no information regarding the criminal purpose for which this vehicle would subsequently be used or Ntagerura's knowledge of such purpose. Accordingly, this summary did not put Ntagerura on notice of the material facts of his alleged responsibility under Article 6 (3) of the Statute.[177]

(ii) Paragraphs 12.1, 13 and 16

75. The Prosecution submits that the Trial Chamber erred in its findings on paragraphs 12.1, 13, 14.1, 14.3 and 16 of the Ntagerura Indictment.[178] Although the Trial Chamber made factual findings on paragraphs 14.1 and 14.3, the Appeals Chamber will consider the arguments related to these paragraphs in order to allow for an analysis of paragraphs 12.1, 14.1 and 14.3 in their context.

76. Paragraphs 12.1, 13, 14.1, 14.3 and 16 of the Ntagerura Indictment read as follows:

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[174] Ntagerura Indictment, Count 6.
[175] Trial Judgement, para. 42.
[176] Prosecution Appeal Brief, para. 133, citing Appendix 4 to Prosecution Pre-Trial Brief, Appendix 4: Summary of Prosecution witness statements, filed on 3 July 2000 ("Appendix 4"), p. 5, N°17 (Witness MF).
[177] Appendix 4, p. 5, N°17 (Witness MF): Witness will state that he knew Ntagerura and alleges that Ntagerura used to avail government vehicles to *Interahamwe*, for example, vehicle A-7058 which Ntagerura ordered the witness to give the Sous-Prefect of Busengo in March 1994; that Ntagerura did this on several occasions; the witness also saw Onatracom buses transporting arms, ammunition and *Interahamwe*; that the witness reported these incidents to his chief and Ntagerura but never received any reaction on these reports.
[178] Prosecution Appeal Brief, para. 184.

> 12.1 From 1 January to 31 July 1994 as early as 1991, André Ntagerura encouraged and participated in the training of *Interahamwe* militiamen in Karengera *commune* and in other *communes* in Cyangugu *préfecture*.
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> 13. From 1 January to 31 July 1994 and as early as January 1993, weapons, ammunition and uniforms were frequently distributed in Cyangugu *préfecture*. These weapons were sometimes stored in Yussuf Munyakazi's house in Bugarama *commune* and elsewhere. They were later distributed to the *Interahamwe* in Cyangugu *préfecture*.
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> 14.1 From 1 January to 31 July 1994, André Ntagerura was often seen in the company of, and publicly expressed his support for, Yussuf Munyakazi and the *Interahamwe* in Cyangugu *préfecture*, specifically in Bugarama *commune*.
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> 14.3 From 1 January to 31 July 1994, André Ntagerura travelled throughout Cyangugu *préfecture*, often accompanied by *Préfet* Emmanuel Bagambiki and Yussuf Munyakazi, to monitor the activities of the *Interahamwe* and verify that the orders to kill the Tutsis and all political opponents had been carried out.
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> 16. From 1 January to 31 July 1994, Yussuf Munyakazi was an influential member and one of the leaders of the *Interahamwe* in Cyangugu *préfecture*. He was one of the people in charge of implementing MRND orders. Many of the orders came from André Ntagerura.

77. The Trial Chamber found that paragraphs 12.1, 13 and 16, in addition to being vague, failed to plead any identifiable criminal conduct on the part of Ntagerura.[179] It further found that paragraphs 14.1 and 14.3 did not sufficiently describe the nature of Ntagerura's criminal participation.[180]

78. The Prosecution submits that the Trial Chamber erred in these findings and argues that

> "the facts stated in those paragraphs are connected to each other in ways that support the allegations in each. The thread that runs through these paragraphs is the association of [Ntagerura] with the *Interahamwe* and the role of the *Interahamwe* in the genocide".[181]

It argues that: (i) paragraph 12.1 connects Ntagerura to the training of the *Interahamwe*; (ii) paragraph 13 connects him to the supply of arms and uniforms to the *Interahamwe* through Munyakazi; and (iii) paragraphs 14.1 and 14.3 and paragraph 16 connect him to the activities of both Munyakazi and Bagambiki in relation to the *Interahamwe*, as well as to the *Interahamwe* directly, and to the activities of the *Interahamwe* involving the killings of Tutsis and political opponents.[182]

79. The Appeals Chamber notes that paragraphs 12.1, 13, 14.1, 14.3 and 16 allege a certain connection between Ntagerura, Munyakazi and the *Interahamwe* and indicated that the latter perpetrated criminal acts. However, such a general allegation did not suffice to put Ntagerura on notice of the material facts of his criminal conduct. The Appeals Chamber notes that it is not obvious that those members of the *Interahamwe* who in paragraph 14.3 were alleged to have carried out acts of killing were the same members who in paragraph 12.1 were alleged to have been trained. In fact, it is not even indicated that the training was undertaken in furtherance of such acts. Moreover, there is no indication in paragraph 14.3 of who allegedly gave and/or executed "[the orders to kill all the Tutsis and political opponents]". Further, the allegations that Ntagerura "was often seen in the company of, and publicly expressed his support for Munyakazi and the *Interahamwe*", as alleged in paragraph 14.1; that he "monitor[ed] the activities" of the *Interahamwe* as pleaded in paragraph 14.3; or that he issued MRND orders as stated in paragraph 16, did not sufficiently describe his role, if any, in the distribution of weapons alleged in paragraph 13.

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[179] Trial Judgement, para. 69.
[180] *Ibid*., para. 45.
[181] Prosecution Appeal Brief, para. 184.
[182] *Ibid*., para. 185.

80. Similarly, it was not clear whether the MRND orders that Ntagerura allegedly issued concerned the activities described in paragraphs 12.1, 13, 14.1 or 14.3. In addition, the Appeals Chamber notes that Ntagerura is not mentioned in paragraph 13 at all. An objective reader cannot understand in what respect the storing and distribution of arms in the *préfecture* of Cyangugu was related to Ntagerura. For the same reasons, Ntagerura's alleged participation in the events alleged in paragraphs 14.1 and 14.3 was not clarified by paragraphs 12.1, 13 or 16. Therefore, the Trial Chamber did not err in finding that paragraphs 12.1, 13, 14.1, 14.3 and 16 failed to sufficiently plead Ntagerura's criminal conduct.

81. The Appeals Chamber notes that the summaries of the statements of Witnesses LAB, MF, LAI, LAP and LAR, which the Prosecution refers to in support of its argument that the defects in paragraphs 12.1, 13, 14.1, 14.3 and 16 were cured,[183] do not cure the vagueness with which Ntagerura's criminal conduct was pleaded in those paragraphs.

82. The summary of Witness LAB's statement alleges that Ntagerura addressed a crowd in the Nyamuhunga Sector in April 1994, but makes no link between his statements on that occasion and any underlying crime with which he is charged.[184] Although the summary of Witness LAB's statement alleges that on 18 May 1994 Ntagerura delivered arms to the Shagasha factory, it did not indicate whether those weapons were used in any crime or in the training that took place at the factory. Moreover, that training was alleged to have taken place between January and April 1994, that is, before 18 May 1994.[185] The allegation in the summary of Witness LAP's statement that Ntagerura arrived on 28 January 1994 in Bigogwe with boots and uniforms which were distributed to the *Interahamwe* also fails to mention any crime in which those supplies were used.[186] The same holds true for the allegation in the summary of Witness LAR's statement that on 28 January 1994 Ntagerura announced to a crowd assembled in Bugarama that he had delivered boots and uniforms.[187] The summary of Witness MF's statement alleges that Ntagerura ordered that government vehicle A-7058 be given to the sub-prefect of Busengo in March 1994, but failed to link the use of that vehicle to a criminal purpose or to specify whether Ntagerura had any knowledge of such a purpose.[188] Finally, although the summary of Witness LAI's statement indicates that Ntagerura faxed an order to Munyakazi to eliminate Tutsi intellectuals "after 7 April 1994", it is not clear whether that order was executed, or when between 7 April 1994 and 31 July 1994[189] he allegedly issued it.[190] Given that Ntagerura is alleged to have been responsible for ordering in this instance, this is not a sufficiently precise time span.

83. Considering that paragraphs 12.1, 13, 14.1, 14.3 and 16 were not cured of defects in respect of the alleged criminal conduct, it is unnecessary for the Appeals Chamber to determine whether these paragraphs were cured of other defects.

(iii) Modes of Responsibility

84. At paragraph 48 of the Trial Judgement, the Trial Chamber held that:

> the formulation of the counts in the Ntagerura Indictment is incomprehensible. The phrase "as a result of the acts committed ... in relation to the events described in paragraphs 9-19", which is

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[183] *Ibid*., para. 136, footnote 181.
[184] Appendix 4, p. 11, N°32 (Witness LAB).
[185] Appendix 4, p. 11, N°32 (Witness LAB). Furthermore, the Appeals Chamber has already found that the summary of Witness LAB did not indicate whether Ntagerura participated in the training at the Shagasha factory.
[186] Appendix 4, p. 7, N°22 (Witness LAP).
[187] Appendix 4, p. 9, N°26 (Witness LAR).
[188] Appendix 4, p. 5, N°17 (Witness MF).
[189] Paragraphs 14.1 and 14.2, as well as 16, of the Ntagerura Indictment pertained to the period between 1 January to 31 July 1994.
[190] Appendix 4, p. 6, N°21 (Witness LAI).

contained in each count, refers to the "results" and to "the events" and not to the criminal conduct of Ntagerura. Moreover, the counts do not clearly specify whether Ntagerura is being charged as a principal or as an accomplice, or what particular form of complicity is alleged.

85. The Prosecution submits that this finding

> "is erroneous in view of the details supplied in the pre-trial disclosures showing, as described, the nature of Ntagerura's involvement in the crimes with which he is charged as well as his relationship to any other perpetrators".[191]

86. The Appeals Chamber notes that the Prosecution does not explain how the pre-trial disclosures served to inform Ntagerura of the mode of responsibility with which he was charged. The Appeals Chamber has already found that certain pre-trial disclosures relied on by the Prosecution did not help to clarify in the least defects in the Indictment relating to Ntagerura's alleged superior responsibility.[192] The Prosecution relies on the pre-trial disclosure of the statements given by Witnesses LAB, LAI, LAR and LAP to show that defects in the Indictment were cured.[193] Having examined these statements, the Appeals Chamber finds that they did not provide Ntagerura with clear and consistent information regarding the mode of responsibility with which he was charged.

(iv) Conclusion on the Ntagerura Indictment

87. In light of the foregoing, the Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber erred in finding that paragraphs 11, 12.1, 13 and 16 of the Ntagerura Indictment were defective or that those defects were not cured. The Prosecution's argument is therefore dismissed in these respects.

(b) Bagambiki/Imanishimwe Indictment

88. The Prosecution submits that the Trial Chamber erred in reading the following paragraphs of the Bagambiki/Imanishimwe Indictment in isolation from each other: (i) 3.12, 3.13 and 3.14; (ii) 3.15, 3.16, 3.17 and 3.18; and (iii) 3.19, 3.20, 3.24 and 3.25.[194] It adds that the defects in these paragraphs as well as in paragraphs 3.21, 3.22, 3.23, 3.26, 3.27, 3.28, 3.30 and 3.31 were cured.[195] The Appeals Chamber recalls that the Trial Chamber made factual findings on paragraphs 3.16 to 3.31, and that as a result, there is no need examining them further. But for the alleged error in paragraph 3.28, no other error alleged by the Prosecution could have an impact on the outcome of the appeal. Accordingly, the Appeals Chamber will examine only paragraphs 3.12 and 3.15 on which no factual findings were made at trial and paragraph 3.28 which was only partly examined.

(i) Paragraphs 3.12, 3.13 and 3.14

89. Paragraphs 3.12, 3.13 and 3.14 of the Bagambiki/Imanishimwe Indictment read as follows:

> 3.12 During the events referred to in this indictment, *Préfet* Emmanuel Bagambiki chaired many of the meetings of the 'restricted security committee' of the *préfecture* of Cyangugu, the body responsible for the safety of the civilian population of the *préfecture*, meetings in which Samuel Imanishimwe participated, in his capacity as the Commander of the Cyangugu Barracks, as well as the Commander of the *Gendarmerie*, the *sous-préfets* and others. One of these meetings was held on or about 9 April 1994.

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[191] Prosecution Appeal Brief, para. 149.
[192] See *supra* Section (ii), paras. 81 and 82.
[193] Prosecution Appeal Brief, paras. 128 and 140.
[194] *Ibid*., paras. 188-191.
[195] *Ibid*., paras. 150-166.

3.13 Furthermore, on at least two occasions, on or about 11 April 1994 and on or about 18 April 1994, *Préfet* Emmanuel Bagambiki chaired meetings of the 'prefectural committee' of Cyangugu p*réfecture*, where problems relating to the safety of the civilian population of the *préfecture* were discussed. Members of the 'restricted security committee', particularly *Préfet* Emmanuel Bagambiki and Lieutenant Samuel Imanishimwe, as well as all the *bourgmestres,* representatives of political parties and different churches, attended these meetings.

3.14 Before and during the events referred to in this indictment, Emmanuel Bagambiki, *Préfet* of Cyangugu;

André Ntagerura, Minister of Transportation and Communications;

Yussuf Munyakazi, *Interahamwe* leader;

Christophe Nyandwi, an official in the Ministry of Planning;

Michel Busunyu, MRND Chairman for Karengera *commune*; and Édouard Bandeste, *Interahamwe* leader;

all of whom were prominent figures within the MRND in Cyangugu, held a large number of meetings among themselves, or with others, to incite, prepare, organise and commit genocide.

These meetings took place in diverse locations throughout Cyangugu *préfecture*, in the *sous-préfectures* and in the *communes*, including public gathering places such as Kamarampaka stadium, and also in restricted locations, such as bars and private residences, notably:

(a) towards late 1993, in Kirambo *commune*, with members of the MRND;

(b) towards late 1993 and early 1994, in Augustin Miruho's drinking place in Karangiro, with the participation of Félicien Baligira, a former parliamentarian, Simeon Nteziryayo, the Manager of SONARWA, Kayijamahe, the Manager of STIR, and others;

(c) February 1994, in André Ntagerura's house, Karengera *commune*, with the participation of Yussuf Munyakazi, an *Interahamwe* leader, Christophe Nyandwi, a civil servant in the Ministry of Planning, Edouard Bandeste, an *Interahamwe* leader, and other members of the MRND;

(d) on 7 February 1994, at Bushenge market, with he [*sic*] participation of André Ntagerura, Daniel Mbangura, Michel Busunyu, Callixte Nsabimana, Félicien Baligira and other members of the MRND and CDR;

(e) during June 1994 at the MRND headquarters, in Cyangugu, organised by President Théodore Sindikubwabo with the participation of André Ntagerura, Daniel Mbangura, a Minister, together with civilians and religious figures;

(f) from 1993 to early 1994, in Gatare *commune*, with the participation of André Ntagerura, Yussuf Munyakazi, and Emmanuel Bagambiki;

(g) on or about 28 January 1994, in Bugarama, with the participation of André Ntagerura and Yussuf Munyakazi; and

(h) in late June 1994, in Gisuma, with the participation of Emmanuel Bagambiki and Samuel Imanishimwe.

90. The Trial Chamber found that paragraphs 3.12, 3.13 and 3.14

> "fail[ed] to allege facts that would constitute material elements of the crime of conspiracy, which, according to the Prosecutor, [was] the only charge that these paragraphs support[ed]".[196]

In particular, the Trial Chamber found that the *actus reus* of the crime of conspiracy, "namely that two or more persons agreed to commit the crime of genocide", was not pleaded.[197] With regard to

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[196] Trial Judgement, paras. 50-51.

paragraphs 3.12 and 3.13, the Trial Chamber found that they failed to identify the criminal purpose of the alleged meetings or any connection that the meetings might have had with an underlying crime, and thus failed to identify any sort of criminal participation of Bagambiki or Imanishimwe. It also found that the time frames in paragraphs 3.12 and 3.13, save for the enumerated dates of 9, 11 and 18 April 1994, were vague.[198] Finally, the Trial Chamber held that paragraph 3.14 did not particularise the nature of Bagambiki's and Imanishimwe's participation in the meetings.[199]

91. The Prosecution argues that the Trial Chamber erred in reading these paragraphs in isolation from one another and without taking into account the context of the underlying charge of conspiracy.[200] The Prosecution further contends that the Trial Chamber's findings that the material elements of conspiracy were not pleaded in paragraphs 3.12, 3.13 and 3.14, were

> "unwarranted since [paragraphs 3.12, 3.13 and 3.14] demonstrate that [Bagambiki and Imanishimwe] undertook coordinated actions and were acting within a unified framework as evidenced by the numerous meetings that they attended together[;] these meetings provided the framework in which the conspiracy involving [Bagambiki and Imanishimwe] took place".[201]

The Prosecution relies in this regard on the finding of the Trial Chamber in *Nahimana et al.* that

> "conspiracy to commit genocide can be inferred from coordinated actions by individuals who have a common purpose and are acting within a unified framework".[202]

92. At the outset, the Appeals Chamber considers that, at a minimum, conspiracy to commit genocide consists of an agreement between two or more persons to commit the crime of genocide.[203] The existence of such an agreement between Bagambiki, Imanishimwe, and potentially other persons, should thus have been pleaded in the Bagambiki/Imanishimwe Indictment as a material fact. The fact that paragraphs 3.12, 3.13 and 3.14, as argued by the Prosecution, were intended to describe the "framework in which the conspiracy involving Bagambiki and Imanishimwe took place" or that those paragraphs were referred to in support of the charge of conspiracy, did not exonerate the Prosecution from the obligation to plead this material fact.[204] The Prosecution remained, indeed, obliged to plead the material facts underpinning the charges against Bagambiki and Imanishimwe so as to enable them to prepare their defence.

93. In the absence of any alleged criminal purpose or criminal participation by Bagambiki or Imanishimwe, the mere allegations as formulated in paragraphs 3.12 and 3.13 that they participated in meetings did not set out the material fact of the crime, namely, that they agreed to commit genocide.[205]

94. The Appeals Chamber admits that, even if paragraph 3.14 does not explicitly mention the words that the accused agreed "to commit genocide", the allegation that Bagambiki, Ntagerura and Imanishimwe (and other important members of the MRND in Cyangugu) held a large number of

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[197] *Ibid*., para. 70.
[198] *Ibid*., para. 50.
[199] *Ibid*., para. 51.
[200] Prosecution Appeal Brief, para. 188.
[201] *Ibid*., para. 189.
[202] *Idem*, citing *Nahimana et al*. Trial Judgement, para. 1047.
[203] *Musema* Trial Judgement, para. 191; *Ntakirutimana* Trial Judgement, paras. 798-799. The Appeals Chamber further recalls that, with regard to the concept of conspiracy in general, the ICTY Appeals Chamber has held that "conspiracy requires a showing that several individuals have agreed to commit a certain crime or set of crimes": *Ojdanic* Jurisdiction Decision, para. 23.
[204] See Prosecution Appeal Brief, para. 221, where the Prosecution itself notes that "the material facts translate the abstract elements of the crime into a specific reality, by establishing who did what to whom, where, when, how, and with what intent".
[205] In fact, the only mentioned purpose of these meetings was "problems relating to the safety of the civilian population of the *préfecture*", which, as noted by the Trial Chamber, appears to run counter to the charge of conspiracy to commit genocide: Bagambiki/Imanishimwe Indictment, para. 3.13; Trial Judgement, para. 50.

meetings among themselves or with others "to instigate, prepare, and organize the genocide"[206] could be understood to suggest the required purpose for a conspiracy to commit genocide. However, the Appeals Chamber notes that the Trial Chamber refused to consider the allegations in paragraph 3.14 because of the vagueness, finding that the paragraph did "not particularise the nature of Bagambiki's and Imanishimwe's participation in the meetings".[207] The Prosecution appears to accept this characterization of the paragraph but argues that during the pre-trial stage, it provided the Accused with the relevant evidence concerning the meetings and their participation therein.[208]

95. The Appeals Chamber agrees with the Trial Chamber's opinion that paragraph 3.14 is unacceptably vague because it provides no details as to the participation of the two accused in the meetings. According to paragraph 3.14, Bagambiki participated in no more than two meetings, while Imanishimwe would have participated only in one. There was no meeting in which all three Accused would have participated together. As to the purpose of these meetings, the Prosecution limited itself to the generic formula that they served "to incite, prepare, organise and commit" genocide, without indicating the precise nature of the role the Accused might have played in the meetings.

96. According to the Prosecution, the ambiguity in paragraph 3.14 was cured by the pre-trial disclosure of the summaries of witness statements given by Witnesses LAI, LAP, LAG, LAR and LAN.[209] The summaries of the statements given by Witnesses LAI, LAP and LAG allege that Bagambiki and/or Imanishimwe participated in meetings in 1993 and the summary of Witness LAR's statement indicates that they met Ntagerura in Bugarama on 28 January 1994, neither of which offers any specification relating to their participation in these meetings.[210] The summary of Witness LAN's statement alleges that Ntagerura, Bagambiki, Munyakazi and other party dignitaries "presided over" an MRND meeting at Bushenge centre on 7 February 1993 at which the *Interahamwe* "sang songs inciting ethnic cleansing which were applauded by Ntagerura, Bagambiki and others", but did not mention any agreement reached on that occasion to commit genocide.[211] Furthermore, this meeting was not mentioned in paragraph 3.14, which, with regard to meetings which took place in 1993, merely refers to meetings "towards late 1993" and "from 1993 to early 1994 in Gatare *commune*".[212] The Appeals Chamber also notes that Bushenge is not located in Gatare *commune*. The Appeals Chamber therefore concludes that the pre-trial disclosure of the summaries of statements given by Witnesses LAI, LAP, LAG, LAR and LAN did not provide clear and consistent information regarding the nature of Bagambiki's or Imanishimwe's participation in the meetings, or regarding any agreement to commit genocide reached by them.

(ii) Paragraph 3.15

97. For a proper analysis, the Appeals Chamber deems it necessary to place paragraph 3.15 in its context, and then examine it in the light of paragraphs 3.16, 3.17 and 3.18. Paragraphs 3.15, 3.16, 3.17 and 3.18 read as follows:

> 3.15 Also, during this same period, André Ntagerura, Yussuf Munyakazi, and Emmanuel BAGAMBIKI publicly expressed anti-Tutsi sentiments.

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[206] The Appeals Chamber notes that the English version of the amended paragraph 3.14 reads "to incite, prepare, organise and commit genocide". The Prosecution filed the English and French versions of the amended paragraph 3.14 on the same day and in the same document, without indicating which language was authoritative. The Appeals Chamber emphasizes that the Bagambiki/Imanishimwe Initial Indictment had been originally filed in French, which was accordingly the authoritative language.
[207] Trial Judgement, para. 51. See also *ibid*., para. 69.
[208] Prosecution Appeal Brief, par. 151.
[209] *Ibid*., para. 151, footnote 193.
[210] Appendix 4, p. 6, N°21 (Witness LAI); *ibid*., p. 7, N°22 (Witness LAP); *ibid*., p. 8, N°25 (Witness LAG); *ibid*., p. 9, N°26 (Witness LAR).
[211] Appendix 4, p. 8, N°24.
[212] Bagambiki/Imanishimwe Indictment, para. 3.14(a), (b), (f).

> 3.16 Before and during the events referred to in this indictment, Minister André Ntagerura, *Préfet* Emmanuel BAGAMBIKI, Yussuf Munyakazi, Christophe NYANDWI, all of whom were influential figures in the MRND in Cyangugu, participated, directly or indirectly, in the training and instructing of, and distributing of weapons to, the MRND militiamen, the *Interahamwe*, who later committed massacres of the civilian Tutsi population.
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> 3.17 During the events referred to in this indictment, Lieutenant Samuel IMANISHIMWE, in his capacity as Commander of the Cyangugu Barracks, participated, with *Préfet* Emmanuel BAGAMBIKI and other persons, in preparing lists of people to eliminate, mostly Tutsis and some Hutus in the opposition.
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> 3.18 These lists were given to the soldiers and militiamen with orders to arrest and kill the persons whose names were listed. The soldiers and the *Interahamwe* then carried out the orders.

98. The Trial Chamber found that none of these paragraphs pleaded the dates or venues of the alleged activities with sufficient particularity.[213] It further held that paragraph 3.15 failed to specify the nature and approximate content of the alleged statements or their connection to the commission of an underlying crime,[214] and that paragraph 3.16 did not plead Bagambiki's role in the training and weapons distribution nor did it indicate any massacre in which those persons who were trained might have participated.[215] Finally, the Trial Chamber found that paragraphs 3.17 and 3.18 failed to identify any individuals named on the lists as well as Bagambiki's or Imanishimwe's role or knowledge in the issuing or execution of the orders that were alleged to have been given.[216]

99. In the first place, the Prosecution argues that the Trial Chamber's assessment of paragraphs 3.15 to 3.18 and its finding on the lack of particularity are unreasonable due to the underlying charge of conspiracy to commit genocide. In addition, it argues that any defects in paragraphs 3.15 to 3.18 were cured.[217]

100. The Appeals Chamber has found that paragraphs 3.12 and 3.13 failed to plead the material fact that Bagambiki, Imanishimwe and others agreed to commit genocide, and that paragraph 3.14 was too vague, because it did not indicate the nature of Bagambiki's and Imanishimwe's participation in the meetings. For the purposes of the crime of conspiracy, it is therefore inconsequential that paragraphs 3.15, 3.16, 3.17 and 3.18 provide information on the background and continuing nature of the acts that culminated in the commission of genocide. The Trial Chamber correctly found that the allegations supporting the charge of conspiracy to commit genocide (Count 19) "could not constitute the material elements of the crime of conspiracy".[218]

101. The Prosecution further submits that the summaries of the statements of Witnesses LAI, LAP, LAG, LAR and LAN provided details of Bagambiki's and Imanishimwe's expressions of anti-Tutsi sentiments alleged in paragraph 3.15.[219]

102. The Appeals Chamber notes that the summary of Witness LAI's statement alleged that "Bagambiki also incited the population to kill [T]utsi", but without specifying date, place or how this statement was connected to an underlying crime.[220] The summary of Witness LAP's statement indicated that Bagambiki attended a meeting at Kamarampaka Stadium in 1993 where the population

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[213] Trial Judgement, paras. 52-54.
[214] *Ibid*., para. 52.
[215] *Ibid*., para. 53.
[216] *Ibid*., para. 54.
[217] Prosecution Appeal Brief, paras. 152-155.
[218] Trial Judgement, para. 70.
[219] Prosecution Appeal Brief, para. 152.
[220] Appendix 4, p. 6, N°21 (Witness LAI).

was "incited against the Tutsi", but does not mention whether Bagambiki expressed any sentiments to that effect.[221] The same holds true for the meeting alleged in the summary of Witness LAG's statement.[222] The summary of Witness LAR's statement contained no information that Bagambiki publicly expressed anti-Tutsi sentiments.[223] The summary of Witness LAN's statement alleged that Ntagerura, Bagambiki and others "presided over" a meeting at Bushenge centre on 7 February 1993, during which "the *Interahamwe* sang songs inciting ethnic cleansing which were applauded by Ntagerura, Bagambiki and others".[224] However, no mention was made of any agreement made at this meeting to commit genocide, the material fact found to be lacking in paragraph 3.15.

(iii) Paragraph 3.28

103. Paragraph 3.28 reads:

> 3.28 During the events referred to in this Indictment, *Préfet* Emmanuel Bagambiki had the duty of ensuring the protection and safety of the civilian population within his *préfecture*. On several occasions in April 1994, *Préfet* Bagambiki failed or refused to assist those whose lives were in danger who asked for his help, particularly in Gatare *commune*, where those Tutsis were massacred.

104. The Trial Chamber found that paragraph 3.28 did not indicate any occasion by date and specific location or any instance where Bagambiki failed or refused to assist those whose lives were in danger.[225]

105. The Prosecution submits that the summary of Witness LQ's statement stated that Bagambiki, despite repeated warnings given to him of the impending attack on the refugees at Hanika Parish in April 1994 and his repeated promises to intervene, did nothing, and about 2 000 refugees were killed in the attack. It also argues that the summary of Witness MP's statement indicated that Bagambiki failed to stop the assault by the *Interahamwe* on thousands of refugees at Mbilizi Parish between 12 and 30 April 1994.[226]

106. Although the Trial Chamber made a number of factual findings with respect to the attacks at Gatare Parish alleged in paragraph 3.28,[227] it, however, declined to mention in its Judgement the attack at Hanika Parish testified to by Witness LQ.

107. The summary of Witness LQ's statement states in relevant part that:

> at 0900AM on 11th April, 1994 *[I]nterahamwe* attackers surrounded the [Hanika] parish; that the witness telephoned Bagambiki seeking his intervention to stave off the attack and that Bagambiki promised to send the burgomaster of Gatare with *gendarmes*; that the attacks first started with machetes, then with grenades; that around noon the witness called Bagambiki again, who told him to be patient; that meanwhile the assault continued; that the burgomaster arrived at around 4:30PM with only one *gendarme* and two communal policemen; […] that about 2000 refugees were killed on that day.[228]

108. The summary does not indicate that Bagambiki, whose assistance was sought by Witness LQ, refused to stave off the attack. Rather, it states that Bagambiki told Witness LQ "to be patient" and

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[221] Appendix 4, p. 7, N°22 (Witness LAP).
[222] Appendix 4, p. 8, N°25 (Witness LAG).
[223] See Appendix 4, p. 9, N°26 (Witness LAR).
[224] Appendix 4, p. 8, N°24 (Witness LAN).
[225] Trial Judgement, para. 61.
[226] Prosecution Appeal Brief, para. 165.
[227] Trial Judgement, paras. 528-540.
[228] Appendix 4, p. 3, N°10 (Witness LQ).

that the protection promised by Bagambiki, however sparse, did arrive in the afternoon. Therefore, the Appeals Chamber finds that the summary of Witness LQ's statement did not clearly allege that Bagambiki failed or refused to assist the people under attack at the Hanika Parish on 11 April 1994 and that, as such, it remains unclear whether this summary does in fact support the allegations made in paragraph 3.28 at all.

(iv) The Counts in the Bagambiki/Imanishimwe Indictment

109. The Trial Chamber found that the formulation of the counts in the Bagambiki/Imanishimwe Indictment were "problematic" because they did not clearly identify whether Bagambiki and Imanishimwe were being charged as principals or as accomplices nor did they specify what particular form of complicity was charged.[229] The Prosecution contends that its arguments relating to how the defects in the Bagambiki/Imanishimwe Indictment were cured show the "nature of Bagambiki's and Imanishimwe's involvement in the crimes with which they were charged as well as their relationship to any other perpetrators".[230]

110. The Prosecution does not show how the remark made by the Trial Chamber to the effect that the formulation of the counts in the Bagambiki/Imanishimwe Indictment was "problematic" impacted on the Trial Judgement. In the preceding section, the Appeals Chamber has already found that the Prosecution's challenges to the Trial Chamber's conclusions, in so far as they are said to impact on the Judgement, are unfounded. The Appeals Chamber therefore declines to further consider the Prosecution's argument on this point.

(v) Conclusion on the Bagambiki/Imanishimwe Indictment

111. The Appeals Chamber finds that the Prosecution has failed to show that the Trial Chamber erred in finding that paragraphs 3.12, 3.13, 3.14, 3.15 and 3.28 of the Bagambiki/Imanishimwe Indictment were defective. Similarly, it failed to show that the defects identified therein had been remedied. Consequently, the Prosecution's arguments as to the Bagambiki/Imanishimwe Indictment are also dismissed.

5. Conclusion

112. The Appeals Chamber finds that the Prosecution's arguments concerning the paragraphs of the Indictments on which the Trial Chamber made no factual findings (or its findings on a portion of paragraph 3.28 of the Bagambiki/Imanishimwe Indictment) are unfounded. The Prosecution, indeed, failed to demonstrate that the paragraphs were not defective or that they had been cured of their defects.

113. The Appeals Chamber had earlier found that the Trial Chamber erred in reconsidering its pre-trial decisions on the form of the Indictments after the close of the trial, without giving the parties the opportunity to be heard.[231] The Appeals Chamber also finds that the Trial Chamber erred in failing to consider whether the defects in the Indictments were cured.[232] In view of its findings on the other grounds of appeal, the Appeals Chamber, however, considers that these two errors do not invalidate the Trial Chamber's decisions. Accordingly, the Prosecution's 4th ground of appeal is dismissed in its entirety.

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[229] Trial Judgement, para. 63.
[230] Prosecution Appeal Brief, para. 167.
[231] See *supra*, paras. 55-56.
[232] See *supra*, para. 65.

114. The Appeals Chamber wishes to express its concern regarding the Prosecution's approach in the present case. The Appeals Chamber recalls that the indictment is the primary accusatory instrument and must plead the Prosecution case with sufficient detail. Although the Appeals Chamber allows that defects in an indictment may be "remedied" under certain circumstances, it emphasizes that this should be limited to exceptional cases.[233] In the present case, the Appeals Chamber is disturbed by the extent to which the Prosecution seeks to rely on this exception. Even if the Prosecution had succeeded in arguing that the defects in the Indictments were remedied in each individual instance, the Appeals Chamber would still have to consider whether the overall effect of the numerous defects would not have rendered the trial unfair in itself.

E. CONVICTION FOR ACTS NOT PLEADED IN THE INDICTMENT (IMANISHIMWE'S 1ST GROUND OF APPEAL)

115. In his first ground of appeal, Imanishimwe contends that the Trial Chamber convicted him for acts not pleaded in the Indictment, and thereby exceeded its jurisdiction.[234] He submits that the Trial Chamber committed an error by convicting him on Counts 7, 10 and 13 for crimes perpetrated at the Gashirabwoba football field, whereas these crimes were not pleaded in the Bagambiki/Imanishimwe Indictment.[235]

1. Was the Indictment defective?

116. In support of his contention, Imanishimwe recalls that in several motions he denounced the vagueness of the Indictment.[236] He alleges that paragraphs 3.25 and 3.30 of the Bagambiki/Imanishimwe Indictment did not in any way inform him of the nature of the charges against him as a result of the acts committed at the Gashirabwoba football field, since these paragraphs do not specify the actual perpetrators, the date and place of the alleged massacre, or the nature of his alleged participation therein or that of his subordinates.[237] While conceding that in some situations, the Prosecution does not have to specify the date and place where some events occur, he submits that the particular gravity of the Gashirabwoba massacre required that such information be provided pursuant to Articles 17 (4), 19 (3) and 20 (4) (a) of the Statute and Rule 47 (B) and (C) of the Rules.[238]

117. The Prosecution concedes that the charges in paragraphs 3.25 and 3.30 of the Bagambiki/Imanishimwe Indictment are in outline form only and that the crimes perpetrated at Gashirabwoba were not pleaded in the Indictment.[239] It acknowledges that "[I]f the case went to trial with nothing more than this, the accused might have no basis on which to prepare a proper defence".[240]

118. The Trial Chamber found Imanishimwe guilty of the counts of genocide (Count 7), extermination as a crime against humanity (Count 10) and serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 and of Additional Protocol II (Count 13) for his responsibility in the massacre of civilian refugees at the Gashirabwoba football field on 12 April 1994, on the basis of paragraphs 3.25 and 3.30 of the Bagambiki/Imanishimwe Indictment.[241] It found beyond reasonable doubt that, although it was not established that Imanishimwe ordered the attack or

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[233] *Kupreskic et al*. Appeal Judgement, para. 114; see also *Ntakirutimana* Appeal Judgement, para. 125; *Kvocka et al*. Appeal Judgement, para. 33.
[234] *Imanishimwe* Notice of Appeal, paras. 7-12.
[235] *Imanishimwe* Appeal Brief, paras. 8-12.
[236] *Imanishimwe* Appeal Brief, paras. 15-20. Imanishimwe is referring to Preliminary Motions of 28 January 1998; Motion for Redefinition of Facts, Article 17 (4) of the Statute and Rules 47 (A) and (B) of the Rules, of 10 February 1998 (and not 24 September 1998 as indicated by Imanishimwe).
[237] *Imanishimwe* Appeal Brief, paras. 24-25.
[238] *Imanishimwe* Appeal Brief, paras. 23, 30-33, also referring to the *Kupreskić et al*. Trial Judgement, para. 725.
[239] Prosecution Response Brief, paras. 37 and 52.
[240] *Ibid*., para. 37.
[241] *Cf*. Trial Judgement, paras. 688, 689, 744 and 791.

that he was present, he was criminally responsible under Article 6 (3) of the Statute for failing to prevent his subordinates from attacking the refugees.[242]

119. Paragraphs 3.25 and 3.30 read as follows:

> 3.25 Between April and July 1994, Tutsis and moderate Hutus were arrested and taken to the Cyangugu Barracks to be tortured and executed. Also, during this period, soldiers, participated on several occasions with MRND militiamen and the *Interahamwe* in massacres of the civilian Tutsi population.
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> 3.30 During the events referred to in this indictment, the militiamen, *i.e.* the *Interahamwe*, with the help of the soldiers, participated in the massacres of the civilian Tutsi population and of Hutu political opponents in Cyangugu *préfecture*.

120. In its Judgement, the Trial Chamber thoroughly examined the preliminary matters pertaining to the Indictments. It thus carefully examined paragraphs 3.25 and 3.30, and noted that:

> The paragraph 3.25 also fails to identify any incident with particularity where soldiers participated in massacres with militiamen and *Interahamwe* against the Tutsi civilian population or any other material fact that would demonstrate Imanishimwe's responsibility for the crimes.[243]
>
> (...) paragraphs 3.30 and 3.31 fail to particularise with any specificity the underlying criminal events or the specific role that the accused allegedly played in the massacres.[244]

before concluding that:

> For the foregoing reasons, the Chamber finds that the operative paragraphs underpinning the charges against Ntagerura, Bagambiki and Imanishimwe, as well as the charges themselves, are unacceptably vague. Moreover, the Chamber finds no justifiable reason for the Prosecution to have pleaded the allegations or charges in such a generic manner.[245]

121. The Appeals Chamber reaffirms that the Prosecution must not only inform the accused of the nature and cause of the charges against him in the indictment, but must also provide a concise description of the facts underpinning those charges. The Appeals Chamber has already had occasion above to recall the material facts to be pleaded in relation to the accused's responsibility under Article 6 (3) of the Statute.[246]

122. The Appeals Chamber cannot but note that paragraphs 3.25 and 3.30 of the Bagambiki/Imanishimwe Indictment are manifestly vague. By framing the charges in such a vague manner, the Bagambiki/Imanishimwe Indictment fails to fulfil the fundamental purpose of providing the accused with a description of the charges against him with sufficient particularity to enable him to prepare his defence. The Appeals Chamber considers the Bagambiki/Imanishimwe Indictment defective with regard to the allegations concerning the Gashirabwoba football field.

2. Could the defects in the Indictment be cured?

123. Imanishimwe contends that since the indictment is the only accusatory instrument of the Tribunal, it cannot be supplemented, completed or corrected through the Prosecution's opening

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[242] Trial Judgement, paras. 694, 749, 750 and 802. The Appeals Chamber notes that in paragraphs 691, 744 and 794 of the Trial Judgement, the Trial Chamber also mentions the fact that "Imanishimwe did not punish any soldier for this attack". The Appeals Chamber considers this clarification to be incidental, given that the Trial Chamber decided in its legal findings not to find Imanishimwe responsible for failure to prevent his soldiers from committing crimes.
[243] Trial Judgement, para. 58.
[244] *Ibid*., para. 62.
[245] Judgement, para. 64 (footnote omitted).
[246] See *supra*, para. 26.

address or Pre-Trial Brief, or by witness statements or other documents disclosed to the accused before or during the trial.[247] Invoking a number of decisions of the Tribunal and of ICTY,[248] as well as Judge Dolenc's Dissenting Opinion, Imanishimwe asserts that by convicting an accused of charges not pleaded in the indictment the Trial Chamber exceeds the confines of the matter referred to it, which confines are fixed by the indictment.[249] He thus takes issue with the legal standard enunciated in paragraphs 67 and 68 of the Trial Judgement. He argues that even if it were legally possible to cure the defects in an indictment, the charges relating to Gashirabwoba in the Bagambiki/Imanishimwe Indictment are so vague and unacceptable that there is no remedy for the Prosecution's omission.[250]

124. The Prosecution concedes that only charges contained in the indictment may be part of the case against the accused. It contends, however, that in the case at hand, the charges pertaining to the Gashirabwoba events are set forth "in outline form" in paragraphs 3.25 and 3.30 of the Bagambiki/Imanishimwe Indictment. The Prosecution submits that Imanishimwe adopts an excessively rigid interpretation of the law relating to pleading[251] and affirms that Judge Dolenc's view that a defective indictment cannot be cured under any circumstances is, by his own admission, not based on applicable law.[252]

125. In his Brief in Reply, Imanishimwe contends that under the principle of legality, whose corollary is the principle of strict interpretation of criminal law, the Trial Chamber could not overlook the provisions governing the indictment – namely Articles 17, 18, 19 and 20 of the Statute and Rules 47 and 50 of the Rules of the Tribunal – pursuant to which a Trial Chamber cannot expand the scope of the case brought before it.[253] As regards the *Niyitegeka*, *Ntakirutimana* and *Kvocka et al.* cases which the Prosecution invokes, Imanishimwe submits that they may not be considered as a source of law since such case-law postdates the Judgement.[254]

126. The Appeals Chamber reiterates that no new charges may be introduced outside the indictment, which is the only accusatory instrument of the Tribunal. Indeed, this is the view held by the Trial Chamber at paragraphs 29, 30 and 66 of the Trial Judgement. Nonetheless, the Appeals Chamber does not consider that an indictment may not be "supplemented, completed or corrected" under any circumstances. There is consistent jurisprudence that a defective indictment due to ambiguity or vagueness can be cured, in some instances, if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.[255]

127. Contrary to Imanishimwe's assertion, the Appeals Chamber does not consider that the principle that an overly ambiguous or vague indictment cannot be cured departs from the provisions of the Statute and the Rules governing indictments. It is by interpreting the said provisions that the Appeals Chamber of ICTY articulated the principle for the first time in those terms. The Appeals Chamber recalls that the principle of legality, or the *nullum crimen sine lege* doctrine, does not prevent a court from determining an issue through a process of interpretation and clarification of the applicable law; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to

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[247] *Imanishimwe* Appeal Brief, paras. 35-36.
[248] Notably, *Kupreskić et al.* Appeal Judgement, para. 92; *Semanza* Trial Judgement, para. 61; *Krnojelac* Trial Judgement, para. 86; *The Prosecution v. Radoslav Brđanin,* Case N°IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, 28 November 2003, para. 88; *Stakić* Trial Judgement, para. 772.
[249] *Imanishimwe* Appeal Brief, paras. 41-44.
[250] *Ibid.*, paras. 48-57.
[251] Prosecution Response Brief, paras. 27 and 32.
[252] *Ibid.*, paras. 33-36 and paras. 38-41, referring to *Niyitegeka* Appeal Judgement, para. 197; *Ntakirutimana* Appeal Judgement, para. 27; *Kvocka et al.* Appeal Judgement, paras. 27-35. See also Prosecution Response Brief, para. 43, directing the reader to paragraphs 115 onwards of the *Kupreskić et al.* Appeal Judgement.
[253] *Imanishimwe* Brief in Reply, paras. 10-29.
[254] *Ibid.*, paras. 29-31, 35-37, 65-66.
[255] *Cf. Aleksovski* Appeal Judgement, paras. 126-127.

the meaning to be ascribed to particular provisions.[256] The Appeals Chamber wishes to clarify that when it interprets certain provisions of the Statute or the Rules, it is merely identifying what the proper interpretation of that provision has always been, even though it was not previously expressed that way. Imanishimwe's argument that the principle of legality precludes consideration of case-law developed subsequent to the Trial Judgement cannot succeed.

128. Having articulated the legal standard to be applied to a defective indictment, the Appeals Chamber should now acknowledge the error that the Trial Chamber committed in the articulation of its own legal standards. Although the Trial Chamber was correct in stating that "in certain circumstances it has discretion to consider evidence supporting a paragraph even if the paragraph is defective",[257] its reasoning stems from an incorrect reading of the *Kupreskić et al*. jurisprudence when it concludes, at paragraph 68, that it would consider Prosecution evidence to see if there is strong evidence pointing towards the guilt of the accused.[258] The Appeals Chamber refers to its analysis on this point in relation to the Prosecution's fourth ground of appeal.[259] The Appeals Chamber agrees with Imanishimwe's assertion that the Trial Chamber overlooked the provisions governing indictments by recording such findings.

129. However, the Appeals Chamber takes issue with Imanishimwe's assertion that, in view of the circumstances of the instant case, the vagueness of the Indictment cannot be cured. Imanishimwe's arguments derive from confusion regarding the evidence to be pleaded in an indictment, namely the charges *per se* and the material facts underlying them. The Trial Chamber did not conclude that paragraphs 3.25 and 3.30 of the Bagambiki/Imanishimwe Indictment did not plead charges *per se*, but that the charges pleaded in those paragraphs were "unacceptably vague".[260] It is worth noting that the principal charge, namely the "massacres of the civilian Tutsi population", is pleaded in the two paragraphs in question. Imanishimwe fails to demonstrate how the Trial Chamber erred by recording such findings. The events at Gashirabwoba are clearly within the contours of this charge, even though the charge exists in outline form only. The Appeals Chamber further notes that the Prosecution clearly stated in the Indictment that it was relying on paragraphs 3.25 and 3.30 for Counts 7, 10 and 13.[261] The Appeals Chamber reaffirms the Trial Chamber's finding that Imanishimwe was not in the dark about the charges against him, but that he was inadequately informed thereof in the Bagambiki/Imanishimwe Indictment.

130. Accordingly, there was no legal basis for the Trial Chamber not to consider the evidence relating to the imprecise charge, as long as the Prosecution provided Imanishimwe with timely, clear and consistent information detailing the factual basis underpinning the charges, and thereby permitted Imanishimwe to prepare his defence. The Appeals Chamber has already indicated that this information could, *inter alia* and depending on the circumstances, be supplied in the Prosecution's Pre-Trial Brief or opening statement.[262] The Appeals Chamber considers that the degree of vagueness of the charge is of no import where the proceedings were not rendered unfair. This constitutes an overarching condition, which must be met in entering a finding of guilt. The Appeals Chamber will now examine if Imanishimwe received timely, clear and consistent information detailing the factual basis underpinning the charges against him.

3. Were the defects in the Indictment cured?

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[256] *Ibid*., paras. 126, 127.
[257] Trial Judgement, para. 67, referring to *Kupreskić et al*. Appeal Judgement, para. 114.
[258] See *supra*, paras. 66-67.
[259] See *supra*, para. 67.
[260] See Trial Judgement, para. 64 read with para. 69.
[261] Bagambiki/Imanishimwe Indictment, para. 4, p. 9.
[262] See, *inter alia*, *Kupreskic et al*. Appeal Judgement, para. 117; *Ntakirutimana* Appeal Judgement, para. 36; *Niyitegeka* Appeal Judgement, para. 219; *Kordic and Cerkez* Appeal Judgement, para. 169.

131. Imanishimwe affirms that the Trial Chamber glaringly exceeded the scope of the matter referred to it by finding him guilty of the crimes perpetrated at the Gashirabwoba football field.[263] Although the Trial Chamber stated that it is possible in certain circumstances to consider evidence supporting a defective paragraph in the indictment, Imanishimwe alleges that the Trial Chamber did not indicate those circumstances in the Trial Judgement[264] and that the failure to give reasons for its decision shows the Trial Chamber's bias and that it was guided by one concern only, namely to convict Imanishimwe "at all cost".[265] He argues that when placed in their context, the paragraphs of the *Kupreskić et al*. Appeal Judgement cited by the Trial Chamber[266] highlight the error the Trial Chamber committed by finding him guilty on the basis of allegations that were not pleaded in the Indictment but were improperly introduced in Witness LAC's evidence, given three weeks after commencement of trial, that is more than three years after the filing of the initial Bagambiki/Imanishimwe Indictment.[267] Imanishimwe further contends that neither the Indictment nor the Prosecution Pre-Trial Brief informed him of the Prosecution's intention to prosecute him under Article 6 (3) of the Statute. He affirms that the Prosecution limited the prosecutorial framework and, hence, the framework within which the case was brought before the Chamber under Article 6 (1) of the Statute.[268] After recalling some of the arguments advanced by Judge Dolenc in his separate and dissenting opinion,[269] Imanishimwe concludes that the Trial Chamber's error caused him serious prejudice which can be remedied only by reversal of the Trial Judgement.[270]

132. The Prosecution argues that failure to mention the events at Gashirabwoba in the Indictment was cured by disclosure of timely, clear, and consistent information.[271] The Prosecution submits that Imanishimwe was supplied with information pertaining to Gashirabwoba on 26 November 1999 through disclosure of the redacted statements of Witnesses LAC, LAB and LAH.[272] It further submits that it clearly stated its intention to show that Imanishimwe was involved in the massacre at the Gashirabwoba football field in paragraphs 2.29 to 2.40 and in Annexes 3 and 5[273] of its Pre-Trial Brief, which was filed two and a half months prior to the start of trial.[274] It emphasizes that the said paragraphs clearly informed Imanishimwe in detail of the allegations against him in relation to the Gashirabwoba massacre,[275] including: (1) the perpetrators of the crimes,[276] (2) the role played by Imanishimwe,[277] (3) the dates and times of the events,[278] (4) the place of the events,[279] (5) the identity

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[263] *Imanishimwe* Appeal Brief, para. 47.
[264] *Ibid*., paras. 53-54.
[265] *Ibid*., para. 56.
[266] *Kupreskic et al*. Appeal Judgement, paras. 122-125.
[267] *Imanishimwe* Appeal Brief, para. 57-61.
[268] *Ibid*., paras. 162-163, referring to paragraphs 2.33 and 2.35 of the Prosecution Response Brief. See also *Imanishimwe* Appeal Brief, para. 102.
[269] See Judge Dolenc Opinion, paras. 5, 6 and 10.
[270] *Imanishimwe* Appeal Brief, paras. 61-68.
[271] Prosecution Response Brief, para. 52.
[272] *Ibid*., para. 47. The Prosecution indicates that the unredacted witness statements were disclosed to Imanishimwe on 31 August 2000.
[273] The Prosecution is referring in particular to the summaries of the witness statements of Witnesses LAC, LAB and LAH as contained in Annex 5 to the Prosecution Pre-Trial Brief, pp. 1412-1413.
[274] Prosecution Response Brief, paras. 43-44.
[275] *Ibid*., para. 50. The Prosecution adds, in paragraph 51, that Annex 5 to the Pre-Trial Brief, containing the summary of the anticipated evidence of Witnesses LAC, LAB and LAH also indicated the allegations in question.
[276] "Soldiers and *Interahamwe*", Prosecution Response Brief, para. 50 (a). During the appeal hearing, Counsel for the Prosecution explained that paragraph 2.39 of the Prosecution Pre-Trial Brief indicated "that the soldiers were acting under Imanishimwe's direction"; AT. 7 February 2006, p. 21.
[277] The fact that he "instigated killings of civilians, mainly Tutsi", that he "verbally encouraged the *Interahamwe* to attack and exterminate Tutsi", that he took a man away and that the man "was never seen again", that he arrived at Gashirabwoba with "a group that included armed soldiers", that he "ordered separation of Hutu from Tutsi", that he "ordered soldiers and *Interahamwe* to encircle the football field", that he gave "a direct command to soldiers to fire at the crowd", Prosecution Response Brief, para. 50 (b).
[278] Monday, 11 April and morning of Tuesday, 12 April 1994, Prosecution Response Brief, para. 50 (c).
[279] Gashirabwoba football field, Gisuma *Commune*, Prosecution Response Brief, para. 50 (d).

of the soldiers,[280] (6) the acts performed,[281] (7) Imanishimwe's knowledge of the events,[282] and (8) Imanishimwe's failure to prevent or punish the crimes committed by the soldiers and the *Interahamwe*.[283] The Prosecution concludes that the way Imanishimwe approached and conducted his defence shows that he was provided with timely notice of the charges relating to the Gashirabwoba football field, and, as such, that he suffered no prejudice to his ability to prepare his defence.[284]

133. Imanishimwe submits that the defects in the Indictment were not cured by the Prosecution Pre-Trial Brief or the disclosure of the statements of Witnesses LAB, LAC and LAH. He affirms that nothing in the Prosecution Pre-Trial Brief indicated that the Prosecution intended to prosecute him as a superior for acts allegedly committed by his subordinates at Gashirabwoba. He argues that paragraphs 1.36 to 1.40, to which the Prosecution refers, allege that he personally participated in the massacre, with nothing whatsoever indicating that he incurred responsibility as a superior for acts allegedly committed by his subordinates. The statements of Witnesses LAB, LAC and LAH are, according to him, equally silent on this point.[285] Imanishimwe argues that he thus sought to defend himself only in relation to his alleged personal involvement in the massacre within the meaning of Article 6 (1) of the Statute.[286] In response to the Prosecution's assertion that he failed to raise objections, he points out that he denounced the defects in the Indictment at the appropriate moments, that is "*in limine litis*" by means of two motions dated 28 January and 17 February 1998[287] and "at the end of the trial" in his final trial brief and closing arguments.[288] Lastly, Imanishimwe submits that the unredacted statements of Witnesses LAB, LAC and LAH were disclosed to him on 31 August 2000, only two weeks prior to the start of trial.[289] He thus reaffirms that he was not able "to prepare his defence in relation to the acts allegedly carried out by the soldiers under his responsibility on 12 April 1994".[290]

134. In its Judgement, under Preliminary Matters Relating to the Indictments, the Trial Chamber sets forth the principles it deems applicable to indictments.[291] The Appeals Chamber has already determined that the Trial Chamber committed some errors in its legal findings. The Appeals Chamber notes, by implication, that the Trial Chamber also erred in the way it applied the law to the facts. Indeed, although the Trial Chamber noted the vagueness of the Indictment with regard to the Gashirabwoba events, it proceeded to make factual findings on the evidence before it, without first determining whether Imanishimwe received timely, clear and consistent information detailing the factual basis underpinning the allegations in question. At no time did the Trial Chamber show that it considered whether the Accused was adequately informed of the material facts permitting him to defend himself against the charges relating to the acts committed at Gashirabwoba, even though it undertook to examine "to what extent the lack of notice and the ambiguity influenced the evidence".[292] After its analysis, the Trial Chamber made factual and legal findings in respect of these events, without meeting its obligation to consider whether the trial was rendered unfair by the "unacceptably" vague and ambiguous Indictment.[293] The Appeals Chamber considers this to be an error of law stemming directly from the application of the wrong legal standard. Now that the error has been

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[280] Those under his "direct command", Prosecution Response Brief, para. 50 (e).
[281] Prosecution Response Brief, para. 50 (f).
[282] *Ibid*., para. 50 (g), arguing that Imanishimwe admitted that he was aware of the Gashirabwoba massacre (Samuel Imanishimwe, T. 22 January 2003, p. 41).
[283] Prosecution Response Brief, para. 50 (h).
[284] *Ibid*., paras. 53, 60-62.
[285] Imanishimwe Brief in Reply paras. 51-59, 65-66.
[286] *Ibid*., para. 60.
[287] Imanishimwe is referring to Preliminary Motions filed on 28 January 1998; Motion for Redefinition of Facts, Article 17 (4) of the Statute and Rules 47 (A) and (B) of the Rules, filed on 10 February 1998 (and not 24 September 1998, as indicated by Imanishimwe).
[288] Imanishimwe Brief in Reply, para. 61.
[289] *Ibid*., para. 64.
[290] *Ibid*., para. 67.
[291] See Trial Judgement, paras. 29-39, 65-68.
[292] Trial Judgement, para. 68.
[293] See *supra*, para. 65.

identified, the Appeals Chamber does not deem it necessary to examine Imanishimwe's allegation that there was no reasoned opinion.

135. With regard to the allegation of bias on the part of the Trial Chamber, the Appeals Chamber recalls that it cannot entertain sweeping or abstract allegations that are neither substantiated nor detailed to rebut the presumption of impartiality enjoyed by the Judges of the Tribunal.[294] In the case at bar, the Appeals Chamber notes that Imanishimwe simply stated his allegation without substantiating it in any way. Hence, Imanishimwe's allegation that there was no reasoned opinion cannot be tantamount to a demonstration of bias on the part of the Trial Judges.

136. In order to determine whether the Trial Chamber's error invalidates its decision to convict Imanishimwe for crimes committed at the Gashirabwoba football field, the Appeals Chamber will have to examine if the defects in the Bagambiki/Imanishimwe Indictment were cured. In other words, after correcting the legal error by articulating the applicable criteria, the Appeals Chamber will now apply the legal standards to the circumstances of the case at hand and determine if the proceedings were not rendered unfair.

137. The Appeals Chamber can affirm the convictions against Imanishimwe for the Gashirabwoba massacre on the basis of paragraphs 3.25 and 3.30 of the Bagambiki/Imanishimwe Indictment only if it is satisfied that the Prosecution provided Imanishimwe with timely, clear and consistent information detailing the factual basis underpinning the Indictment, and thereby permitted Imanishimwe to prepare his defence.

(a) Burden of proof

138. First and foremost, the Appeals Chamber has to determine on which party lies the burden of proof. The Appeals Chamber recalls that, where the indictment turns out to be defective, an accused person who fails to object on this point at trial has the burden of proving on appeal that his ability to prepare his case was materially impaired. Where, however, the accused person objected at trial, the burden is on the Prosecution to prove on appeal that the accused's ability to prepare his defence was not materially impaired.[295] In the instant case, the Appeals Chamber notes that, in the pre-trial phase, Imanishimwe filed two separate preliminary motions on defects of the Initial Bagambiki/Imanishimwe Indictment, pursuant to Rule 72 (A) (ii) of the Rules. In his 29 January 1998 Motion, Imanishimwe denounced the lack of sufficient evidence to support the charges and the absence of a "concise statement of the charges against the Accused".[296] In the 24 March 1998 Motion, Imanishimwe requested that the Indictment be withdrawn on the grounds that it did not inform him of the exact nature and cause of the charges against him.[297] Imanishimwe reiterated his complaints about the vagueness of the Indictment in his Final Trial Brief and Closing Arguments, thereby denouncing the introduction of new charges related to Gashirabwoba.[298] In light of the foregoing, the Appeals Chamber finds that Imanishimwe did not invoke the defects in the Indictment for the first time on appeal. It is therefore for the Prosecution to prove that Imanishimwe's ability to prepare his defence against the allegations pertaining to Gashirabwoba was not seriously impaired by the failure to provide him with information. In other words, the Prosecution has the burden of proving that the proceedings were not rendered unfair.

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[294] See *Rutaganda* Appeal Judgement, para. 43, referring to *Akayesu* Appeal Judgement, paras. 92 and 100.
[295] See *supra*, para. 31.
[296] The Prosecution v. Emmanuel Bagambiki, Samuel Imaniwhimwe and Yussuf Munyakazi, Case N°ICTR-97-36.I, Preliminary Motions, 29 January 1998, p. 4.
[297] The Prosecution v. Emmanuel Bagambiki, Samuel Imanishimwe and Yussuf Munyakazi, Case N°ICTR-97-36-I, Motion for Redefinition of Facts, 17 February 1998.
[298] Imanishimwe Final Trial Brief, pp. 66-69 for paragraphs 3.25 and 3.30 of the Bagambiki/Imanishimwe Indictment. See also, Imanishimwe's Closing Arguments, T.15 August 2003, pp. 10-11 and 47-48, regarding Gashirabwoba specifically.

(b) Disclosure of Material Facts: Place, Date, Identity of the Perpetrators of the Massacre

139. The Prosecution affirms in its written submissions that it provided Imanishimwe with the material facts concerning the charges formulated in paragraphs 3.25 and 3.30 as from 26 November 1999. On that date, the Prosecution filed the redacted statements of Witnesses LAC, LAB and LAH. According to the Prosecution, these statements are the "sources of the particulars pertinent to the Gashirabwoba events". The Appeals Chamber is not satisfied that the mere service of copies of the statements of the witnesses the Prosecution intended to call to testify at trial, required by Rule 66 (A) (ii) of the Rules, was sufficient to provide Imanishimwe with the information necessary to cure the defects of the Indictment.[299]

140. The Appeals Chamber recognises, however, that the Prosecution did state its intention to charge Imanishimwe for the acts perpetrated at the Gashirabwoba football field in his Preliminary Pre-Trial Brief, filed on 24 May 2000.[300] The intention was confirmed in the Prosecution Pre-Trial Brief, which was filed a few months thereafter. In the latter filing, the Prosecution clearly stated its intention to invoke Imanishimwe's participation in the massacres perpetrated at the Gashirabwoba football field on or around Tuesday, 12 April 1994.[301] The Prosecution supports the charge formulated in paragraphs 3.25 and 3.30 by specifying the exact date and place of one of the massacres of Tutsi civilians. The information pertaining to the acts of violence and to its direct perpetrators is contained in paragraphs 2.33 to 2.40 of the Pre-Trial Brief. It is also stated in paragraph 2.39 of the Pre-Trial Brief that soldiers under Imanishimwe's command participated in the acts of violence.

141. It emerges from these factors that the Prosecution did provide Imanishimwe with clear and consistent information regarding the place and dates of the massacre of Tutsi refugees, as well as the identity of the actual direct perpetrators. The Appeals Chamber however reserves its conclusions as to whether disclosure was made in a timely manner until later in the analysis.

(c) Criminal conduct attributed to the Accused

142. With regard to Imanishimwe's role in the commission of the crimes, the Appeals Chamber observes that paragraphs 2.31 to 2.40 of the Prosecution Pre-Trial Brief clearly describe Imanishimwe's direct and personal involvement in the massacres perpetrated at the Gashirabwoba football field on 12 April 1994.[302] The Prosecution alleges that Imanishimwe committed both concrete acts of inciting, encouraging and aiding and abetting, and of giving criminal orders.

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[299] *Ntakirutimana* Appeal Judgement, para. 27, referring to *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case N°IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 62.

[300] The Prosecutor's Preliminary Pre-Trial Brief, filed on 24 May 2000, paras. 1.29-1.40.

[301] Prosecution Pre-Trial Brief, para. 2.29.

[302] The relevant sections of the Prosecution Pre-Trial Brief read as follows:

2.31. […] Imanishimwe encouraged with words the interahamwe to attack and exterminate the Tutsi causing them and others to flee to the football field. […]

2.33. It is alleged that immediately prior to the attack, Emmanuel Bagambiki and Samuel Imanishimwe brought grenades by vehicle to Gisuma *commune*, which were passed to Ananie Kanyamuhanda for distribution to the *Interahamwe*.

2.36. On or around 12 April 1994, early in the morning, the *Interahamwe* attacked the refugees who again successfully resisted. Later that same morning, Emmanuel Bagambiki and Samuel Imanishimwe came to the football field with others, including a group of armed soldiers.

2.38. Samuel Imanishimwe then ordered the Hutus on the field to separate from the Tutsis and that the Hutus should leave the field, which many did; he then ordered the soldiers and the interahamwe to encircle the field.

2.39 Soldiers under the direct command of Samuel Imanishmwe began firing at the crowd. It is alleged that an automatic firing weapon, positioned on the football field, was able to spray the crowd with bullets. It is alleged that the soldiers and *Interahamwe* threw grenades into the crowd at the same time.

2.40 After the shooting stopped, many people lay dead or fatally wounded. The *Interahamwe* finished off any survivors by stabbing with knives, hacking with machetes or bludgeoning to death with clubs. The *Interahamwe* and soldiers looted the belongings of the dead.

143. Imanishimwe contends, however, that he was not convicted of direct individual criminal responsibility under Article 6 (1) of the Statute, but as a superior, under Article 6 (3) of the Statute, for failure to prevent his subordinates from attacking the refugees. Indeed, the Appeals Chamber notes that the Trial Chamber found that it was not established that Imanishimwe ordered the attack or that he was present.[303]

(i) Form of Responsibility Charged Against Samuel Imanishimwe

144. Without necessarily examining further whether the information provided by the Prosecution outside the Indictment did remedy the Prosecution's shortcomings, the Appeals Chamber is of the opinion that Imanishimwe's ground of appeal can be admitted at this stage. Having read the contradictory information contained in the Prosecution's Pre-Trial Brief and in its Final Trial Brief, the Appeals Chamber considers that the Prosecution failed to pursue its allegation that Imanishimwe incurred responsibility for the crimes described in paragraphs 3.25 and 3.30 of the Bagambiki/Imanishimwe Indictment under Article 6 (3) of the Statute, *i. e.* the form of responsibility under which he was convicted.

145. While the Prosecution states its intention to charge Imanishimwe in Counts 7, 10 and 13 of the Bagambiki/Imanishimwe Indictment under Article 6 (3) of the Statute,[304] a careful reading of the Prosecution's earlier filings reveals a number of contradictions and inconsistencies with regard to Imanishimwe's responsibility for the said crimes as a superior.

146. The first such inconsistencies are found in the Prosecution Pre-Trial Brief: whereas in the headings of paragraphs 3.33 and 3.35 relating to Counts 7 and 10 against Imanishimwe, the Prosecution reiterates its intention to invoke Articles 6 (1) and 6 (3) of the Statute, which corresponds to the charges as formulated in the Indictment, the Prosecution states without any ambiguity in the body of these paragraphs that it intends to charge the Accused by virtue of his responsibility pursuant to Article 6 (1) only:

> 3.33 Genocide 6 (1) and 6 (3)
>
> The accused is charged in count seven of the indictment with genocide pursuant to Article 2 (3) (a) of the Statute of the Tribunal by virtue of his responsibility pursuant to Article 6 (1) of the Statute, for killing, causing of serious bodily or mental harm and deliberate infliction of conditions calculated to bring about the destruction of Tutsis in whole or in part, that occurred in the area of Cyangugu *préfecture*, Rwanda in April, May and June 1994, and outlined in the indictment. […] [305]
>
> 3.35 Crimes against Humanity (Murder, Extermination, Imprisonment and Torture), 6 (1) and 6 (3)
>
> At counts nine, ten, eleven and twelve of the indictment, Samuel Imanishimwe is charged with crimes against humanity, of murdering, extermination and imprisoning of civilians, by virtue of his responsibility pursuant to Article 6 (1) of the Statute in and around Cyangugu *préfecture* in April, May and June 1994 as outlined in the indictment.
>
> In support of the said charge the Prosecution will prove beyond reasonable doubt that:

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[303] See Trial Judgement, paras. 653 and 691.
[304] Bagambiki/Imanishimwe Indictment, para. 4, p. 7, and Counts 7 and 10.
[305] Prosecution Pre-Trial Brief, para. 3.33 (emphasis added). See also Prosecution Preliminary Pre-Trial Brief, 24 May 2000, para. 2.33.

a. The accused instigated, ordered committed, aided and abetted in the extermination of thousands of Tutsi civilians in Cyangugu *préfecture* in April, May and June 1994 as outlined in the indictment.[…][306]

The Prosecution does not specify in its Pre-Trial Brief the form of responsibility alleged under Count 13 (serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereof).[307]

147. With regard to the allegations pertaining to Gashirabwoba in particular, the Appeals Chamber notes that the only indication given by the Prosecution of its intention to charge Imanishimwe as a superior is the allegations of participation of "soldiers under the direct command of Samuel Imanishimwe".[308] This information is nevertheless given as part of the factual evidence of Imanishimwe's direct participation in the massacre.[309] Moreover, the Appeals Chamber considers that the information that soldiers under Imanishimwe's command allegedly participated in the massacre is not in itself inconsistent with the charge of direct participation, which, in this instance, seems to be the Prosecution case.[310]

148. Similar inconsistencies are found in the Prosecution Final Trial Brief.[311] Whereas it states several times that Samuel Imanishimwe is charged for Counts 7, 10 and 13 pursuant to Articles 6 (1) and 6 (3) of the Statute[312], the Prosecution systematically refers to Imanishimwe's direct participation in the commission of the crimes relating to the material facts underpinning these three counts.[313] The facts that may form the basis for a 6 (3) conviction are systematically omitted.

149. In light of the above, the Appeals Chamber considers that the Prosecution failed to pursue the charges relating to Gashirabwoba under Article 6 (3) of the Statute, but focused solely on criminal responsibility under Article 6 (1) of the Statute, a form of responsibility that the Trial Chamber did not retain for the events in question.

150. The Appeals Chamber considers that for the foregoing reasons, the Trial Chamber could not have entered a finding of guilt under Article 6 (3) of the Statute for Counts 7, 10 and 13. On this basis

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[306] Prosecution Pre-Trial Brief, para. 3.35 (emphasis added). See also Prosecution Preliminary Pre-Trial Brief, 24 May 2000, para. 2.35.
[307] Prosecution Pre-Trial Brief, para. 3.36.
[308] *Ibid*., para. 2.39.
[309] *Ibid*., paras. 2.31-2.40.
[310] The Appeals Chamber recalls in this regard that an accused's responsibility for "ordering" crimes requires the implied existence of a superior-subordinate relationship between the direct perpetrators and the accused. See *Semanza* Appeal Judgement, para. 361.
[311] The Appeals Chamber notes that the Prosecution does not mention in his oral closing arguments the form of responsibility with which Imanishimwe is charged for Gashirabwoba.
[312] Prosecution Final Trial Brief, paras. 39, 1132, 1302, 1596, 1741.
[313] The Prosecutor's Closing Brief Filed under Rule 86 (B) and (C) of the Rules of Procedure and Evidence, 26 Juny 2003, paras. 1146-1151. The most relevant sections read as follows (emphasis added):
1146. Genocide (Counts 1 and 7)
1147. Evidentiary basis establishing the Crime of Genocide:
1148. […] Specifically, the following supporting evidence establishes that [Bagambiki and Imanishimwe] committed genocide by directly participating in massacres and attacks with the specific intent to destroy, in whole or in part, ethnic Tutsi.
1149. Direct Participation in Massacres and Attacks:
[…]
1151. […] The Accused Emmanuel Bagambiki and Samuel Imanishimwe participated directly in these mass killings, gave orders to others to kill Tutsis, provided ammunition to people to be used to kill Tutsis, and otherwise encouraged and facilitated the massacres and attacks against Tutsis in Cyangugu *préfecture*.[313]
See also paras. 1313 and 1316. Regarding the Gashirabwoba massacre in particular, see Prosecution Final Trial Brief, para. 1172. Regarding Count 10, see Prosecution Final Trial Brief, para. 1604. Regarding Count 13, see Prosecution Final Trial Brief, paras. 1758, 1769-1770, 1772.

only, the Appeals Chamber deems it possible to allow the ground of appeal and set aside the guilty verdict against Imanishimwe for the Gashirabwoba events based on Article 6 (3) of the Statute.

151. In any event, the Appeals Chamber finds, having examined the question as to whether Imanishimwe was adequately informed of the material facts underpinning the charges based on Article 6 (3) relating to the Gashirabwoba massacre, that he was not so informed, as will be shown in the following analysis.

(ii) Disclosure of material facts underpinning a charge based on Article 6 (3)

152. The Prosecution charges Samuel Imanishimwe with responsibility pursuant to Article 6 (3) in the Indictment, but omits to plead the material facts relating to this form of responsibility, especially with regard to Gashirabwoba, which is simply omitted. The Appeals Chamber recalls that where an accused is charged with responsibility pursuant to Article 6 (3) of the Statute, the material facts which must be pleaded in the indictment are: (1) that the accused is the superior of subordinates sufficiently identified over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible; (2) the criminal conduct of those others for whom he is alleged to be responsible; (3) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinate; and (4) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[314]

153. First, as to whether Imanishimwe had effective control over subordinates, Imanishimwe could not have been unaware of the Prosecution's intention to establish that he exercised *de facto* and *de jure* authority over the soldiers at the Cyangugu military camp as the commander of the camp.[315] Specifically with regard to the Gashirabwoba massacre, the mention "soldier under the direct command of Samuel Imanishimwe" in paragraph 2.39 of the Prosecution Pre-Trial Brief shows that Imanishimwe was informed of this material fact. The same applies to his knowledge of the alleged criminal conduct of his subordinates.[316]

154. Secondly, regarding the Accused's conduct, from which it may be deduced that he knew or had reason to know that his subordinates were about to commit crimes,[317] the Appeals Chamber notes that in its Pre-Trial Brief, the Prosecution omits to mention this material fact. This omission is easily explained by the fact that the Prosecution alleges that the Accused was physically present and made a direct and substantial contribution on the day of the massacre: the Accused's knowledge is inferred by implication, but as the only inference possible from the criminal conduct with which he is charged. At no moment is Samuel Imanishimwe's absence from the scene of the massacre envisaged. The summary of the statements of Witnesses LAH, LAB and LAC annexed to the Prosecution's Pre-Trial Brief are no more informative in this regard: the summary of Witness LAB's statement indicates that Imanishimwe was present during the attack, with no further details,[318] whereas the summary of

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[314] See *supra*, para. 26.

[315] See Bagambiki/Imanishimwe Indictment, para. 3.10. See also Prosecution Pre-Trial Brief, para. 2.3.

[316] See Prosecution Pre-Trial Brief, para. 2.39.

[317] The Appeals Chamber has decided not to consider whether Imanishimwe was properly informed that the Prosecution intended to prove that he knew or had reason to know that his subordinates were about to commit crimes, given that Imanishimwe was found guilty for failing to prevent the crimes, a finding which requires prior knowledge of the commission of the crimes.

[318] Prosecution Pre-Trial Brief, Annex 4: Summary of Anticipated Evidence, prepared by the Prosecution, p. 1412 (Registry pagination):

[Witness LAB will state that] in January 1994, Imanishimwe and Bagambiki came to Shagasha tea factory and recruited about 30 youths for military training which was conducted till April 1994 […]; that Imanishimwe trained them for a week in the forest on target practice using live ammunition while Bagambiki used to inspect training and brief trainees that they were

Witness LAC's statement says nothing about Imanishimwe's supposed knowledge of the attack.[319] It is mentioned in the summary of Witness LAH's statement that the witness "made daily updates on the progress of the killings to Bagambiki and Imanishimwe".[320] Such indication, which is not specifically related to the Gashirabwoba attack, with regard to which LAH mentions Imanishimwe's presence, is of little weight compared to the abundant information provided by the Prosecution about its intention to prove that Imanishimwe was present, and even ordered the massacre.

155. The Appeals Chamber cannot conclude that the Prosecution provided Imanishimwe with clear and consistent information of this allegation. In fact, it is interesting to note that the Prosecution in its Response Brief simply alleges that Imanishimwe was aware of the facts by relying on the Accused's own admission before the Trial Chamber on 22 January 2003.[321] Nothing in the relevant part of the trial transcript indicates that Imanishimwe was informed of the conduct by which the Prosecution intended to establish that he knew or had reasons to know that his subordinates were about to attack the refugees at Gashirabwoba.[322] Imanishimwe simply affirms that he knew that massacres had occurred at the Gashirabwoba football field. The Appeals Chamber notes that the Accused admits that he knew that a massacre had been perpetrated, and not that a massacre was about to be perpetrated, and his subordinates' participation is not mentioned.

156. Lastly, with regard to the Accused's conduct, from which it may be deduced that he failed to take the necessary and reasonable measures to prevent the crimes from being committed,[323] the Appeals Chamber notes that the Prosecution Pre-Trial Brief says nothing about it. The Prosecution does not bring any particular information to the attention of the Chamber – by way of a passage in its Pre-Trial Brief, its Opening Statement or summaries of witness statements – to demonstrate it provided Imanishimwe with clear and consistent information regarding this material fact. In paragraph

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being trained to fight the tutsi invaders and their accomplices; that on 7 April, Imanishimwe and Bagambiki brought about 150 clubs and 300 machetes which were distributed to the *Interahamwe*; that a few days later there was an attack on the refugees at Gashirobwa by the *Interahamwe*, which was repulsed by the refugees using stones and bricks; that later that day Imanishimwe and Bagambiki arrived with a reinforcement of soldiers and went for the final attack on Gashirabwoba […]

[319] Prosecution Pre-Trial Brief, Annex 4: Summary of Anticipated Evidence, prepared by the Prosecution, p. 1412 (Registry pagination):
[Witness LAC will state that] he fled to Gashirobwa football field where he arrived simultaneously with other Tutsi refugees around 1300 hours; that about an hour later, Imanishimwe and Bagambiki arrived with a list and Bagambiki called out two names […]; that on 12 April the refugees were attacked by *Interahamwe* around 0800 hours but repulsed the attack and also repulsed another attack about two hours later; that Bagambiki came about 30 minutes after the second attack and said he would send soldiers to guard them; that after about another 30min soldiers came with *Interahamwe* and started firing at the crowd with guns and lobbing hand grenades; that when the shooting stopped, after many were dead and wounded, the *Interahamwe* moved in and started hacking the wounded with machetes and stripping the dead of valuables […].

[320] Prosecution Preliminary Pre-Trial Brief, Annex 4: Summary of Anticipated Evidence, prepared by the Prosecution, p. 1413 (Registry pagination):
[Witness LAH will state that on 7 April 1994] Bagambiki and Imanishimwe distributed grenades that were used against the Tutsi in the attack at Gashirabwoba; that Imanishimwe came to Gashirobwa with a reinforcement of about 30 soldiers and guns which he distributed to the *Interahamwe* before commencing the attack; that [the] witness also made daily attacks against Tutsi and made daily updates on the progress of the killings to Bagambiki and Imanishimwe.

[321] Prosecution Response Brief, para. 50 (g), referring to T.22 January 2003, p. 34, lines 26-31.

[322] Samuel Imanishimwe, T.22 January 2003, p. 34:
MR. PRESIDENT:
Mr. Imanishimwe, just before I forget, because sometimes I make a note of these things but later on I forget, maybe you can assist me with something, and I am not sure whether I have the pronunciation right, so if I don't have it right, you can excuse me. Gashirabobwa park, or pitch, or football pitch, were you aware that any killings took place at that place?
THE WITNESS:
Yes, I heard that there were massacres there.
MR. PRESIDENT:
Very well, thank you.

[323] The Appeals Chamber does not deem it necessary to consider whether Imanishimwe was informed of the conduct by which the Prosecution was to make the case that he failed to take necessary and reasonable measures to punish the perpetrators of the crimes, given that he was found guilty of failure to prevent the crimes, and punishing the perpetrators thereof, which requires prior knowledge of the commission of the crimes.

50 (h) of its Response Brief, the Prosecution simply lists the violent acts committed by "the soldiers and the *Interahamwe*,"[324] as enumerated in the Pre-Trial Brief, without demonstrating to what extent such facts informed Imanishimwe of the reasons for which he was charged for failing to prevent the crimes committed at the Gashirabwoba football field on 12 April 1994. The Appeals Chamber recalls that the Prosecution has the burden of proving that the Indictment was cured of its defects, because Imanishimwe was provided with the necessary details concerning the charges against him.[325]

157. The Appeals Chamber notes that a certain amount of clear and consistent information on the charges relating to the Gashirabwoba massacre was provided by the Prosecution to the Accused in its Pre-Trial Brief, which was filed two months before the start of trial. The Appeals Chamber considers, however, that it does not need to rule on whether the information was provided timely – that is, in time for Imanishimwe to prepare his defence – since it is of the view that not all the necessary information was disclosed.[326] Imanishimwe's criminal conduct, described in sufficient detail by the Prosecution in his Pre-Trial Brief, is limited to his direct participation in the massacre. General reference to Article 6 (3) and to the fact that people "under his direct command" participated in the crimes is not sufficient to find that Imanishimwe was given clear and consistent information regarding the case he had to meet under Article 6 (3) of the Statute in respect of the acts committed by his subordinates in Gashirabwoba.

158. The Appeals Chamber recognises that, prior to the presentation of all of the evidence, the Prosecution cannot determine with certainty which of the charges brought against an accused will be proven. Cumulative charging is therefore allowed.[327] However, this does not relieve the Prosecution of its obligation to state all material facts underpinning each of the charges if it intends to plead several forms of responsibility, cumulatively or alternately. In the instant case, the Prosecution simply invokes Article 6 (3) of the Statute without providing the Accused with all the material facts underpinning the charges under that Article. The Prosecution seems to consider mere mention of Article 6 (3) to be the key to a conviction under this Article. The Appeals Chamber cannot but denounce this approach. It reaffirms that if the Prosecution intends to charge a superior with individual criminal responsibility pursuant to Article 6 (3) of the Statute, it must plead the material facts underpinning the charges in the indictment, and that failure to do so may be remedied only if the missing material facts are provided in a clear, consistent and timely manner.

(d) Unfairnes of the proceedings

159. The Prosecution contends, nonetheless, that the proceedings were not rendered unfair because it can be inferred from the whole trial record that Imanishimwe

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[324] Prosecution Response Brief, para. 50 (h):
"The Appellant's failure to act – besides the active role played by the Appellant, set out in subparagraphs b and f herein, the Appellant was aware of and omitted to prevent or punish soldiers and *Interahamwe* for committing these acts: they burned houses and killed individuals on the hills around Gashirabwoba (Pre-Trial Brief, paragraph 2.30); soldiers and *Interahamwe* threw grenades into the crowd at Gashirabwoba on 12 April 1994 (Pre-Trial Brief, paragraph 2.39); *Interahamwe* finished off the survivors by stabbing with knives, hacking with machetes and bludgeoning to death with clubs (Pre-Trial Brief, paragraph 2.40); *Interahamwe* and soldiers looted the belongings of the dead (Pre-Trial Brief, paragraph 2.40)."
[325] See *supra*, para. 138.
[326] In the light of the conclusions regarding Imanishimwe's 10th ground of appeal, the Appeals Chamber does not consider it necessary to discuss whether the material facts which had to be pleaded to allow Imanishimwe's conviction for the events at Gashirabwoba under Article 6 (1) of the Statute were communicated to him in a timely manner. See below, Ch. III, G, paras. 353-377.
[327] *Čelebići* Appeal Judgement, para 400.

"understood and was ready at trial for the Prosecution case, based on the charges relating to Gashirabwoba".[328]

160. In support of its assertion, the Prosecution argues that Imanishimwe failed to raise a specific objection to any evidence being led on the Gashirabwoba massacre[329] and did not require further time for cross-examination, or to conduct further investigation.[330] In the view of the Appeals Chamber, this does not demonstrate that Imanishimwe was informed of the fact that the Prosecution intended to charge him with responsibility for those acts as a superior. The Appeals Chamber concluded earlier that Imanishimwe was informed of some of the material facts relating to the Gashirabwoba charges. It was therefore normal for him to defend against those facts at trial. The Appeals Chamber notes that none of the evidence adduced by the Prosecution in respect of the events at Gashirabwoba was limited to Imanishimwe's responsibility as a superior, thereby necessitating an objection on his part or the request for additional time for the preparation of his defence.

161. The Prosecution contends that Imanishimwe's attitude at trial shows that he was prepared to meet the charges relating to Gashirabwoba. First, it invokes the fact that Counsel for Imanishimwe cross-examined Witnesses LAC, LAB and LAH in detail on the Gashirabwoba events.[331] Having read the passages of the trial records cited by the Prosecution, the Appeals Chamber cannot consider that the way Counsel for Imanishimwe conducted the cross-examination of Witnesses LAC and LAH[332] supports the Prosecution's position: the cross-examination did not touch on the evidence relating to the form of responsibility for which Imanishimwe was found guilty.

162. The Prosecution also asserts that Imanishimwe adduced further evidence on the Gashirabwoba events.[333] The only example of the additional evidence the Prosecution cites is Exhibit D-IS 2 presented on 10 October 2002. In the opinion of the Appeals Chamber, the introduction of this exhibit – a rudimentary sketch of the Gashirabwoba football field and its immediate surroundings – does not in any way demonstrate that Imanishimwe knew that he was to defend himself against charges based on Article 6 (3) of the Statute. The Prosecution further asserts that Defence Witnesss PBA and PKA testified in an attempt to provide an alibi for Imanishimwe for 12 April 1994.[334] The calling of these two witnesses and the strategy adopted by Counsel for Imanishimwe at trial strengthen the Appeals Chamber's conviction that Imanishimwe thought that he was to defend himself against the charge relating to his responsibility for direct participation in the crimes, and not against his responsibility as a superior. Lastly, the Prosecution avers that Imanishimwe himself testified about the Gashirabwoba massacres, "stating that he knew about it, simply denying being involved".[335] Here again, the Appeals Chamber considers that this evidence, which is insufficient to conclude that Imanishimwe was informed of all the material facts underpinning the charges based on Article 6 (3) of the Statute, seems to demonstrate that Imanishimwe was responding to a charge of direct participation in the Gashirabwoba massacre.

163. Lastly, the Prosecution argues that (1) in his Opening Statement, Imanishimwe made specific reference to the events at Gashirabwoba, not in the context of the Appellant's lack of knowledge of

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[328] Prosecution Response Brief, paras. 53-62. During the appeal hearing, Counsel for the Prosecution elaborated on this point, referring to paragraph 53 of the *Kvočka* Appeal Judgement: "proper notice may be inferred from an accused's understanding of the nature of the Prosecution case"; AT.7 February 2006, p. 24. See Imanishimwe Brief in Reply, paras. 57-62 and 67.
[329] Prosecution Response Brief, paras. 55-59. See Imanishimwe Brief in Reply, para. 61.
[330] AT. 7 February 2006, p. 24.
[331] Prosecution Response Brief, para. 60. The Prosecution refers to the following passages of the trial record: Witness LAC, T.10 October 2000, pp. 39-47 (closed session); Witness LAH, T.11 October 2000, pp. 75-98; Witness LAB, T.29 January 2001, pp. 25-76. See also AT.7 February 2006, p. 24. See Imanishimwe Brief in Reply, paras. 57-60 and 62.
[332] The Appeals Chamber considers that the excerpts of Witness LAH's cross-examination quoted by the Prosecution are not relevant in this instance, because the cross-examination in question was led by Counsel for Emmanuel Bagambiki.
[333] Prosecution Response Brief, para. 60. The Prosecution refers to Exhibit D-IS 02, presented on 10 October 2002.
[334] Prosecution Response Brief, para. 60. The Prosecution refers to the following passages: Witness PBA, T.5 November 2002, pp. 83-84, and T.6 November 2002, pp. 7-8; Witness PKA, T.15 October 2002, pp. 7-8.
[335] Prosecution Response Brief, para. 60.

these events, but simply in order to state that he had not participated in them;[336] and (2) that the testimony of Witnesses LAC, LAH and LAB was examined closely in Imanishimwe's Final Trial Brief.[337] The Appeals Chamber considers that these arguments do not advance the Prosecution case. Contrary to the purpose for which they are advanced, they end up convincing the Appeals Chamber that Imanishimwe was not informed that he had to defend himself against charges for responsibility as a superior for failure to prevent the massacre. It is, indeed, a matter of concern to note that Imanishimwe's whole strategy in relation to Gashirabwoba is essentially confined to proving that he was not present at the scene on 12 April 1994.

4. Conclusion

164. The Appeals Chamber considers that Imanishimwe's ability to prepare his defence in relation to the Gashirabwoba events was materially impaired. Aside from the fact that Imanishimwe was not provided with timely, clear and coherent information about the material facts underpinning the charges that the Prosecution intended to bring against him under Article 6 (3) of the Statute, the Appeals Chamber finds that Imanishimwe was entitled to infer from the post-indictment filings that the Prosecution had decided not to pursue the Gashirabwoba charges based on Article 6 (3) of the Statute. In the opinion of the Appeals Chamber, Imanishimwe was not informed that he had to defend himself against a charge alleging responsibility as a superior for the Gashirabwoba massacre. This set of circumstances rendered the proceedings unfair. Accordingly, the Appeals Chamber finds that the Trial Chamber could not enter a finding of guilt on the basis of Article 6 (3) of the Statute for the acts committed at the Gashirabwoba football field.

165. The Appeals Chamber allows this ground of appeal and sets aside the guilty verdict against Imanishimwe entered under Article 6 (3) of the Statute for the acts committed at the Gashirabwoba football field, that is, for genocide (Count 7 of the Bagambiki/Imanishimwe Indictment), for extermination as a crime against humanity (Count 10 of the Bagambiki/Imanishimwe Indictment) and for serious violations of the Common Article 3 to the Geneva Conventions and of Additional Protocol II (Count 13 of the Bagambiki/Imanishimwe Indictment). The impact, if any, of this decision on the sentence will be addressed later in this Judgement.

III. THE PROSECUTION'S APPEAL

A. STANDARD OF PROOF (5TH GROUND OF APPEAL)

1. The Application of the standard of proof

166. Under the fifth ground of appeal, the Prosecution submits that the Trial Chamber committed an error of law with respect to the application of the criminal standard of proof beyond a reasonable doubt. It contends that

> "instead of reserving the application of the criminal standard of proof for the determination of the ultimate issues of guilt or innocence in the case, the Trial Chamber applied it to the assessment of individual items of evidence presented at the trial, treated in isolation from one another".[338]

The Prosecution submits that it was not required to prove each and every individual circumstance alleged against the Accused beyond a reasonable doubt, but that the Trial Chamber should have considered the whole of the evidence in relation to each of the counts.[339] Referring to the jurisprudence

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[336] Prosecution Response Brief, para. 61, referring to Imanishimwe Opening Statement, T.2 October 2002, pp. 71-87.
[337] Prosecution Response Brief, para. 62, referring to Imanishimwe Final Trial Brief, pp. 769-865. See Imanishimwe Brief in Reply, para. 61.
[338] Prosecution Appeal Brief, para. 193.
[339] *Ibid*., para. 194.

of the ICTY, the Prosecution concedes that in order to establish the guilt of the accused it must prove the material facts beyond a reasonable doubt, but it argues that this does not apply to background facts. In the present case, the Prosecution reproaches the Trial Chamber with considering itself bound to establish also these background facts beyond a reasonable doubt.[340] In the view of the Prosecution, "the criminal standard of proof [beyond reasonable doubt] should only apply at the verdict stage, and not at the earlier fact-finding stage".[341] According to the Prosecution, this ground of appeal affects all the verdicts rendered against Ntagerura, Bagambiki and Imanishimwe.[342]

167. Bagambiki and Ntagerura maintain that the material elements of the crimes have to be proved beyond a reasonable doubt.[343] Imanishimwe argues that an indictment should not contain "general facts", which implies that each fact contained in an indictment has to be considered as an element of the crime, and therefore has to be proved by the Prosecution.[344] In fact, Imanishimwe submits, each contested element of the charges should be proved.[345]

168. In the understanding of the Appeals Chamber, the Prosecution raises two closely interlinked arguments to support this ground of appeal: first, the standard of proof beyond reasonable doubt should not, as the Trial Chamber did, be applied at the fact-finding stage of the trial, but rather to the "ultimate issues of guilt or innocence in the case";[346] and second, the Trial Chamber erroneously failed to consider the evidence as a whole, but applied the standard of proof beyond reasonable doubt to each individual piece of evidence.[347]

(a) Application of the Standard of Proof at the Fact-Finding Stage

169. As to the first argument, the Prosecution relies on a decision of the Supreme Court of Canada, *R. v. Morin*, to support its position that the standard of proof has to be applied at the verdict stage only, but not to the individual facts of the case.[348] However, this decision does not support the contention that the individual facts of the case do not have to be proven beyond a reasonable doubt:

> During the process of deliberation, the jury must consider the evidence as a whole and determine whether guilt is established by the prosecution beyond a reasonable doubt. *This of necessity requires that each element of the offence or issue be proved beyond a reasonable doubt*.[349]

In fact, Judge Sopinka, speaking for the majority, endorsed the conclusion in another case of the Supreme Court of Canada, *Nadeau v. The Queen*:

> The jurors cannot accept his [a 'Crown witness'] version, or any part of it, unless they are satisfied beyond all reasonable doubt, having regard to all the evidence, that the events took place in this manner; otherwise, the accused is entitled, *unless a fact has been established beyond a reasonable doubt*, to the finding of fact the most favourable to him, provided of course that it is based on evidence in the record and not mere speculation.[350]

In addition, the Appeals Chamber notes that some of the language used in *R. v. Morin*, which could be construed to support the Prosecution's position at first view, is due to the fact that the issue in

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[340] *Ibid*., paras. 221-222.
[341] *Ibid*., para. 198.
[342] Prosecution Notice of Appeal, para. 40.
[343] Bagambiki Response Brief, para. 188; Ntagerura Response Brief, para. 126; *cf*. Imanishimwe Response Brief, para. 80.
[344] Imanishimwe Response Brief, para. 83.
[345] *Ibid*., para. 80.
[346] Prosecution Appeal Brief, para. 193.
[347] *Ibid*., para. 218.
[348] *Ibid*., paras. 227-228.
[349] *R. v. Morin*, [1988] 2 S. C. R. 345 (emphasis added).
[350] *Nadeau v. The Queen*, [1984] 2 S.C.R. 570, at p. 571, *per* Judge Lamer (emphasis added).

R. v. Morin was the instruction given to the jury by the trial judge. When considering this case in the context of the Tribunal, it has to be borne in mind that here the trier of fact is not a jury, but a panel of professional judges. In the case of the jury, the one question which has to be answered is the question of guilty or not guilty, and the factual findings supporting this conclusion are neither spelled out nor can they be challenged by one of the parties. The instruction given to the jury concentrates on this "ultimate issue" of the case. In this Tribunal, on the other hand, Trial Chambers cannot restrict themselves to the ultimate issue of guilty or not guilty; they have an obligation pursuant to Article 22 (2) of the Statute, translated into Rule 88 (C) of the Rules, to give a reasoned opinion.[351]

170. The Appeals Chamber recalls that Article 20 (3) of the Statute provides that an accused shall be presumed innocent until proven guilty. This Article embodies a general principle of law, that the Prosecution bears the onus of establishing the guilt of the accused beyond reasonable doubt.[352] With respect to the Trial Chamber's Judgement, Rule 87 (A) of the Rules clearly states that a finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt. Although the Rules are silent as to whether the same standard applies at the fact-finding stage, and, if so, with respect to which facts, the ICTY Appeals Chamber has left no doubt that the standard of proof "beyond reasonable doubt" is not limited to the ultimate question of guilt:

> [T]he Prosecution argues that […] the evidence of Witness H '…forms nothing more than a constituent in the entire composition of evidence against the Appellant for count 1 [persecution].' The Appeals Chamber disagrees. The Prosecution's argument reflects the same misconception that the attack on Witness H's house was only evidence of persecution, not a material fact integral to the crime of persecution as identified in the preceding discussion on the defects in the Amended Indictment. The persecution conviction of Zoran and Mirjan Kupreškić hinged upon their participation in the attack on Witness H's house. The Prosecution's argument that the Trial Chamber was at liberty to employ anything other than the standard of proof beyond reasonable doubt in assessing Witness H's evidence implicating Zoran and Mirjan Kupreškić in that attack cannot be sustained.[353]

(b) Piecemeal approach to the evidence

171. To support its argument that the Trial Chamber erroneously adopted a piecemeal approach to the evidence, the Prosecution refers to the *Musema* Appeal Judgement. There, the Appeals Chamber endorsed the view of the ICTY Appeals Chamber in the *Tadić* Judgement on Allegations of Contempt:

> [A] tribunal of fact must never look at the evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of *all* the evidence in the case which must be considered. The evidence of one witness, when considered by itself, may appear at first to be of poor quality, but it may gain strength from other evidence in the case. The converse also holds true.[354]

172. In the Appeals chamber's view, the case law referred to by the Prosecution does not address the issue of the standard of proof applicable to any particular fact. The duty of the Trial Chamber to consider all the evidence does not relieve it from the duty to apply the required standard of proof to any particular fact.

173. The Prosecution quotes as one of the examples for the alleged error of law by applying the standard of proof to individual items of evidence the Trial Chamber's conclusions in paragraph 118 of

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[351] *Kordić and Čerkez* Appeal Judgement, para. 383.
[352] *Kayishema and Ruzindana* Appeal Judgement, para. 107.
[353] *Kupreškić et al*. Appeal Judgement, para. 226 (footnotes omitted).
[354] *Tadic* Judgement on Allegations of Contempt, para. 92, quoted by *Musema* Appeal Judgement, 134.

the Trial Judgement.[355] The Appeals Chamber notes that the Trial Chamber did not look at the testimony of the different witnesses in isolation, but considered it in the light of other evidence. It took into account the testimony of a Defence witness (Witness BLB), which created doubts as to the credibility of Witness LAH in general, and also that of Prosecution Witness NL, but found that it did not corroborate the testimony of Witness LAH. The Trial Chamber's approach clearly follows the principle enunciated in the *Tadic* Judgement on Allegations of Contempt. Only at the end of this analysis does the Trial Chamber apply the standard of proof and determine whether the fact in question was proved beyond a reasonable doubt.

174. It appears to the Appeals Chamber that the Prosecution's argument does not clearly distinguish between the different stages of the fact-finding process which a Trial Chamber undertakes before it can enter a conviction:

- At the first stage, the Trial Chamber has to assess the credibility of the relevant evidence presented. This cannot be undertaken by a piecemeal approach. Individual items of the evidence, such as the testimony of different witnesses, or documents admitted into evidence, have to be analysed in the light of the entire body of evidence adduced. Thus, even if there are some doubts as to the reliability of the testimony of a certain witness, that testimony may be corroborated by other pieces of evidence leading the Trial Chamber to conclude that the witness is credible. Or, on the other hand, a seemingly convincing testimony may be called into question by other evidence which shows that evidence to lack credibility.
- Only after the analysis of all the relevant evidence, can the Trial Chamber determine whether the evidence upon which the Prosecution relies should be accepted as establishing the existence of the facts alleged, notwithstanding the evidence upon which the Defence relies. At this fact-finding stage, the standard of proof beyond a reasonable doubt is applied to establish the facts forming the elements of the crime or the form of responsibility alleged against the accused, as well as with respect to the facts which are indispensable for entering a conviction.
- At the final stage, the Trial Chamber has to decide whether all of the constitutive elements of the crime and the form of responsibility alleged against the accused have been proven. Even if some of the material facts pleaded in the indictment are not established beyond reasonable doubt,[356] a Chamber might enter a conviction provided that having applied the law to those material facts it accepted beyond reasonable doubt, all the elements of the crime charged and of the mode of responsibility are established by those facts.

In light of the above analysis, the Appeals Chamber agrees with the Prosecution that "applying the criminal standard of proof piecemeal to individual items of evidence" would amount to an error.[357]

(c) Conclusion

175. The Appeals Chamber recalls that the presumption of innocence requires that each fact on which an accused's conviction is based must be proved beyond a reasonable doubt. The Appeals Chamber agrees with the Prosecution's argument that

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[355] Prosecution Appeal Brief, para. 193, fn. 257. Prosecution Witness LAH had testified that he had taken part in a meeting at the Bushenge market, where, according to the witness, Ntagerura had said that in a short time President Habyarimana would no longer be there, "and at that time, the fate of the Tutsi will be sealed". (See Trial Judgement, para. 114, referring to T.10 October 2000, pp. 63, 104, 109-110; T.11 October 2000, pp. 25, 26. The Trial Chamber found that the testimony of another Prosecution witness, Witness NL, did not corroborate Witness LAH's testimony. The Trial Chamber therefore concluded that it was not satisfied beyond a reasonable doubt that Ntagerura took part in the meeting (Judgement, para. 118).

[356] The Appeals Chamber considers that the "material facts" which have to be pleaded in the indictment to provide the accused with the information necessary to prepare his defence have to be distinguished from the facts which have to be proved beyond reasonable doubt.

[357] Prosecution Appeal Brief, para. 258.

"if facts which are essential to a finding of guilt are still doubtful, notwithstanding the support of other facts, this will produce a doubt in the mind of the Trial Chamber that guilt has been proven beyond a reasonable doubt".[358]

Thus, if one of the links is not proved beyond a reasonable doubt, the chain will not support a conviction.

2. Individual Instances of the alleged misapplication of the standard of proof

176. To support its position, the Prosecution identifies a number of instances where the Trial Chamber, in the Prosecution's view, incorrectly applied the standard of proof. The Appeals Chamber will examine each of these instances relied upon by the Prosecution to determine whether the treatment of the evidence reveals a factual error on the part of the Trial Chamber. In addition, the Prosecution refers to an annex to its Brief, containing tables to "illustrate [the Prosecution's] argument visually".[359] The Appeals Chamber accepts them as an illustration and, accordingly, declines to discuss in detail the individual facts contained in the tables.

(a) Bagambiki's Involvement in the Gashirabwoba massacre and the killing of refugees removed from Cyangugu Cathedral and Kamarampaka Stadium

177. The Prosecution submits that one example of the Trial Chamber's erroneous approach is its treatment of Bagambiki's role in the events related to the Gashirabwoba massacre and the murder of refugees removed from Cyangugu Cathedral and Kamarampaka Stadium.[360] The Prosecution argues that the majority of the Trial Chamber looked at these incidents in isolation, rather than viewing them in conjunction with one another, and with other evidence. Viewed this way, the Prosecution argues, they reveal a pattern, implicating Bagambiki unequivocally in the crimes.[361]

178. In response, Bagambiki argues that the Trial Chamber did recognize a pattern in the events, namely, that he tried to help and to protect the refugees.[362]

179. The Trial Chamber found that on 16 April 1997 Bagambiki, Imanishimwe and others selected 12 Tutsi from the refugees assembled at Kamarampaka Stadium, who were subsequently killed together with 4 other Tutsi refugees, who had been selected from Cyangugu Cathedral by the same authorities some time earlier.[363] The majority of the Trial Chamber found that it lacked sufficient evidence to conclude that Bagambiki participated in the killing of the 16 refugees.[364] In paragraph 437 of the Trial Judgement, the Trial Chamber found that on 12 April 1994 a large number of refugees had assembled at the Gashirabwoba football field. After they had been attacked in the morning, Bagambiki arrived and tried to reassure them and promised to send soldiers to protect them. An hour later, armed guards and soldiers surrounded the refugees and opened fire on them. The Trial Chamber found that it was not satisfied that Bagambiki participated in the attack.[365]

180. In both instances, the Trial Chamber relied on the evidence of a number of witnesses to support its findings. In the instance of the 16 refugees, there is no direct evidence that Bagambiki participated in their killing. The Prosecution argues that the Trial Chamber erroneously failed to draw

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[358] AT. 6 February 2006, p. 52.
[359] Prosecution Appeal Brief, para. 200.
[360] *Ibid*., para. 202.
[361] Idem.
[362] Bagambiki Response Brief, paras. 189-191.
[363] Trial Judgement, para. 337.
[364] Idem.
[365] *Ibid*., paras. 438-440.

the only reasonable inference from the circumstantial evidence.[366] This, however, is not a question of the alleged piecemeal approach to the evidence. Regarding the findings relating to the Gashirabwoba football field massacre, the Trial Chamber relied mainly on the evidence of one witness (Witness LAC), but rejected the testimony of Witnesses LAH and LAB. Although Witnesses LAH and LAB, the Trial Chamber reasoned, provided some measure of corroboration for their assertions that Bagambiki and Imanishimwe participated in the attack, their accounts contained inconsistencies and were incompatible with Witness LAC's testimony.[367] The reasoning of the Trial Chamber does not reveal an erroneous approach; on the contrary, the Trial Chamber analysed the entire body evidence without isolating any individual item.

181. Also, when viewing the two incidents in conjunction, a reasonable Trial Chamber could still arrive at the conclusion that Bagambiki's participation was not proved. The Trial Chamber's reasoning with respect to the killing of the 16 refugees and the Gashirabwoba football field massacre does not reveal an erroneous application of the standard of proof.

(b) Paragraphs 3.12 through 3.22 of the Bagambiki/Imanishimwe Indictment

182. The Prosecution submits that the Trial Chamber did not consider a number of paragraphs of the Bagambiki/Imanishimwe Indictment, because they were too vague or did not plead identifiable criminal conduct on the part of the Accused. In the Prosecution's view, the entire Indictment and all of the evidence should have been considered as a whole.[368]

183. The Appeals Chamber notes that most of the Prosecution's argument does not relate to the application of the standard of proof, but to the Trial Chamber's consideration of the Indictments, which has already been discussed in Section II (D) of this Judgement.[369]

184. With regard to paragraph 3.22 of the Bagambiki/Imanishimwe Indictment, the Prosecution submits that the Trial Chamber found that *gendarmes* guarded the Kamarampaka Stadium, curtailing the movement of the refugees who were staying there. It argues that the Trial Chamber again adopted "a piecemeal approach to the consideration of the evidence",[370] by finding that it lacked

> "sufficient reliable evidence to determine whether the restriction on the refugees' movement was principally to keep them incarcerated or to ensure their protection".[371]

The Prosecution argues that the Trial Chamber should have been considered all of the available evidence to "determine whether the presence of the *gendarmes* was benign or sinister".[372]

185. The Appeals Chamber notes that the Prosecution does not identify other evidence which would have allowed the Trial Chamber to draw more far-reaching conclusions on the culpability of the Accused. Bagambiki correctly points out that the Trial Chamber found, for instance, that *gendarmes* guarded the refugees who had assembled at the Cyangugu Cathedral and deterred two attacks on them on 11 April 1994, only a few days before the refugees were transferred to the Kamarampaka Stadium.[373] The Trial Chamber subsequently found that the refugees were transferred from the Kamarampaka Stadium to a camp at Nyarushishi. Both during the transfer and the stay at the camp the

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[366] Prosecution Appeal Brief, paras. 202 and 210. This argument is discussed below, in the context of the Prosecution's first ground of appeal; see below, paras. 302-328.
[367] Trial Judgement, para. 440.
[368] Prosecution Appeal Brief, para. 206.
[369] See *supra*, paras. 47-114.
[370] Prosecution Appeal Brief, para. 208.
[371] *Idem*, quoting Trial Judgement, para. 336.
[372] Prosecution Appeal Brief, para. 208.
[373] Bagambiki's Brief in Response, para. 198, referring to Trial Judgement, paras. 309 and 313.

refugees were guarded by gendarmes, who pushed back at least one attempted attack on the camp.[374] In the light of these findings, which are not contested by the Prosecution, the Appeals Chamber does not find any error in the Trial Chamber's application of the standard of proof.

(c) The execution of 16 Tutsi in Gataranda

186. The Prosecution challenges the Trial Chamber's conclusion in paragraph 337:

> "The Chamber lacks sufficient evidence to determine if the execution of the sixteen Tutsis occurred at Gataranda".[375]

In this passage, the Prosecutor submits,

> "there is clear misunderstanding of the role and function of the application of the ultimate burden of proof that is to be applied to the evidence as a whole to determine the *guilt* of the accused, not applied to each individual piece of evidence".[376]

187. The Appeals Chamber disagrees. The killing of 16 refugees is not an individual piece of evidence, but a material fact which had to be established in order to constitute a basis for conviction. As a material fact, it had to be proved beyond a reasonable doubt.

(d) Ntagerura's Participation in meetings

(i) Alleged refusal to consider evidence outside the temporal scope of the Indictment

188. The Prosecution submits that the Trial Chamber refused to consider the evidence related to a number of facts, only because these facts did not fall within the temporal scope of paragraphs 14.1, 14.3, 17, 18 and 19 of the Ntagerura Indictment.[377] The Prosecution argues that this evidence should have been taken into consideration, because it was relevant to understanding the evidence that did fall into the temporal scope of these paragraphs.[378]

189. The Appeals Chamber finds that the Prosecution misread the Trial Judgement. In paragraph 149 of the Trial Judgement, the Trial Chamber indeed noted that the facts the Prosecution is referring to "fall outside the temporal scope of paragraphs 14.1, 14.3, 17, 18 and 19".[379] However, in a footnote to this observation, the Trial Chamber stated that it had considered these facts in other parts of the Trial Judgement, and gave references to the relevant parts of the Trial Judgement.[380]

(ii) The Meeting at Bushenge Market, February 1993

190. The Prosecution goes on to challenge the Trial Chamber's considerations with respect to the very facts which it alleged only a few paragraphs earlier not to have been taken into consideration at all by the Trial Chamber. For example, the Prosecution takes issue with the Trial Chamber's conclusion regarding a meeting at Bushenge Market in February 1993.[381] The Trial Chamber had analysed the testimony of Witness LAN, who had testified that Ntagerura had addressed the gathering and had made statements about repulsing the "*Inkotanyi*" and "*Inyenzi*", terms which had been used,

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[374] Trial Judgement, paras. 609 and 611.
[375] Prosecution Appeal Brief, para. 209, quoting Trial Judgement, para. 337.
[376] Prosecution Appeal Brief, para. 209.
[377] *Ibid*., para. 212.
[378] Idem.
[379] Trial Judgement, para. 149.
[380] *Idem*, para. 220.
[381] Prosecution Appeal Brief, para. 213.

as the witness explained, to describe the entire Tutsi ethnic group.[382] The Trial Chamber found that it could not accept

> "the unsubstantiated interpretation proffered by Witness LAN, namely, that Ntagerura's words suggested a general and indiscriminate attack on Tutsi civilians".[383]

The Prosecution submits that this evidence might have been better assessed in the light of evidence of subsequent events and Ntagerura's involvement in them.[384]

191. The Appeals Chamber observes that the Trial Chamber relied on the testimony of Witnesses LAD, LAN and NG-1, and considered also the hearsay evidence of a Defence witness, Hope. The Trial Chamber compared their testimonies and came to the conclusion that, despite some differences between their accounts, their evidence was largely consistent.[385] This reasoning does not lend support to the Prosecution's view that the Trial Chamber employed a fragmented and "piecemeal" approach towards the evidence. The Prosecution does not identify the "evidence of subsequent events"[386] the Trial Chamber should have taken into consideration. The Appeals Chamber understands that the Prosecution refers to the allegations that Ntagerura participated in meetings at the Hotel Izure, Gatare and the Cyangugu *Préfecture* Office.[387]

(iii) Meetings at the Hotel Izure, Gatare and the Cyangugu *Préfecture* Office

192. Regarding the alleged meetings at the Hotel Izure, Gatare and the Cyangugu *Préfecture* Office, the Prosecution argues that the Trial Chamber's treatment of these allegations is a clear demonstration of the effect of the Trial Chamber's method of considering the individual pieces of evidence in isolation.[388] The Trial Chamber, the Prosecution submits, even used its incorrect application of the "ultimate burden of proof" as a reason for its further incorrect application in another instance.[389]

193. Ntagerura responds that the relevance of these meetings to the Prosecution's case was unclear. Either, he argues, the Prosecution tried to prove that Ntagerura instigated genocide during these meetings, or it tried to prove that Ntagerura had the *mens rea* with regard to genocide. In either case, Ntagerura submits, the meetings were material facts, which had to be proved beyond a reasonable doubt.[390]

194. With regard to the alleged meeting at the Hotel Izure, the Trial Chamber analysed the testimony of Witness LAI, the only witness testifying about this meeting, and concluded that his testimony was not credible.[391] Witness LAI was also the only witness who testified about the meetings in Gatare and the Cyangugu *Préfecture* Office; also in this instance, the Trial Chamber declined to accept his testimony.[392]

195. The Appeals Chamber finds that the Trial Chamber's assessment of the evidence regarding the three meetings does not reveal an erroneous application of the standard of proof. The Prosecution

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[382] Trial Judgement, paras. 103 and 97.
[383] Trial Judgement, para. 103.
[384] Prosecution Appeal Brief, para. 213.
[385] Trial Judgement, para. 102.
[386] Prosecution Appeal Brief, para. 213.
[387] *Ibid*., paras. 217 and 218.
[388] *Ibid*., para. 217.
[389] Idem.
[390] Ntagerura Response Brief, para. 128.
[391] Trial Judgement, para. 108.
[392] *Ibid*., para. 113. The Prosecution challenges also the Trial Chamber's conclusion as to Witness LAI's credibility; this issue will be addressed later. See below, paras. 198-209.

has not identified any other evidence supporting Ntagerura's presence at anyone of these three meetings. The Trial Chamber did not analyse Witness LAI's testimony with regard to each of the meetings in isolation; it rather found that it could not rely on the uncorroborated evidence of a witness whom it had found unreliable in other instances. In particular, the Prosecutions takes issue with the Trial Chamber's argument that it was not convinced of Ntagerura's participation in the Gatare meeting, because this meeting had been planned at the Hotel Izure meeting, where Ntagerura's presence had not been proved beyond a reasonable doubt.[393] Thus, the Prosecution argues, the Trial Chamber used one erroneous conclusion as a reason for another erroneous conclusion.[394] The Appeals Chamber finds that, given the fact that Witness LAI was the only witness to testify about both events, this approach was not unreasonable. Moreover, the Trial Chamber did exactly what, in the Prosecution's view, it failed to do in other instances: it analysed the evidence relevant to one fact in the light of the evidence relevant to other facts. The Prosecution may not be satisfied with the result of this analysis; but this cannot form the basis of a successful appeal.

(iv) Considering the entire body of evidence related to the meetings

196. The Prosecution submits repeatedly that the Trial Chamber should have analysed the evidence in a cumulative way, that is, by taking into account the whole of the Prosecution's case.[395] However, the Appeals Chamber recalls its earlier observation that a factual allegation which is not supported by sufficient evidence cannot be used to support the finding of another fact, for which there is equally insufficient evidence. This applies in particular to Ntagerura's alleged participation in the meetings at Hotel Izure, Gatare and the Cyangugu *Préfecture* Office: a witness, who is found not to be credible with respect to one fact, does not become more reliable because he gives equally doubtful evidence about another related fact.

3. Conclusion

197. The Appeals Chamber rejects the Prosecution's argument that the Trial Chamber made an erroneous application of the standard of proof. Moreover, the Prosecution has not shown that the Trial Chamber employed a "piecemeal" approach to the evidence, analysing individual items of evidence in isolation from each other. Accordingly, this ground of appeal is dismissed.

B. ASSESSMENT OF ACCOMPLICE EVIDENCE (6TH GROUND OF APPEAL)

198. Under the sixth ground of appeal, the Prosecution submits that the Trial Chamber erred in law in its approach to accomplice evidence. This error, the Prosecution argues, affected the Trial Chamber's assessment of the testimony of Witnesses LAP, LAI, LAJ, LAH, LAB, LAK and LAM. According to the Prosecution, this ground of appeal affects all the verdicts rendered against Ntagerura, Bagambiki and Imanishimwe.[396] The Prosecution advances four sub-grounds under this ground:

(1) The Trial Chamber applied an incorrect legal test to accomplice evidence;[397]
(2) The Trial Chamber failed to consider evidence in corroboration of the accomplice evidence;[398]
(3) The Trial Chamber did not apply the same caution to accomplice evidence presented by the Defence;[399] and

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[393] Prosecution Appeal Brief, para. 217, referring to Trial Judgement, para. 113.
[394] Prosecution Appeal Brief, para. 217.
[395] See, e. g., Prosecution Appeal Brief, paras. 211, 218.
[396] Prosecution Notice of Appeal, para. 44.
[397] Prosecution Appeal Brief, paras. 265-287.
[398] *Ibid*., paras. 288-301.
[399] *Ibid*., paras. 302-313.

(4) The Trial Chamber did not allow the Prosecution to cross-examine Defence witnesses about their role as accomplices.[400]

1. The legal standard applied by the Trial Chamber

199. The Prosecution submits that the Trial Chamber erred in law in presuming that accomplice evidence necessarily had to be viewed with caution, without a closer analysis of the witness' credibility.[401] In fact, the Prosecution argues, the Trial Chamber did not accept the evidence of any of the seven alleged "accomplice witnesses", showing that the Trial Chamber's approach of "automatic suspicion" towards the accomplice witnesses led to a "wholesale dismissal of their evidence".[402]

200. In response, Bagambiki, Imanishimwe and Ntagerura assert that the Trial Chamber's approach was correct. Imanishimwe argues that the Trial Chamber analysed the evidence of the accomplice witnesses before arriving at the conclusion that the witnesses were not credible.[403] Bagambiki adds that the Trial Chamber did not reject the evidence only because it was accomplice evidence.[404] Bagambiki, Imanishimwe and Ntagerura point to the fact that the witnesses in question were detained in the Cyangugu prison and confessed that they participated in crimes in 1994.[405] Ntagerura points out that all of them were awaiting sentence from the Rwandan courts and had an evident interest in giving evidence implicating "[former Rwandan authorities]" in the crimes.[406]

201. The Prosecution replies that the Trial Chamber, by automatically applying "caution" to the testimony, chose a wrong starting point in its assessment, thus tainting its analysis.[407] The argument that the witnesses were motivated by self-serving interests is dismissed by the Prosecution as "unfounded conjecture",[408] adding that it was denied by the witnesses in question.[409]

202. The Appeals Chamber notes that the Prosecution mainly takes issue with the formula employed by the Trial Chamber when assessing the evidence of the seven witnesses in question: "[t]he Chamber notes that Witnesses […] are alleged accomplices of the accused and, as such, views their testimonies with caution."[410]

203. In the *Niyitegeka* Appeal Judgement, the Appeals Chamber stated that the ordinary meaning of the term "accomplice" is "an association in guilt, a partner in crime".[411] In its analysis of the applicable jurisprudence, the Prosecution points to the *Čelebići* and the *Kordić and Čerkez* cases of the ICTY. In both cases, the Prosecution submits, the Trial Chamber believed the evidence of witnesses notwithstanding the fact that they could be qualified as accomplices of the accused.[412] However, the Appeals Chambers notes that in both cases the Trial Chamber did not accept the testimony without caution. In *Čelebići,* the Trial Chamber noted that it had "critically analysed the evidence" of the witness in question,[413] and in *Kordić and Čerkez*, the Trial Chamber observed that "[i]n common law

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[400] Prosecution Notice of Appeal, para. 45; Prosecution Appeal Brief, paras. 314-320.
[401] Prosecution Appeal Brief, paras. 259-260.
[402] *Ibid*., para. 265.
[403] Imanishimwe Response Brief, para. 94.
[404] Bagambiki Response Brief, paras. 207 and 242; see also Ntagerura Response Brief, para. 150.
[405] Bagambiki Response Brief, para. 237; Imanishimwe Response Brief, para. 95; Ntagerura Response Brief, para. 151.
[406] Ntagerura Response Brief, para. 151; see also Imanishimwe Response Brief, para. 96.
[407] Prosecution Brief in Reply, para. 58.
[408] *Ibid*., para. 54.
[409] *Ibid*., para. 54.
[410] Trial Judgement, para. 92. This formula is repeated, almost *verbatim*, in paras. 95, 108, 131, 135, 141, 174, 176, 216, 321, 403, 438, 484, 540 and 587.
[411] *Niyitegeka* Appeal Judgement, para. 98.
[412] Prosecution Appeal Brief, paras. 270-273, quoting *Čelebići* Trial Judgement, para. 759 and 762, and *Kordić and Čerkez* Trial Judgement, paras. 628-629.
[413] *Čelebići* Trial Judgement, para. 761.

jurisdictions the evidence of Witness AT would be regarded as that of an accomplice and would be treated *with great caution*".[414] With regard to this witness, Dario Kordić argued on appeal that the Trial Chamber should have required corroboration of his testimony. The ICTY Appeals Chamber rejected this argument, holding that a Trial Chamber may convict an accused on the basis of the testimony of a single witness, "although such evidence must be assessed *with the appropriate caution*, and care must be taken to guard against the exercise of an underlying motive on the part of the witness".[415]

204. The Trial Chambers of this Tribunal employ the same cautionary approach when assessing the evidence given by accomplice witnesses. In *Niyitegeka*, the Trial Chamber noted with respect to the testimony of alleged accomplices "that it has exercised caution in its deliberations on such evidence",[416] and observed later that the evidence of accomplice witnesses "is subject to special caution".[417] On appeal, the Appeals Chamber held that accomplice evidence is not *per se* unreliable, especially where an accomplice may be thoroughly cross-examined. The Appeals Chamber stated, however, that considering that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal, a Chamber, when weighing the probative value of such evidence, is bound to *carefully* consider the totality of the circumstances in which it was tendered.[418]

205. The Appeals Chamber finds that, contrary to the Prosecution's arguments, nothing in the jurisprudence of both this Tribunal and the ICTY suggest that the adoption of a cautious approach by a Trial Chamber when assessing accomplice evidence is erroneous. The Appeals Chamber further disagrees with the Prosecution's argument that such approach is inconsistent with the fact that national rules requiring corroboration of accomplice evidence have been abolished.[419] Even if national rules do not require corroboration of accomplice evidence, they certainly do not prevent the trial judge from exercising caution when analysing this type of evidence. Accordingly, the Appeals Chamber dismisses the argument that the Trial Chamber applied an incorrect legal test to accomplice evidence.

206. An analysis of the above-mentioned jurisprudence demonstrates that in assessing the reliability of accomplice evidence the Trial Chamber must consider whether the particular witness has a specific motive to testify as it did and to lie.[420] A reading of the Trial Judgement shows that the Trial Chamber merely stated that the witnesses in question were "alleged accomplices", without elaborating on the nature of this alleged complicity or analysing whether any of these witnesses had a personal motive to give false testimony. However, the fact that the Trial Chamber did not specifically refer to such motives does not mean that it failed to take them into consideration. The Appeals Chamber notes that a Trial Chamber is not obliged to justify every step in its reasoning. In particular, it is within the discretion of the Trial Chamber to evaluate the evidence and to consider whether the evidence as a whole is credible, without explaining its decision in every detail.[421]

207. During the Appeals hearing, Counsel for the Prosecution cited as an example of the alleged error the Trial Chamber's conclusions regarding an event that occurred on 20 January 1994, when Ntagerura allegedly went in a helicopter to Bugarama or Bigogwe to distribute weapons there. The Prosecution submits that the Trial Chamber dismissed the evidence about Ntagerura's presence only because it was given by accomplice witnesses.[422]

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[414] *Kordić and Čerkez* Trial Judgement, para. 628 (emphasis added).
[415] *Ibid*., para. 274 (emphasis added).
[416] *Niyitegeka* Trial Judgement, para. 48.
[417] *Ibid*., para. 73.
[418] *Niyitegeka* Appeal Judgement, para. 98 (emphasis added). See also *Kajelijeli* Appeal Judgement, para. 18, where the Appeals Chamber approved of the Trial Chamber's decision to treat the testimony of a witness who was allegedly biased against the accused with "caution".
[419] Prosecution Appeal Brief, para. 281.
[420] *Čelebići* Trial Judgement, paras. 759, 762; *Kordić and Čerkez* Trial Judgement, para. 630.
[421] *Kvočka et al*. Appeal Judgement, para. 23.
[422] AT. 6 February 2006, pp. 12-13.

208. The Appeals Chamber notes that the Trial Chamber dedicated two entire paragraphs to a careful discussion of the evidence of the three witnesses in question, Witnesses LAI, LAJ and LAP. It noted the contradiction between their account and the testimony of Witness Gratien Kabiligi,[423] and went on to discuss discrepancies between Witness LAJ's testimony and his earlier statement, which it found to be irreconcilable.[424] Only after this analysis did the Trial Chamber "recall" that Witnesses LAI, LAJ and LAP were "alleged accomplices" and that their testimony therefore had to be viewed with caution.[425] Hence, the Appeals Chamber does not agree with the Prosecution that this discussion of Witness LAI's, LAJ's and LAP's credibility "did not proceed along fair lines".[426]

209. In addition, the Appeals Chamber notes that the Prosecution misrepresented the Trial Chamber's reasoning. Instead of "finding" that Witness LAI, LAJ and LAP fabricated their evidence, as the Prosecution characterized the Trial Chamber's conclusion,[427] the Trial Chamber "acknowledged" the possibility "that the testimonies […] about this event *may* have been fabricated"[428] and concluded that

> "the Prosecution failed to prove Ntagerura's participation in these events beyond a reasonable doubt".[429]

The Prosecution has not shown that this conclusion was not open to a reasonable trier of fact.

210. As a second example of the alleged error, the Prosecution cited the Trial Chamber's conclusion with regard to Witnesses BLB and JNQ and the letter purportedly written by Witness LAP.[430] This issue is discussed in detail below, when examining the Prosecution's eighth ground of appeal.[431]

2. Corroborated accomplice evidence

211. As its second sub-ground of appeal, the Prosecution submits that the Trial Chamber erred in failing to consider evidence corroborating the accomplice evidence.[432] The Prosecution submits that the Trial Chamber required every part of the accomplice evidence to be corroborated by other evidence, without considering whether it could rely also on the uncorroborated parts of the accomplice evidence.[433] The Prosecution argues that once a "suspect witness" is shown to be telling the truth on a number of issues, even if these issues do not implicate the accused, a tribunal of fact may have confidence also in the uncorroborated parts of this witness' testimony.[434]

212. Bagambiki responds that a Trial Chamber may reject the whole testimony of a witness once it found that his credibility was damaged, and that it is within the discretion of a Trial Chamber to accept accomplice evidence only when it is corroborated.[435] Ntagerura adds that the Trial Chamber was not obliged to mention all the corroborative evidence it found unconvincing.[436]

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[423] The Prosecution also takes issue with the Trial Chamber's approach to the evidence given by Kabiligi. This issue is discussed below, paras. 239-244.
[424] Trial Judgement, paras. 129-130.
[425] *Ibid*., para. 131.
[426] AT. 6 February 2006, p. 12.
[427] *Ibid*., p. 13.
[428] Trial Judgement, para. 131 (emphasis added).
[429] *Ibid*., para. 132.
[430] AT. 6 February 2006, p. 14.
[431] See below, paras. 265-268.
[432] Prosecution Appeal Brief, para. 288.
[433] *Ibid*., para. 292.
[434] *Ibid*., para. 289.
[435] Bagambiki Response Brief, paras. 246 and 247.
[436] Ntagerura Response Brief, para. 166.

213. The Appeals Chamber will analyse in turn the instances cited by the Prosecution as examples of the "problematic approach" adopted by the Trial Chamber.[437] But first, the Appeals Chamber deems it appropriate to recall that it will not lightly overturn findings of fact made by a Trial Chamber. The Appeals Chamber will give deference to the Trial Chamber that heard the evidence at trial as it is best placed to assess the evidence, including the demeanour of the witnesses. The Appeals Chamber will only interfere in those findings which no reasonable trier of fact could have reached or which are wholly erroneous. Moreover, if the finding of fact is erroneous, it will be quashed or revised only if the error occasioned a miscarriage of justice.[438]

214. In addition, the Appeals Chamber recalls that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony.[439] Even if some parts of a witness's testimony are corroborated by other evidence, a Trial Chamber is not bound to accept the whole of the testimony.

(a) Gashirabwoba Football Field

215. With respect to the attack at Gashirabwoba football field, the Prosecution submits that the Trial Chamber rejected the testimony of Witnesses LAB and LAH, despite the fact that their testimony was largely corroborated by the evidence given by Witness LAC, whose testimony was accepted by the Trial Chamber. The Prosecution claims that the only inconsistency between the different accounts was the date of the attack, but this should not have been a significant factor.[440]

216. The Appeals Chamber notes that one of the Trial Chamber's reasons for rejecting Witness LAB's evidence was the fact that it "materially conflicts with other evidence on record".[441] The main contradiction identified by the Trial Chamber concerns the issue whether Bagambiki was present during the attack on the refugees. According to Witness LAC, on the morning of 12 April 1994, a large number of people started attacking the refugees at the Gashirabwoba football field. During this attack, Bagambiki arrived, accompanied by another person, and asked the refugees to explain the situation. Bagambiki then promised to send soldiers to protect the refugees. One hour later, soldiers and armed guards arrived, but, instead of protecting the refugees, attacked them.[442] Witnesses LAH and LAB, on the other hand, testified that Bagambiki and Imanishimwe were present during the attack and organized it.[443]

217. The Appeals Chamber finds that it was not unreasonable for the Trial Chamber to reject Witness LAH's and LAB's evidence about the Gashirabwoba massacre. Even if some details of their testimony were corroborated by Witness LAC's testimony, there was a clear contradiction as to whether Bagambiki and Imanishimwe were present. Witness LAC clearly stated that Bagambiki left after he had promised to send soldiers to protect the refugees, and did not mention the presence of Imanishimwe during the attack at all.[444] Witnesses LAH and LAB both testified that Bagambiki was present when the soldiers arrived and the massacre began.[445] The Trial Chamber had to decide between

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[437] Prosecution Appeal Brief, paras. 293-299.
[438] *Semanza* Appeal Judgement, para. 8; see also *Niyitegeka* Appeal Judgement, para. 8; *Krstić* Appeal Judgement, para. 40; *Krnojelac* Appeal Judgement, paras. 11-13, 39; *Tadić* Appeal Judgement, para. 64; *Aleksovski* Appeal Judgement, para. 63; *Vasiljević* Appeal Judgement, para. 8.
[439] *Ntakirutimana* Appeal Judgement, para. 215; *Kamuhanda* Appeal Judgement, para. 248; *Kupreškić et al*. Appeal Judgement, para. 333.
[440] Prosecution Appeal Brief, para. 294.
[441] Trial Judgement, para. 439.
[442] *Ibid*., paras. 417-418.
[443] *Ibid*., paras. 423 (Witness LAH) and 426 (Witness LAB).
[444] Witness LAC, T.9 October 2000, pp. 35-36. According to Witness LAC, Bagambiki was accompanied by Callixte Nsabimana, the manager of the Shagasha Tea Factory.
[445] Witness LAB, T.24 January 2001, pp. 10-12; T.29 January 2001, pp. 53-55, Witness LAH, T.10 October 2000, pp. 85-86, T.11 October 2000, pp. 87-90.

these two accounts; the Prosecution has not shown that it was unreasonable to accept that of Witness LAC.

(b) Shangi Parish

218. The Prosecution submits that the Trial Chamber erroneously disregarded Witness LAK's testimony about the events at Shangi Parish. The Prosecution argues that Witness LAK testified to the very same facts that were accepted by the Trial Chamber, but that the Trial Chamber did not even mention this circumstance. Rather, the Prosecution argues, the Trial Chamber concentrated on those parts of his testimony which were not corroborated, and rejected the whole of it.[446]

219. The Trial Chamber summarized Witness LAK's testimony comprehensively.[447] In its analysis of his testimony, the Trial Chamber stated that it viewed his testimony with suspicion, because he testified that he saw Ntagerura delivering weapons and addressing a crowd between 20 and 25 December 1993, whereas the Trial Chamber found that Ntagerura had been on a mission to Cameroon at that time.[448] The Trial Chamber noted that no other witness had mentioned Bagambiki or Imanishimwe distributing weapons at the Shangi roadblock, and that no other witness had corroborated Witness LAK's testimony about this roadblock.[449]

220. Witness LAK had testified that a roadblock had been set up on the orders of communal authorities near a small shop belonging to a certain Bonaventure Harerimana where Witness LAK worked three days a week. According to Witness LAK, any Tutsi who tried to pass this roadblock was killed.[450] Witness LAK further claimed that Bagambiki and Imanishimwe came to the roadblock and distributed weapons there on 9 April 1994.[451] Witnesses PCG and PCF, on the other hand, testified that there was no roadblock in front of Bonaventure Harerimana's shop. The first roadblock, according to them, was located about one kilometre away.[452] Witness PCG, who had been manning this roadblock, testified that the roadblock was never visited by any official, and that no weapons were distributed there.[453] In addition, Witness PCF testified that he had been drinking beer at the relevant time on 9 April 1994 at Harerimana's shop and did not notice any distribution of weapons.[454]

221. The Appeals Chamber finds that there are clear contradictions between Witness LAK's testimony and the evidence given by Witnesses PCF and PCG as to the Shangi roadblock and Bagambiki's and Imanishimwe's alleged visit to it. As such, a reasonable trier of fact could conclude that Witness LAK's testimony was unreliable in this respect, even if his evidence about other events at Shangi Parish was corroborated by other witnesses.

(c) Mibilizi Parish

222. Another instance which is, in the Prosecution's view, "revealing" of the consequences of the Trial Chamber's approach, is its treatment of Witness LAJ's evidence in relation to the attack at Mibilizi Parish. Although, the Prosecution argues, Witness LAJ's evidence about the attack was amply

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[446] Prosecution Appeal Brief, para. 297, T.6 February 2006, pp. 21-26.
[447] Trial Judgement, paras. 443-448.
[448] Trial Judgement, para. 484. The Trial Judgement reads "December 1994". From the references given by the Trial Chamber it becomes clear that this is a clerical error; *cf. CRA du 19 janvier 2001*, pp. 58-59.
[449] Trial Judgement, para. 485.
[450] Trial Judgement, para. 443; Witness LAK, T.18 November 2001, pp. 96-97 and 102.
[451] *Ibid*., para. 444; Witness LAK, T.18 November 2001, pp. 116-117.
[452] *Ibid*., paras. 475-476; Witness PCG, T.23 October 2002, pp. 2-3; Witness PCF, T.21 October 2002, p. 52.
[453] *Ibid*., para. 475; Witness PCG, T.23 October 2002, pp. 7-8.
[454] *Ibid*., para. 476; Witness PCF, T.21 October 2002, pp. 56-57.

corroborated by Witnesses MM, MP and Théodore Munyangabe, the Trial Chamber disregarded his evidence completely.[455]

223. The Appeals Chamber finds that the Prosecution's contention that Witness LAJ's testimony about the attack on Mibilizi Parish was corroborated by Witnesses MM, MP and Théodore Munyangabe is not supported by the record.[456] The Trial Chamber noted that Witness LAJ's account was "often internally inconsistent and conflict[ed] with other reliable and credible evidence on the record".[457] For example, the Trial Chamber explained, Witness LAJ testified that on 20 April 1994, he participated in a large-scale attack on the parish, and that later that day Munyakazi and his *Interahamwe* attacked. Later, the Trial Chamber noted, Witness LAJ denied that he had taken part in an attack on 20 April 1994, and the evidence on record indicated that Munyakazi attacked the parish on 30 April.[458] In addition, the Trial Chamber noted that Bagambiki and Imanishimwe had taken part in a prefectural security council meeting on 18 April 1994, thus undermining Witness LAJ's claim that he met them on the same day at the Hotel Ituze and received grenades and money from them.[459] The Appeals Chamber finds that the Prosecution has not shown that this conclusion was unreasonable.

(d) Nyamasheke Parish

224. Likewise, the Prosecution submits, the Trial Chamber disregarded the evidence of Witness LAM in relation to the events at Nyamasheke Parish, although it was corroborated in numerous instances by the evidence of Witnesses LBI and LAY.[460]

225. The Trial Chamber rejected Witness LAM's evidence about the events at Nyamasheke Parish "because it contradicts other evidence on the record and is not credible or reliable".[461] As an example of such contradictions, the Trial Chamber noted differences between Witness LAM's account of Bagambiki's arrival at the parish and that of Witnesses LAY and LBI: Witness LAM had testified that, after a gendarme had shot three *Interahamwe*, the attackers retreated and removed their dead; likewise, the *gendarmes* moved away. According to Witness LAM, Bagambiki arrived at a later time and met the witness at the communal office.[462] The Trial Chamber noted that Witnesses LAY and LBI, on the other hand, had testified that Bagambiki came to the parish and found on his arrival the attackers as well as the dead *Interahamwe* still there.[463] In addition, the Trial Chamber found it "highly doubtful" if Bagambiki and Imanishimwe could, as Witness LAM had testified, distribute weapons on the afternoon of 15 April 1994, because the Trial Chamber found that they were involved with church authorities in transferring the refugees from Cyangugu Cathedral to Kamarampaka Stadium.[464]

226. A close review of the trial record reveals that the Trial Chamber's reasoning with regard to Witness LAM's testimony is not correct: Witness LBI, in fact, also testified that the attackers left after three of them had been killed, and from Witness LBI's testimony it is not clear whether Bagambiki came first to the parish or to the communal office.[465] Witness LBI's testimony is not inconsistent with Witness LAM's in this respect. On the other hand, a reasonable tribunal of fact could conclude from

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[455] Prosecution Appeal Brief, para. 298.
[456] Witness LAJ, T.23 October 2000, pp. 90-112; Witness MM, T.12 October 2000, pp. 31-109; Witness MP, T.12 October 2000, pp. 127-164; Théodore Munyangabe, T.24 March 2003, pp. 22-34 and T.25 March 2003, pp. 3-11.
[457] Trial Judgement, para. 540.
[458] *Idem*. The evidence that Munyakazi attacked on the 30th was provided by Prosecution Witnesses MM (T.12 October 2000, p. 63) and MP (T.12 October 2000, p. 147).
[459] Trial Judgement, para. 540; *cf*. Witness LAJ, T.23 October 2000, pp. 93-98.
[460] Prosecution Appeal Brief, para. 299.
[461] Trial Judgement, para. 587.
[462] Witness LAM, T.2 November 2000, pp. 20-21.
[463] Trial Judgement, para. 587; Witness LAY, T.26 October 2000, p. 117.
[464] *Ibid*., para. 588; *cf*. Witness LAM, T.20 November 2000, pp. 33-34.
[465] Witness LBI, T.25 October 2000, p. 61: "After the death of the three people the attack came to an end. The attackers left …" See also Witness LBI, T.25 October 2000, p. 62.

Witness LAY's testimony that the attackers and the gendarmes were still present when Bagambiki arrived at the parish[466] and thus find that Witness LAM's testimony was contradicted.

227. The Prosecution has not challenged the Trial Chamber's finding about Bagambiki's and Imanishimwe's activities on the afternoon of 15 April 1994 nor has it offered any explanation as to the contradictions between the accounts of Bagambiki's arrival at Nyamasheke Parish. Given the improbability of Bagambiki's and Imanishimwe's presence in this area on the afternoon of 15 April 1994, and Witness LAM's rather confused account of their participation in the distribution of weapons and the subsequent attack,[467] the erroneous interpretation of Witness LBI's testimony does not amount to a miscarriage of justice. The Appeals Chamber finds that, even if some aspects of Witness LAM's evidence in relation to the events at Nyamasheke Parish were consistent with other evidence, a reasonable trier of fact could still arrive at the conclusion that his evidence as to Bagambiki's and Imanishimwe's participation in the attack was unreliable.

(e) Kamarampaka Stadium

228. During the Appeal hearing, the Prosecution cited as another example Witness LAP's evidence about the events at Kamarampaka Stadium. Witness LAP's evidence that Bagambiki ordered the refugees removed from the stadium on 16 April 1994 to be killed was rejected, the Prosecution submits, although it was largely corroborated by other witnesses.[468]

229. As the Prosecution acknowledges, the Trial Chamber "named many reasons for rejecting the testimony of [Witness] LAP".[469] In fact, the Trial Chamber devoted two entire paragraphs to an extensive discussion of the contradictions between Witness LAP's testimony and other evidence on the record, and to the inconsistencies between his testimony before the Trial Chamber and his earlier statements.[470] Most of these contradictions and inconsistencies related precisely to the uncorroborated part of Witness LAP's testimony about Bagambiki's direct participation in the killing of the refugees. The Appeals Chamber finds that, given these contradictions, it was only reasonable for the Trial Chamber to disregard the fact that this witness' testimony was corroborated in some – not all – other aspects by other evidence.

3. Alleged failure to apply caution to Defence accomplice testimony

230. The Prosecution submits that the Trial Chamber aggravated its erroneous treatment of the Prosecution's accomplice witnesses by not applying the same caution to accomplice witnesses testifying for the Defence. The Prosecution enumerates four Defence witnesses (Augustin Ndindiliyimana, Witness BLB, Gratien Kabiligi and Sub-Prefect Théodore Munyangabe) who, in its view, ought to have been characterized as accomplice witnesses. In fact, the Prosecution submits, none of these witnesses were even identified as possible accomplices in the Trial Judgement.[471]

(a) Augustin Ndindiliyimana

231. Augustin Ndindiliyimana, the Prosecution submits, admitted that he was facing charges of genocide and crimes against humanity before the Tribunal, and that he and Bagambiki had served under the same Government in Rwanda in 1994. In addition, the Prosecution submits, Augustin

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[466] Witness LAY, T.26 October 2000, p. 117: "After the arrival of the Prefect and his delegation, the assailants retreated."
[467] Witness LAM, T.2 November 2000, pp. 26-32.
[468] AT.6 February 2006, pp. 25-27.
[469] AT.6 February 2006, p. 25.
[470] Trial Judgement, paras. 321-322.
[471] Prosecution Appeal Brief, paras. 302-303.

Ndindiliyimana expressed the clear wish that Bagambiki should be acquitted.[472] The Prosecution argues that Augustin Ndindiliyimana was charged with crimes committed by his troops in Cyangugu and was clearly exculpating himself and Bagambiki from any criminal responsibility.[473]

232. The Appeals Chamber notes that the Prosecution gives no details about the charges Augustin Ndindiliyimana is facing before the Tribunal, and that it does not contest Bagambiki's argument that these charges are based on different criminal acts than the charges against the Accused in the present case.[474] The Appeals Chamber will therefore first determine whether Ndindiliyimana can be qualified as an accomplice of Bagambiki in the ordinary meaning of this term.

233. In *Niyitegeka*, the Defence submitted that one of the witnesses, Witness KJ, was an accomplice and that the Trial Chamber should treat his evidence with suspicion.[475] The Trial Chamber, addressing this submission, noted that, although the witness was detained in a Rwandan military camp, he had not been charged with any crime. The Trial Chamber further stated:

> "Moreover, no evidence has been adduced of criminal involvement on his part in the events giving rise to the charges faced by the Accused".[476]

Thus, the Trial Chamber concluded, the witness was not an accomplice whose uncorroborated testimony was subject to special caution.[477] On appeal, the Appeals Chamber endorsed the Trial Chamber's conclusion.[478] Reviewing the jurisprudence cited in the first section of this chapter,[479] the Appeals Chamber finds that it exclusively relates to accomplices in the "ordinary meaning" of the term. In *Čelebići*, the witness whom the Trial Chamber considered an accomplice was employed in the same prison camp as the accused and participated in the offences against the detainees.[480] In *Kordić and Čerkez*, the witness was convicted by the ICTY for his participation in one attack with which the accused was also charged.[481]

234. The Appeals Chamber recalls that the reason for applying "caution" to the testimony of accomplice evidence is that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal.[482] Obviously, these motives or incentives are much stronger when the witness is charged with the same criminal acts as the accused. It may be necessary, depending on the circumstances of the case, also to employ a critical approach towards witnesses who are merely charged with crimes of a similar nature. But in most cases, they will not have the same tangible motives for giving false evidence like a witness who was allegedly involved in the same criminal acts as the accused. Therefore, as long as no special circumstances have been identified, it is reasonable not to employ the same cautious approach towards the testimony of witnesses charged with similar crimes as to the testimony of accomplices in the ordinary sense of the word.

235. As the Appeals Chamber has already noted, the Trial Chamber provided no details as to the involvement of the Prosecution "accomplice witnesses". However, the Prosecution does not challenge Bagambiki's contention that they are charged for their participation in the same acts with which the Accused were charged.[483] In fact, Witnesses LAB and LAH testified that they took part in the attack at

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[472] *Ibid*., para. 304.
[473] *Ibid*., para. 306.
[474] Bagambiki Response Brief, para. 257.
[475] *Niyitegeka* Trial Judgement, para. 72.
[476] *Ibid*., para. 73.
[477] *Niyitegeka* Trial Judgement, para. 73.
[478] *Niyitegeka* Appeal Judgement, para. 105.
[479] See *supra*, paras. 203-204.
[480] *Čelebići* Trial Judgement, para. 759.
[481] *Kordić and Čerkez* Trial Judgement, para. 627.
[482] *Niyitegeka* Appeal Judgement, para. 98; see *supra*, para. 204.
[483] Bagambiki Response Brief, paras. 255-256.

the Gashirabwoba football field.[484] Witness LAK, despite stating that he did not commit any crimes, is detained in Cyangugu prison because of his involvement in the events at Shangi.[485] Witness LAJ testified that he led the attack at Mibilizi Parish;[486] Witness LAM testified that he participated in the attacks at Nyamasheke Parish,[487] Witness LAP testified that he took part in the killing of Tutsi brought to the Gatandara roadblock by Bagambiki and Imanishimwe,[488] and Witness LAI testified that he took part in several attacks in the Cyangugu *préfecture*, including the attack at Mibilizi Parish.[489] Thus, the Prosecution's "accomplice witnesses" were in fact accomplices to the very crimes with which Bagambiki, Imanishimwe and Ntagerura are charged.

236. The Appeals Chamber considers that the broad assertion that Augustin Ndindiliyimana "is charged with crimes committed by his troops in Cyangugu"[490] does not justify his qualification as an accomplice in the ordinary sense of the word, that is, as "a partner in crime".[491] In fact, the indictment in his case contains only a very general reference to events in Cyangugu.[492] There is no specific relation between Augustin Ndindiliyimana and these events in Cyangugu, apart from the fact that he was at the relevant period chief of staff of the *Gendarmerie nationale*.[493] The Appeals Chamber finds therefore that the Trial Chamber did not err in not adopting the same cautionary approach to Augustin Ndindiliyimana's testimony as to the testimony of witnesses who were directly participating in the crimes with which the Accused are charged.

237. In addition, the Appeals Chamber notes that the Trial Chamber referred only two times to the evidence given by Augustin Ndindiliyimana. In both instances, he testified in general terms that the *préfet*, under Rwandan law, had the legal authority to requisition the *gendarmerie* (but not the army).[494] The Prosecution has not indicated to what extent this evidence may have been influenced by the fact that Augustin Ndindiliyimana was facing charges of a similar legal nature as the charges raized against the Accused in the present case.

(b) Witness BLB

238. With regard to Witness BLB, the Prosecution submits that he was facing charges in Rwanda for involvement in the same offences. The Prosecution argues that the witness "obviously could have benefited from a finding of not guilty respecting persons who had allegedly committed offences in the same *commune*".[495] In response, Bagambiki stresses that Witness BLB was acquitted at trial by the

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[484] Witness LAH, T.10 October 2000, p. 94; Witness LAB, T.24 January 2001, pp. 10-11.
[485] Witness LAK, T.19 January 2001, pp. 21-23 (closed session).
[486] Witness LAJ, T.23 October 2000, p. 90.
[487] Witness LAM, T.2 November 2000, pp. 20, 26,
[488] Witness LAP, T.10 September 2001, pp. 22-23.
[489] Witness LAI, T.17 September 2001, pp. 15-16.
[490] Prosecution Appeal Brief, para. 306.
[491] See *supra*, para. 203.
[492] *The Prosecutor v. Bizimungu et al.*, Case N°ICTR-2000-56-I, Indictment, amended in conformity with Trial Chamber II Decision dated 25 September 2002, para. 5.66:
In Cyangugu, as in all the regions of the country throughout this period, members of the Tutsi population sought refuge in locations they thought would be safe, often locations that had been indicated to them by the authorities, such as Kamparampaka Stadium and Nyarushishi Camp. At these locations, despite the promises given by authorities that they would be protected, soldiers and *Interahamwe* abducted and killed refugees. Rape and other acts of sexual violence were notoriously committed by soldiers and *Interahamwe* against Tutsi women and young girls. Soldiers and *Interahamwe* abducted Tutsi women and young girls to isolated locations where they were raped and subjected to various other acts of sexual violence, including degrading and humiliating treatment, such as exposure of sexual organs, nudity and derogatory and sexually abusive language.
[493] *The Prosecutor v. Bizimungu et al.*, Case N°ICTR-2000-56-I, Amended Indictment, para. 1.5.
[494] Trial Judgement, para. 194 and fn. 1609.
[495] Prosecution Appeal Brief, para. 308.

Cyangugu court of first instance.[496] The Prosecution mentions this acquittal also, but adds that the Rwandan Prosecution has appealed this decision.[497]

239. The Appeals Chamber notes that the Prosecution does not provide any details as to the charges raised against Witness BLB. The Appeals Chamber understands that the charges were related to the abduction of Côme Simugomwa and the events at the Gashirabwoba football field, thus to criminal acts with which Bagambiki and Imanishimwe were charged.[498] However, as the Prosecution acknowledges, the Trial Chamber was aware of the charges against Witness BLB.[499] The Appeals Chamber understands that the Prosecution blames the Trial Chamber for relying on Witness BLB's testimony. However, the Appeals Chamber observes that the Prosecution does not advance any arguments to show that the Trial Chamber's assessment of Witness BLB was "wholly erroneous".

240. The Appeals Chamber recalls that it is within the discretion of the Trial Chamber to evaluate the evidence and to consider whether the evidence as a whole is credible, without explaining its decision in every detail.[500] The Appeals Chamber notes that Witness BLB was acquitted of the charges raised against him, even if this decision was appealed. The Appeals Chamber considers that, contrary to the Prosecution's contention, it is not "obvious" to what extent the witness could have benefited from the acquittal of Bagambiki and Imanishimwe. After all, the witness was acquitted at first instance, before he gave evidence in the trial against Bagambiki and Imanishimwe, and, moreover, neither Bagambiki nor Imanishimwe are mentioned at all in the Rwandan judgement acquitting the witness.[501] Accordingly, the Appeals Chamber concludes that the Prosecution has failed to establish that the Trial Chamber erred when it evaluated the evidence of Witness BLB without explicitly stating that it was treating his evidence with caution.

(c) Gratien Kabiligi

241. The Prosecution submits that the Trial Chamber recognized during the cross-examination of Witness Gratien Kabiligi that he was an accused in another case before this Tribunal, and that it was clear that his offences were possibly linked to those of Bagambiki. Nevertheless, the Prosecution argues, the Trial Chamber did not apply any caution to his testimony that he was out of the country on 28 January 1994, but accepted it and used it to discredit the evidence of Witnesses LAI, LAJ and LAP, who had claimed to have seen him on this date. It even disregarded, the Prosecution adds, the fact that it could be demonstrated that Gratien Kabiligi had repeatedly made use of falsified travel documents to leave Rwanda.[502]

242. The Appeals Chamber notes that the Prosecution does not provide any details as to the charges raised against Gratien Kabiligi, and observes that the indictment in his case does not mention any criminal acts committed in the Cyangugu *préfecture*.[503] The references given by the Prosecution to support the argument that Gratien Kabiligi's offences were possibly linked to those of Bagambiki are not helpful: they only show that the witness made use of a false passport at a certain time.[504] The

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[496] Bagambiki Response Brief, para. 257.
[497] Prosecution Appeal Brief, para. 308, fn. 358.
[498] Witness BLB., T.19 February 2003, pp. 23-24 (closed session).
[499] Trial Judgement, para. 432.
[500] *Kvočka et al*. Appeal Judgement, para. 23.
[501] Exhibit D-EBA-9 "Jugement du 31/03/2000 N°RMP.79.901/S2/B.A RP.22/99 de la Chambre spécialisée du Tribunal de première instance de Cyangugu, y siégeant au 1er degré en matière pénale dans les affaires relatives au génocide et autres crimes contre l'humanité commis depuis le 1/10/1990".
[502] Prosecution Appeal Brief, para. 309.
[503] *The Prosecutor v. Kabiligi and Ntabakuze*, Case N°ICTR-97-30-I and ICTR-97-34-I, Amended Indictment, 13 August 1999. The Indictment contains specific allegations as to criminal acts committed in Kigali (paras. 6.34-6.39), Butare (paras. 6.40-6.41) and Gitarama (para. 6.42).
[504] Prosecution Appeal Brief, para. 309, referring to T.25 March 2002, pp. 121, 123-125.

Appeals Chamber concludes that Gratien Kabiligi is not an "accomplice" of Bagambiki and Ntagerura in the ordinary sense of the word, but merely facing charges with the same legal qualification.

243. The Trial Chamber noted that Witnesses LAP, LAI and LAJ testified that they had seen Ntagerura and Gratien Kabiligi visiting the Bigogwe military camp on 28 January 1994 and distributing weapons.[505] Noting also some inconsistencies in the evidence given by Witness LAJ,[506] the Trial Chamber accepted the corroborated evidence that Gratien Kabiligi had been on mission to Egypt from 27 January to 10 February 1994.[507] The Trial Chamber was aware of the fact that Gratien Kabiligi had admitted that, after he had left Rwanda as a refugee, he had obtained false documents to escape arrest by the Rwandan authorities.[508]

244. The Appeals Chamber finds that the Prosecution has not shown that the Trial Chamber's acceptance of Gratien Kabiligi's evidence was wholly erroneous. The fact that the witness, as a refugee, used false documents to travel and to escape arrest, does not necessarily mean that his testimony relating to his official position and activities before he left the country have to be viewed with suspicion.

(d) Théodore Munyangabe

245. The Prosecution challenges the Trial Chamber's treatment of the testimony of Witness Théodore Munyangabe. This witness, the Prosecution submits, had been charged, convicted at trial and subsequently acquitted on appeal by the Rwandan courts. The Cyangugu Court of Appeal, the Prosecution argues, accepted Théodore Munyangabe's defence that "[other named persons]", including Bagambiki and Imanishimwe, had been responsible for the crimes he was charged with, among them the abduction and murder of 17 Tutsi civilians from the Kamarampaka Stadium.[509] The Prosecution avers that it was clear that the witness changed his story before the Tribunal, but that the Trial Chamber neither mentioned this stark inconsistency nor that the witness may have been an accomplice of Bagambiki and Imanishimwe.[510]

246. Imanishimwe and Bagambiki respond that the judgement of the Cyangugu trial court on which the Prosecution relies to support its argument was subsequently overturned by the Cyangugu Court of Appeal.[511] Imanishimwe points to the appeal judgement, which explicitly states that the transcripts of the trial had been changed and contained statements of witnesses which were never made.[512]

247. The Appeals Chamber notes that the Prosecution does not show to what extent the Trial Chamber actually made use of Théodore Munyangabe's testimony; apparently, the Prosecution uses the Trial Chamber's treatment of this evidence more as an illustration of the Trial Chamber's approach. A review of the Trial Judgement, however, reveals that the Trial Chamber's approach towards this evidence was rather cautious, even if the Trial Chamber did not identify the witness as an alleged accomplice.

248. In three instances the Trial Chamber relied on the testimony of Théodore Munyangabe:

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[505] Trial Judgement, paras. 119-124.
[506] *Ibid*., para. 130.
[507] *Ibid*., para. 129. The Trial Chamber did not identify the corroborative evidence; the only piece of evidence corroborating Gratien Kabiligi's testimony seems to be a photocopy of his mission report with the pertaining cover letter to the Rwandan President, Exhibit DAN-5.
[508] Trial Judgement, para. 126.
[509] Prosecution Appeal Brief, para. 310.
[510] *Ibid*., para. 312.
[511] Bagambiki Response Brief, para. 257; Imanishimwe Response Brief, para. 108.
[512] Imanishimwe Response Brief, para. 125.

- In paragraph 317 of the Trial Judgement, the Trial Chamber referred to the evidence given by Théodore Munyangabe and Bagambiki to establish that the refugees leaving the Cyangugu Cathedral joined at the Kamarampaka Stadium 50 to 100 refugees who had been there since 9 April 1994. For the other facts related to the events at the cathedral and the stadium, the Trial Chamber relied on a number of other witnesses, in particular on Witness LY.[513]
- For some details concerning the attacks at Mibilizi Parish, the Trial Chamber referred to the testimony of Théodore Munyangabe. For the principal findings related to these events, the Trial Chamber relied on the testimonies of Witnesses MM and MP.[514]
- Only in relation to the events at Shangi Parish is Théodore Munyangabe's testimony used in a more extensive manner. However, the Trial Chamber never relied on his testimony exclusively; he is only one in a number of several witnesses referred to in this context.[515]

Apart from the findings related to some details of the events at Mibilizi Parish, the Trial Chamber never relied on the uncorroborated testimony of Théodore Munyangabe alone. With regard to the events at Shangi Parish, the Trial Chamber noted that Munyangabe's testimony was "largely consistent" with the evidence given by Prosecution Witnesses NG-1 and LAD and Bagambiki Defence Witness GLB.[516] The Appeals Chamber notes in particular that the Trial Chamber never used Munyangabe's evidence to discredit Prosecution witnesses.

249. The Appeals Chamber further notes that Théodore Munyangabe was acquitted of his alleged participation in the crimes in the Cyangugu *préfecture* in 1994 when he testified before the Tribunal. His motive to give false testimony, if any, was therefore greatly reduced. With regard to the alleged "stark inconsistency" between Munyangabe's testimony before the Rwandan court and this Tribunal, the Appeals Chamber notes that Munyangabe, when confronted with the Rwandan trial judgement, maintained that his testimony was misstated in the judgement.[517] In addition, the Cyangugu Court of Appeal found that

> "the [trial] transcripts were altered by inventing testimony from witnesses and these witnesses never said those things before the court".[518]

In the view of the Appeals Chamber, a reasonable trier of fact could disregard the alleged inconsistency, because it is unclear what Munyangabe had actually said before the Rwandan court.

4. Alleged failure to allow the Prosecution to cross-examine on issues relating to Defence witnesses' roles as accomplices

250. In a related argument, the Prosecution submits that the Trial Chamber erred on a question of law by refusing to allow the Prosecution to test the credibility of Defence witnesses by improperly limiting their cross-examination.[519] This happened, the Prosecution submits, during the testimony of

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[513] Trial Judgement, paras. 308-331.
[514] *Ibid*., paras. 528, 534.
[515] *Ibid*., paras. 479-487.
[516] *Ibid*., para. 479.
Q. And it is also true that you refer to *Préfet* Bagambiki and Samuel Imanishimwe as having removed people from the stadium and had them killed on a date you do not remember; isn't it?
A. Once more, the sentence here is not correct and that is why I appealed against this judgment, because I was not happy with it. If you would allow me, Counsel, I would like to tell you what I said with some nuance which has been omitted here.
Q. Witness, in this paragraph the judgment is referring to your evidence, isn't it?
A. No. The judgment misused my evidence and that's why I appealed against it because, in my opinion, it is incorrect.
[517] Witness Théodore Munyangabe, T.25 March 2003, p. 36.
[518] Witness Théodore Munyangabe, T.25 March 2003, p. 42, reading from the Kinyarwanda judgement (Exhibit D-EBA 15, "*Procès en appel de Munyangabe Théodore*"). [Théodore Munyangabe Appeal].
[519] Prosecution Appeal Brief, para. 314.

Witnesses Augustin Ndindiliyimana, BLB, Gratien Kabiligi and PNA.[520] Thus, the Prosecution concludes, the Trial Chamber did not allow

> "the Prosecution to pursue issues that would relate to the Witness's own involvement in the matters before the Chamber".[521]

(a) Augustin Ndindiliyimana

251. With regard to Augustin Ndindiliyimana, the Prosecution argues that it attempted to test the credibility of the witness "through his participation in the offences", but was prevented from doing so, because the Trial Chamber declined to compel the witness to testify under Rule 90 (E) of the Rules, which would have offered the witness the necessary protection.[522]

252. Rule 90 (E) of the Rules reads:

> A witness may refuse to make any statement which might tend to incriminate him. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than perjury.

The Trial Chamber indeed declined to use this possibility; however, the Appeals Chamber observes that during the testimony of Augustin Ndindiliyimana the Prosecution did not explicitly request the Trial Chamber to compel the witness:

> If the witness doesn't want to respond to the questions, that is his right. The Judges can compel the witness to answer these questions. In the event they don't, I can't push it any further. But it is, first and foremost, the right of the Prosecution to pose these questions.[523]

The question was finally allowed, but the witness declined to answer it.[524] The question related to the transport of *Interahamwe* by ONATRACOM buses in northern Rwanda;[525] subsequent questions concerned the distribution of arms in and around Kigali[526] and a report about the military situation in Rwanda received by the witness in September 1992.[527] Finally, the Presiding Judge found it necessary to give Prosecution Counsel a warning.[528]

253. The main issue before the Appeals Chamber is whether the Trial Chamber, as the Prosecution contends,[529] abused its discretion under Rule 90 (E) by not compelling the witness to answer the first question. The second and third questions were apparently dropped by the Prosecution after

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[520] *Ibid*., paras. 316-319.
[521] *Ibid*., para. 318.
[522] *Ibid*., para. 316.
[523] T.18 February 2003, p. 50.
[524] Witness Augustin Ndindiliyimana, T.18 February 2003, p. 53.
[525] T.18 February 2003, pp. 49, 52-53.
[526] T.18 February 2003, pp. 57-58.
[527] T.18 February 2003, pp. 60, 63.
[528] T.19 February 2003, pp. 2-3:
This is the very issue the Court has been raising with you all yesterday afternoon. You are using the indictment of this witness to impeach him. You are not permitted to do that. He's not charged before this Court. He's not the one on trial. It is Imanishimwe and Bagambiki who are on trial here, so all of this time you are spending, it has just been wasted; you are wasting the time of the Court. And I think the time has come when you have to desist from pursuing this line because I am not going to warn you again. We cannot proceed this way. So desist from this line of cross-examination, move on to some other line, or if you have no other line on which to cross-examine, take your seat because we must proceed.
We are not going to go back over what we went over yesterday afternoon when I constantly had to be reminding you, whatever you may be alleging that this witness failed to do or whatever wrong you may be alleging that he may or may not have done is of no relevance to these proceedings. So that is my final warning to you, and now let us proceed to some other area rather than the areas you are trying to impeach him on his own indictment.
[529] Prosecution Appeal Brief, para. 316.

interventions by the Defence and the Presiding Judge.[530] The Appeals Chamber bears in mind that it is the primary responsibility of the Trial Chamber to exercise control over the mode and order of witnesses, and that, in doing so, it has to make the interrogation effective for the ascertainment of the truth and avoid needless consumption of time.[531]

254. In the view of the Appeals Chamber, the question about the transport of *Interahamwe* in northern Rwanda had very little relevance to the facts of the present case, or to the subject-matter of Augustin Ndindiliyimana's testimony.[532] Counsel for the Prosecution argued that the question was necessary to test the witness' credibility.[533] Under Rule 90 (G) (i) of the Rules, questions about matters affecting the credibility of a witness may be asked during cross-examination. However, the possibility to ask questions to test the credibility of a witness is not unlimited.[534] The Appeals Chamber has already observed that Augustin Ndindiliyimana was not an accomplice in the ordinary meaning of the word, but is only charged with similar offences as Bagambiki and Imanishimwe.[535] The question the Prosecution wanted to put to the witness concerned a very specific matter, which was only in the most general way related to the criminal charges against the Accused. Taking into consideration the very limited scope of Augustin Ndindiliyimana's testimony,[536] the Appeals Chamber finds that the Prosecution has not demonstrated that this particular question was relevant to determining the reliability of Augustin Ndindiliyimana's testimony in the present case. The Appeals Chamber does not find that the Trial Chamber erred in law when it declined to compel the witness under Rule 90 (E) of the Rules to answer the question.

(b) Gratien Kabiligi

255. The Prosecution raises a similar argument with regard to the cross-examination of Gratien Kabiligi. The Prosecution argues it

> "attempted to test the witness's credibility on an issue relating to the witness's whereabouts during the events".[537]

When the witness refused to answer the question, the Prosecution submits, the Trial Chamber should have compelled the witness under Rule 90 (E), but it declined to do so.

> "Thus, the Trial Chamber limited the cross-examination of the Prosecution, not allowing the Prosecution to pursue issues that would relate to the Witness's own involvement in the matters before the Chamber".[538]

256. The Appeals Chamber notes that the question was whether the witness was informed about the RPF attack on Ruhengeri on the 22 of January 1991.[539] The Prosecution has not established how this question related to facts relevant to the present case, or how an eventual answer of the witness would have affected his credibility. The Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber abused its discretion when it declined to compel the witness to answer.

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[530] T.18 February 2003, p. 60; T.19 February 2002, p. 4.
[531] Rule 90 (F) (i) and (ii) of the Rules.
[532] See *supra*, para. 237.
[533] T.18 February 2003, p. 50.
[534] Archbold, *Criminal Pleading, Evidence and Practice* (London, 2004), para. 8-138, p. 1176: "[A] witness may be asked questions about his antecedents, associations or mode of life which although irrelevant to the issue would be likely to discredit his testimony. […] The judge has discretion to excuse an answer when the truth of the matter suggested would not in his opinion affect the credibility of the witness as to the subject matter of his testimony."
[535] See *supra*, para. 236.
[536] See *supra*, para. 237.
[537] Prosecution Appeal Brief, para. 318.
[538] Idem.
[539] T.25 March 2002, p. 102.

(c) Witness BLB

257. The Prosecution submits that the Trial Chamber also intervened in an inadmissible manner during the cross-examination of Witness BLB. The Prosecution argues that it asked the Witness

> "whether the purpose of his testimony was 'to absolve both yourself and Bagambiki from responsibility [for] the killings in the commune'",

and that the Trial Chamber did not allow the witness to answer this question.[540]

258. Upon reviewing the transcript, the Appeals Chamber finds that, although the Presiding Judge was initially concerned about the admissibility of the question,[541] he finally admitted it, and it was duly answered by the witness.[542] This argument is therefore obviously without merit.

(d) Witness PNA

259. Likewise, the Prosecution argues, the Trial Chamber disallowed the Prosecution to ask Witness PNA questions concerning his identity, which related to his credibility.[543]

260. The Appeals Chamber observes that Witness PNA is not mentioned at all in the Trial Judgement. The Prosecution has failed to demonstrate the relevance of his testimony to the case against Bagambiki, Imanishimwe and Ntagerura. The Appeals Chamber therefore declines to discuss the merits of the Prosecution's argument in question.

5. Appearance of unfairness

261. The Prosecution submits that the Trial Chamber's exercise of its discretion in its different treatment of Prosecution and Defence accomplice witnesses, and the greater degree of scrutiny to which it subjected the testimony of Prosecution witnesses, resulted in an appearance of unfairness, which "in itself is a further error on a question of law".[544] The Prosecution stresses that it does not question the independence of the Tribunal or the impartiality of its Judges, but that in the present case the appearance of equality between the parties is in question.[545]

262. The Appeals Chamber notes that the Prosecution's contention that the Trial Chamber did not apply the same caution to the accomplices testifying as Defence witnesses, thus creating "a different standard for the Prosecution", is not supported by the Trial Judgement. When assessing the evidence given by five Imanishimwe Defence witnesses, the Trial Chamber took into consideration the fact

> "that the Imanishimwe Defence witnesses are biased and self-interested because they previously served as soldiers under Imanishimwe's command and because acknowledging that civilians were brought to the camp would implicate them or their colleagues in the mistreatment".[546]

The Trial Chamber clearly took into account the possible involvement of these Defence witnesses in Imanishimwe's crimes, concluding that it rendered their testimony unreliable.

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[540] Prosecution Appeal Brief, para. 317.
[541] T.20 February 2003, pp. 11-12.
[542] Witness BLB, 20 February 2003, p. 14 (closed session).
[543] Prosecution Appeal Brief, para. 319.
[544] Prosecution Appeal Brief, para. 321.
[545] Prosecution Appeal Brief, paras. 322-323.
[546] Trial Judgement, para. 399. The five witnesses are Witness PCD (Trial Judgement, para. 367), Witness PCE (Trial Judgement, para. 372), Witness PKB (Trial Judgement, para. 374), Witness PNC (Trial Judgement, para. 376) and Witness PNF (Trial Judgement, para. 382).

263. The Appeals Chamber has found that the Prosecution's arguments as to the alleged errors of the Trial Chamber relating to its treatment of Defence "accomplice" witnesses are unfounded. Therefore, there is no basis for the contention that the Trial Chamber imposed a "double standard" in relation to the treatment of accomplice evidence.

6. Conclusion

264. The Prosecution's sixth ground of appeal is accordingly dismissed.

C. REBUTTAL EVIDENCE IN RELATION TO CERTAIN LETTERS (8TH GROUND OF APPEAL)

1. Witness PR3/LAP

265. Under the eighth ground of appeal, the Prosecution submits that the Trial Chamber erred in law in its Decision of 21 May 2003[547] that denied the Prosecution leave to call rebuttal evidence in relation to certain letters.[548] According to the Prosecutiom, this ground affects all the verdicts rendered against Ntagerura, Bagambiki and Imanishimwe.[549] The Prosecution contends that the Trial Chamber erroneously admitted into the trial record five letters, which were allegedly written by the Prosecution Witnesses LAP, LAB and LAJ.[550] These letters were introduced into evidence, Prosecution argues, through Defence Witness JNQ, who had no knowledge as to the authenticity of the letters. Moreover, the Prosecution adds, the letters were never put to the Prosecution witnesses in cross-examination.[551] The Prosecution further submits that the Trial Chamber denied its motion to present rebuttal evidence as to the authenticity of the letters.

266. Ntagerura and Bagambiki respond that the Trial Chamber did not rely on the letters in question, and that neither their admission nor the refusal to allow evidence in rebuttal had any impact on the final verdict of the Trial Chamber.[552]

267. The Appeals Chamber notes that, although originally five letters were introduced into evidence, the Prosecution's arguments are focused on the two letters purportedly written by Witness LAP. In fact, the letters purportedly written by Witnesses LAB and LAJ are not mentioned at all in the Trial Judgement.

268. With regard to Witness LAP and the two letters introduced by Witness JNQ, the Trial Chamber found:

> Moreover, in the Chamber's opinion, Witness LAP's request for money in exchange for providing evidence leaves the impression that his testimony is for sale, which is further supported by Bagambiki Defence Witnesses GLB and JNQ who testified about Witness LAP's reputation for making false accusations for personal gain. The Chamber further notes that Witness JNQ testified about a series of letters bearing the seal of the Cyangugu Prison in which Witness LAP admitted to falsifying evidence related to other cases. The Prosecution has asserted that these letters are not reliable because they are of questionable provenance. Given

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[547] *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe,* Case N°ICTR-99-46-T, Decision on the Prosecutor's Motion for Leave to Call in Evidence in Rebuttal Pursuant to Rules 54, 73, and 85 (A) (iii) of the Rules of Procedure and Evidence, 21 May 2003 ("Decision of 21 May 2003").
[548] Prosecution Appeal Brief, para. 341.
[549] Prosecution Notice of Appeal, para. 50.
[550] Prosecution Appeal Brief, paras. 341-342.
[551] *Ibid*., para. 342.
[552] Ntagerura Response Brief, paras. 221-222; Bagambiki Response Brief, para. 267.

> the numerous indicia that Witness LAP lacks credibility and is not reliable, the Chamber need not examine this issue further.[553]

In the view of the Appeals Chamber it is clear that the Trial Chamber did not rely on the letters in question, because other evidence before it was sufficient to establish that Witness LAP's testimony was unreliable. The Prosecution has not shown that this conclusion was unreasonable. The Appeals Chamber finds that the Prosecution has not demonstrated that the alleged error of law invalidated the decision, and accordingly declines to discuss the Prosecution's arguments further.

2. The Letter Purportedly Written by Witness LAH

269. The Prosecution contends that the Trial Chamber's approach to the admission of evidence impugning the credibility of Prosecution witnesses was not isolated, and refers to the admission of a letter purportedly written by Witness LAH, in which he recanted evidence he had allegedly given against Witness BLB before the Rwandan courts. The Prosecution argues that the letter was never put to Witness LAH in cross-examination and that its authenticity was never established.[554] The Prosecution submits that the Trial Chamber erred in law by admitting this letter into the record and subsequently relying on it to discredit Witness LAH.[555]

270. Ntagerura and Bagambiki respond that the Prosecution did not seek to examine the authenticity of the letter, or to adduce rebuttal evidence as to the authenticity of the letter.[556] Ntagerura points out that Witness BLB was acquitted by the Rwandan courts, adding that the letter was only of secondary importance to the Trial Chamber's conclusions.[557]

271. The Trial Chamber admitted the letter in question into evidence as Defence exhibit D-EBA 8, overruling an objection by the Prosecution.[558] There are several references in the Trial Judgement to this exhibit. In paragraphs 118, 141 and 438, the Trial Chamber repeated the same finding:

> The Trial Chamber has considered Witness LAH's testimony in light of the evidence provided by Defence Witness BLB, who testified that Witness LAH made and then recanted false accusations against him in relation to serious charges before the Rwandan courts.

To support this finding, the Trial Chamber referred to the testimony of Witness BLB as well as to Bagambiki Defence exhibits 8 and 9,[559] exhibit 9 being the Rwandan judgement acquitting Witness BLB.[560]

272. Before determining whether the Trial Chamber erred in law by admitting the letter into evidence, the Appeals Chamber recalls that

> [t]he determination of whether the admission of a particular piece of evidence is precluded, under the circumstances, by the need to ensure a fair trial, is one which lies within the discretion of the Trial Chamber. The Appeals Chamber will revise such a determination only where the party challenging it has demonstrated that no reasonable trier of fact could have reached the conclusion.[561]

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[553] Trial Judgement, para. 322 (footnote omitted).
[554] Prosecution Appeal Brief, para. 357.
[555] Idem.
[556] Ntagerura Response Brief, paras. 210 and 224; Bagambiki Response Brief, paras. 283-284.
[557] Ntagerura Response Brief, paras. 225, 229.
[558] T.19 February 2003, pp. 33-34 (closed session).
[559] Trial Judgement, para. 118, fn. 153; para. 141, fn. 214. In paragraph 438, footnote 1029, the Trial Chamber referred to its earlier findings in paragraphs 118 and 141.
[560] T.19 February 2003, p. 35 (closed session).
[561] *Kordić and Čerkez* Appeal Judgement, para. 232.

273. According to Rule 89 (C) of the Rules, a Chamber may admit any relevant evidence which it deems to have probative value. Under this rule, the reliability of a piece of evidence is relevant to its admissibility. However, the threshold to be met before ruling that evidence is inadmissible is high. Only if the evidence is so lacking in terms of the indicia of reliability as to be devoid of any probative value, can admission be denied.[562] As long as there are sufficient indicia to allow a provisional proof of reliability, the evidence may be admitted.[563]

274. Witness BLB had testified that a copy of the letter written purportedly by, or on behalf of,[564] Witness LAH had been sent to Witness BLB's spouse by the Rwandan Office of the Public Prosecutor. Subsequently, the Witness continued, he had used the letter as exculpatory evidence in his own trial, which resulted in his acquittal.[565] The Appeals Chamber finds that a reasonable trier of fact could conclude from this testimony that there were sufficient indicia as to the authenticity of the letter. The admittance of the letter into evidence was, accordingly, not erroneous.

275. In addition, the Prosecution submits that the Trial Chamber committed an error on a question of fact by its use of the letter in assessing the credibility of Witness LAH.[566] The Prosecution argues that Witness BLB was not the author, addressee or recipient of the letter, and could not confirm that Witness LAH wrote it as alleged.[567]

276. In the assessment of Witness LAH's credibility, the Trial Chamber relied on Witness BLB's testimony that Witness LAH at first made, and then later recanted serious accusations against him. Although the letter is referred to in the footnotes, the Trial Chamber clearly attached more importance to the testimony of Witness BLB.[568] Considering that Witness BLB was acquitted by the Rwandan court, the Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber's assessment of Witness LAH's credibility did not reflect an assessment by a reasonable trier of fact.

3. Conclusion

277. Accordingly, the Prosecution's eighth ground of appeal is dismissed.

D. ALLEGED ERROR OF LAW RELATING TO NTAGERURA'S SUPPOSED RELATIONS WITH RTLM (7TH GROUND OF APPEAL)

278. The Prosecution submits that the Trial Chamber erred in law by preventing him from leading evidence on Ntagerura's relations with RTLM, in his capacity as founding member and shareholder.[569] By so doing, the Prosecution claims, the Trial Chamber failed to consider and assess the relevance and probative value of the evidence for establishing the requisite *mens rea* on the part of Ntagerura for the crimes charged.[570]

279. The Prosecution further submits that the Trial Chamber erred in law by preventing it from cross-examining Ntagerura on his involvement with RTLM[571] so as to test his credibility; yet,

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[562] *Rutaganda* Appeal Judgement, para. 266; *Prosecutor v. Zlatko Aleksovski*, Case N°IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15.
[563] *Rutaganda* Appeal Judgement, para. 266.
[564] Witness BLB, 19 February 2003, p. 43 (closed session).
[565] *Ibid*., pp. 22, 30, 40-41 (closed session).
[566] Prosecution Notice of Appeal, para. 57.
[567] Prosecution Appeal Brief, para. 357.
[568] Trial Judgement, paras. 118, 141 and 438.
[569] Prosecution Appeal Brief, paras. 324 and 328.
[570] *Ibid*., para. 325.
[571] *Ibid*., para. 337.

Ntagerura had been allowed to call evidence relating to other media and in disallowing cross-examination, the President Judge merely stated that Ntagerura's credibility was not in issue.[572]

280. Ntagerura contends in response that, even if the Prosecution intended to demonstrate his criminal intent by leading evidence of his involvement with RTLM, *mens rea* should be considered as a material fact of the crimes charged and, as such, should have been specifically pleaded in the Indictment.[573] Moreover, he contends that evidence of his alleged involvement with RTLM is irrelevant because "[n]one of the charges against [him] was in any way connected to the activities of RTLM".[574]

281. The Appeals Chamber notes that the error alleged under this ground of appeal centres on two issues. First, the Appeals Chamber is requested to determine whether the Trial Chamber erroneously deprived the Prosecution of the possibility of leading evidence of Ntagerura's criminal intent during the examination of Expert Witness Guichaoua. Secondly, the Appeals Chamber is requested to evaluate whether the Trial Chamber's overruling of the line of questioning adopted by the Prosecution during the cross-examination of Ntagerura unduly prevented the Prosecution from testing Ntagerura's credibility.

282. The Appeals Chamber notes that at the hearing of Expert Witness Guichaoua on 19 September 2001, the Trial Chamber, apparently concurring with the assertion by Counsel for Ntagerura that the expert's testimony should focus on allegations contained in the Indictment,[575] decided not to take into account the Prosecution's questions that made reference to RTLM, "[that is,] the association with the RTLM".[576] It clearly transpires from the trial record that it was solely in connection with the counts of conspiracy to commit genocide and complicity in genocide that the Prosecutor referred to Ntagerura's involvement with RTLM for the first time.[577] It was thus with regard to these two counts that the Trial Chamber refused to take into consideration Ntagerura's alleged involvement with RTLM.

283. During the hearing of 1 October 2002, the Prosecution referred to Ntagerura's supposed involvement with RTLM in order to test his credibility.[578] During that hearing the Trial Chamber seems to have admitted, on the basis of the line of argument used by Counsel for Ntagerura,[579] that the Prosecution was in fact using Ntagerura's cross-examination to reintroduce evidence relating to acts not pleaded in the Indictment. The Trial Chamber excluded from cross-examination the Prosecution's questions bearing on Ntagerura's supposed involvement with RTLM.[580] In the Prosecution Appeal Brief, it is in respect of the "various offences charged, including genocide"[581] that the Prosecution refers to Ntagerura's supposed involvement with RTLM.

284. However, it is with regard to the counts of conspiracy to commit genocide and complicity in genocide that the Appeals Chamber will direct its attention, as it was on these two counts that the Prosecution made reference to Ntagerura's involvement with RTLM and in which the Trial Chamber

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[572] *Ibid*., paras. 338 and 339.
[573] Ntagerura Response Brief, paras. 189, 193, 196 and 199-201.
[574] *Ibid*., para. 195. See also paras. 202-203.
[575] Expert Witness Guichaoua, T.19 September 2001, pp. 86-92.
[576] *Ibid*., p. 92.
[577] T.19 September 2001, pp. 88, 89:
Notwithstanding, however, Your Honours, the evidence is nonetheless admissible in support of the count of conspiracy. Membership of RTLM, in itself, indeed may not be a chargeable offence or crime. It does, however, go to show the *mens rea* of the Accused with reard to the counts of conspirary and complicity, and on that basis, Your honours, it is admissible even though no specific reference is made in the factual allegations.
[578] André Ntagerura, T.1 October 2002, p. 71.
[579] *Ibid*., pp. 69-70.
[580] *Ibid*., p. 75.
[581] Prosecution Appeal Brief, para. 332.

rejected the line of questioning on the grounds of relevance. The Appeals Chamber recalls that the Ntagerura Indictment charges in Count 2 the crime of conspiracy to commit genocide in view of the acts described in paragraphs 9, 13, 14.3, 16 and 19. Counts 3 and 6 of the Ntagerura Indictment correspond to the crime of complicity in genocide and are both based on the acts described in paragraphs 9 to 19.[582] For the purpose of ruling on this ground of appeal, the Appeals Chamber will examine below the way in which the Trial Chamber analysed these three counts.

285. The Appeals Chamber notes that the Trial Chamber advanced several findings to dismiss the count of conspiracy to commit genocide. The Trial Chamber first pointed out that paragraph 10 of the Ntagerura Indictment amounted to a "general allegation",[583] which could not, for this reason, sustain a count. With regard to paragraphs 12.2, 14.2, 15.1 and 15.2 of the Ntagerura Indictment, the Chamber considered that no evidence had been adduced to support the allegations contained in these paragraphs.[584] The Chamber further considered, after a careful study,[585] that paragraphs 11, 12.1, 13 and 16 of the Ntagerura Indictment,

> "in addition to being vague, […] fail to plead any identifiable criminal conduct on the part of the accused".[586]

The Chamber thus considered only paragraphs 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 and 19 to make its factual findings.[587] The Trial Chamber consequently dismissed the count of conspiracy to commit genocide

> because the allegations supporting these counts, even if proven, could not constitute the material elements of the crime of conspiracy. In particular, the concise statements of the facts of these crimes fail to allege the *actus reus* of conspiracy, namely that two or more persons agreed to commit the genocide.[588]

286. The Appeals Chamber recalls that the Trial Chamber examined the evidence related to paragraphs 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 and 19 of the Ntagerura Indictment, and that it concluded that the facts alleged in these paragraphs had not been proven beyond reasonable doubt.[589] When the Appeals Chamber examined the Prosecution's fourth ground of appeal, it concluded that the Prosecution had not demonstrated that the Trial Chamber had erred in finding paragraphs 11, 12.1, 13 and 16 of the Ntagerura Indictment defective and that those defects had not been cured.[590]

287. Having determined that the Trial Chamber rightly found paragraphs 11, 12.1, 13 and 16 of the Ntagerura Indictment defective, and considering that the Prosecution admitted that there was no evidence to support the allegations in paragraphs 12.2, 14.2, 15.1 and 15.2 of the Ntagerura Indictment, the Appeals Chamber considers that the Trial Chamber acted correctly in dismissing the count of conspiracy to commit genocide, given that this count was based on the acts described in these paragraphs. The Appeals Chamber holds that, insofar as conspiracy to commit genocide was not properly pleaded, the issue of Ntagerura's intent for this crime is without substance.

288. With regard to the count of complicity in genocide, the Appeals Chamber notes that the Trial Chamber dismissed the third and sixth counts on several grounds. Recalling the findings it had made in respect of paragraphs 11, 12.1, 12.2, 13, 14.2, 15.1, 15.2 and 16 of the Ntagerura Indictment,[591] the

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[582] The Ntagerura Indictment states in Count 3, "particularly paragraphs 12.1 and 12.2" and in Count 6 "and particularly paragraph 11".
[583] Trial Judgement, para. 40.
[584] *Ibid*., paras. 40 and 69.
[585] *Ibid*., paras. 42-44 and 46.
[586] *Ibid*., para. 69.
[587] *Ibid*., paras. 41, 45 and 47.
[588] *Ibid*., para. 70 (footnote omitted).
[589] *Ibid*., paras. 69, 667.
[590] See *supra*, paras. 70-83.
[591] *Ibid*., para. 666.

Trial Chamber, in making its legal findings, considered only paragraphs 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 and 19.[592] The Chamber also found that the charges made in paragraphs 17 and 18 did not allege any criminal conduct on the part of Ntagerura.[593] Furthermore, the Chamber found that the acts alleged in paragraphs 9.1, 9.2, 9.3, 14.1, 14.3 and 19 had not been proven beyond a reasonable doubt.[594]

289. The Appeals Chamber notes that in his fifth ground of appeal, the Prosecution contested, in particular, the way in which the Trial Chamber assessed the evidence adduced to establish the facts as well as Ntagerura's guilt.[595] In this regard, although the Prosecution made reference to many findings,[596] it developed this line of argument only with regard to some specific examples.[597] It specifically contested the Trial Chamber's refusal to examine the allegations made in paragraphs 14.1, 14.3, 17, 18 and 19 of the Ntagerura Indictment in view of the evidence relating to the following allegations concerning paragraphs 9.1, 9.2 and 9.3 of the Ntagerura Indictment: the February 1993 meeting in Bushenge market, the June 1993 meeting at Ituze Hotel, the October 1993 meeting in Gatare, the visit to Cimerwa (cement) factory in Bugarama in December 1993 and the visit to Bugarama in January 1994. The Appeals Chamber notes that the Prosecution did not challenge certain other findings relating to paragraphs 9.1, 9.2 and 9.3 of the Ntagerura Indictment.

290. The Appeals Chamber has earlier analysed the way in which the Trial Chamber assessed the evidence for each of the specific acts contested by the Prosecution in his fifth ground of appeal. The Appeals Chamber has not discovered any error in the way the Trial Chamber assessed the evidence relating to the facts relevant to paragraphs 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 and 19 of the Ntagerura Indictment.[598] In addition, the Appeals Chamber considers that it is not required to rule on the other findings relating to paragraphs 9.1, 9.2 and 9.3 of the Ntagerura Indictment, insofar as these have not been challenged by the Prosecution.

291. Accordingly, the Appeals Chamber considers that the Trial Chamber was correct in concluding that the acts alleged in paragraphs 9.1, 9.2, 9.3, 14.1, 14.3 and 19 have not been proven beyond reasonable doubt and they can thus not be relied on to find Ntagerura guilty under the Counts (Counts 3 and 6) of complicity in genocide.[599] The Appeals Chamber therefore considers that, since no evidence was called in respect of the material facts of the crime of complicity in genocide, the issue of Ntagerura's intent for this crime is without substance.

292. This finding does not conclude the examination of this ground of appeal. It still remains for the Appeals Chamber to determine whether the overruling of the Prosecution's line of questioning relating to the links between Ntagerura and RTLM during the cross-examination of Ntagerura unduly prevented the Prosecution from testing Ntagerura's credibility.

293. The Appeals Chamber notes that Ntagerura actually caused to be admitted into evidence a series of transcripts of broadcasts by Radio Rwanda and the BBC, establishing, in his view, specific government acts and statements. During the cross-examination of Ntagerura, the Prosecution questioned Ntagerura on his status as founding member and shareholder of RTLM,[600] to which Counsel for Ntagerura objected. When the Trial Chamber allowed this objection, it pointed out the following:

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[592] *Ibid*., para. 667.
[593] *Ibid*., para. 667.
[594] *Ibid*., para. 667.
[595] Prosecution Appeal Brief, paras. 193-258.
[596] Prosecution Appeal Brief, para. 193, referring in particular – but not exclusively – to Trial Judgement, paras. 92, 95, 103, 113, 118, 132, 141, 145, 149, 178 and 667.
[597] Prosecution Appeal Brief, para. 212.
[598] See *supra*, paras. 188-197.
[599] Trial Judgement, para. 667.
[600] André Ntagerura, T.1 October 2002, pp. 68-69.

> What the witness did was, he said that government at certain meetings, I believe, had made certain statements and that was given over the press and to the press carried those statements. Now, you can't go off simply to deal with other radio stations or what other radio stations might have done.[601]

294. The Prosecution has not explained in what way the issue of Ntagerura's status as founding member and shareholder in RTLM made it possible to test Ntagerura's credibility regarding the government acts and statements reported by other radio stations. Although the Prosecution was at liberty to show that the acts and statements in question were reported differently depending on each radio station,[602] it, however, did not convince the Trial Chamber that questioning on Ntagerura's status as founding member and shareholder in RTLM would allow it to do so. The Appeals Chamber considers that it was proper for the Trial Chamber to exclude from cross-examination issues linked to Ntagerura's involvement with RTLM.

295. In view of the foregoing, the Appeals Chamber finds that the Trial Chamber did not commit any error of law by excluding the question on Ntagerura's involvement with RTLM from the examination of expert Witness Guichaoua and from the cross-examination of Ntagerura. Accordingly, this ground of appeal fails.

E. BAGAMBIKI'S PARTICIPATION IN THE CRIMES (1ST AND 2ND GROUNDS OF APPEAL)

296. The Prosecution submits that the Trial Chamber erred in law and fact when it acquitted Bagambiki; in law, because it placed an impossible burden of proof on the Prosecution (2nd Ground of Appeal);[603] in fact, because it failed to draw the only reasonable inference from the facts it had found to be proven (1st Ground of Appeal).[604]

1. Misapplication of the burden of proof (2nd Ground of Appeal)

297. Under its second ground of appeal, the Prosecution submits that the Trial Chamber placed an impossible burden of proof upon the Prosecution. In the Prosecution's view, the majority of the Trial Chamber "appears" to have insisted upon direct evidence of Bagambiki's participation in the crimes. The Prosecution bases this view on certain observations in the Dissenting Opinion of Judge Williams, the Separate Opinion of Judge Ostrovsky and the language used in the Trial Judgement.[605] The Prosecution argues that circumstantial evidence is sufficient to support a conviction, and, if the Trial Chamber insisted upon direct evidence of Bagambiki's involvement in the crimes, this constituted a misapplication of the criminal standard of proof.[606]

298. Bagambiki notes that the Prosecution does not identify the circumstantial evidence upon which, in its view, the Trial Chamber should have based a conviction.[607] He argues that the Prosecution's arguments are founded on rash misinterpretations of the opinions of Judge Williams and Judge Ostrovsky as well as the Trial Chamber's conclusions.[608] Even if the Trial Chamber rejected certain elements of circumstantial evidence, Bagambiki argues, the language of the Trial Judgement does not show that the Trial Chamber insisted upon direct evidence.[609]

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[601] *Ibid*., p. 75.
[602] *Ibid*., pp. 70-71.
[603] Prosecution Notice of Appeal, para. 9; Prosecution Appeal Brief, para. 32.
[604] *Ibid*., para. 2; Prosecution Appeal Brief, para. 16.
[605] Prosecution Appeal Brief, paras. 32-33.
[606] *Ibid*., para. 37.
[607] Bagambiki Response Brief, para. 60.
[608] *Ibid*., para. 61.
[609] *Ibid*., paras. 70-71.

299. The Appeals Chamber notes that Judge Williams considered in his Dissenting Opinion that his conclusions about the Gashirabwoba football field massacre are the only "logical inference"[610] or "reasonable inference"[611] to be drawn from the evidence. In comparison, the separate opinion of Judge Ostrovsky shows that he considered the evidence about Bagambiki's conduct at the Gasirabwoba football field and the Kamarampaka Stadium to raise a "lingering suspicion" not amounting to proof beyond reasonable doubt.[612] The final conclusion of Judge Ostrovsky reads:

> This and other evidence reflect a concern on the part of Bagambiki for the welfare of the refugees and leave me with reasonable doubt that Bagambiki intended or that he was aware and consented to the deaths of refugees in Cyangugu *préfecture*. […] On the basis of the totality of the reliable and credible evidence presented in this case, I am not convinced that Bagambiki, with the resources available to him, could do more for the protection of refugees in Cyangugu *préfecture*.[613]

300. The majority reasoned that it "lacked sufficient reliable evidence to determine" whether Bagambiki played any role in the killing of the refugees selected and removed from Kamarampaka Stadium and Cyangugu Cathedral and in the death of Côme Simugomwa.[614] In the view of the Appeals Chamber, the Judgement shows that the Judges considered whether the evidence as a whole led to a conclusion beyond reasonable doubt as to the responsibility of Bagambiki for the crimes in question, but that the majority considered that this was not the case.[615]

301. Nothing in the Trial Judgement suggests that the majority, when it found that it "lacked sufficient reliable evidence to determine" whether Bagambiki was involved in the crimes, had in mind that there was not sufficient reliable *direct* evidence, as the Prosecution contends.[616] There is no instance in the Trial Judgement where the majority rejected evidence only because of its circumstantial nature. In fact, the Prosecution acknowledges that in the case of Imanishimwe the Trial Chamber "relied on evidence of an essentially circumstantial nature to establish his individual criminal responsibility".[617] Under these circumstances, there is simply no room for the "appearance" that the Trial Chamber, generally, erroneously insisted on direct evidence, as the Prosecution claims.[618] Whether the Trial Chamber erred in fact by not drawing the only reasonable inference from the circumstantial evidence will be discussed in the next section.

2. The Trial Chamber failed to draw the only reasonable inference (1st Ground of Appeal)

302. Under its first ground of appeal, the Prosecution submits that the Trial Chamber erred in fact when it failed to draw the conclusion that Bagambiki was criminally responsible for the massacre of Tutsi refugees at the Gashirabwoba football field and the murder of 16 Tutsi refugees, who had been removed from Cyangugu Cathedral and the Kamarampaka Stadium. In the Prosecution's view, this was the only reasonable inference that could be drawn from the facts accepted by the Trial Chamber.[619] The Prosecution then provides an extensive paraphrase of the Trial Chamber's factual findings[620] and finally draws up a list of "culminating facts", which, it says, support "the irresistible

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[610] Judge Williams' Opinion, para. 7.
[611] *Ibid*., para. 8.
[612] Judge Ostrovsky Opinion, para. 15.
[613] *Ibid*., paras. 16-17.
[614] Trial Judgement, paras. 337, 442.
[615] See Trial Judgement, para. 337.
[616] Prosecution Appeal Brief, para. 36.
[617] Prosecution Brief in Reply, para. 10.
[618] The Prosecution expressly uses the terms "appear", Prosecution Appeal Brief, paras. 32 and 36. Even if the language of the Trial Judgement would lend support to this interpretation, the "appearance" of an error does not justify the intervention of the Appeals Chamber.
[619] Prosecution Appeal Brief, para. 16.
[620] *Ibid*., para. 18.

conclusion of guilt".[621] The Prosecution adds that, in order to establish Bagambiki's responsibility for aiding and abetting genocide and other crimes, it was sufficient to show that Bagambiki had knowledge of the genocidal intent of the other participants and that he had made a substantial contribution to the commission of the crimes. The Prosecution submits that under the individual circumstances of the case – in particular, Bagambiki's position, his implication in the events and the proximity of his acts and the crimes – the only reasonable conclusion on the basis of the evidence was that he aided and abetted the commission of the crimes.[622]

303. The Prosecution points to the Dissenting Opinion of Judge Williams, according to which Bagambiki should have been convicted, and argues that no reasonable tribunal of fact could have assessed the evidence differently. The doubts of the majority, the Prosecution submits, were neither logically connected to the evidence, nor "based upon reason or common sense".[623]

(a) The Standard of proof applicable to circumstantial evidence

304. In the *Čelebići* Appeal Judgement, the ICTY Appeals Chamber set out the standard of proof applicable to circumstantial evidence as follows:

> A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him – here that he participated in the second beating of Gotovac. Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.[624]

The same standard was applied in the *Vasiljević*, *Krstić* and *Kvocka et al*. Appeal Judgements in relation to the establishment of the state of mind of the accused by inference[625] and, more recently, in the *Stakić* Appeal Judgement.[626]

305. As the ICTY Appeals Chamber made clear in the *Kordić and Čerkez* Appeal Judgement, the *Čelebići* standard on circumstantial evidence has to be distinguished from the standard of appellate review.[627] The Appeals Chamber notes that the Tribunal's law on appellate proceedings, namely wheter "no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt", permits a conclusion to be upheld on appeal even where other inferences sustaining guilt could reasonably have been drawn at trial".[628]

306. It is settled jurisprudence that the conclusion of guilt can be inferred from circumstantial evidence only if it is the only reasonable conclusion available on the evidence. Whether a Trial Chamber infers the existence of a particular fact upon which the guilt of the accused depends from direct or circumstantial evidence, it must reach such a conclusion beyond reasonable doubt. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the non-existence of that fact, the conclusion of guilt beyond reasonable doubt cannot be drawn.

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[621] Prosecution Brief in Reply, para. 3.
[622] Prosecution Appeal Brief, paras. 26 and 27.
[623] *Ibid*., para. 21.
[624] *Čelebići* Appeal Judgement, para. 458.
[625] *Vasiljević* Appeal Judgement, para. 120; *Krstić* Appeal Judgement, para. 41; *Kvočka et al*. Appeal Judgement, para. 237.
[626] *Stakić* Appeal Judgement, para. 219.
[627] *Kordić and Čerkez* Appeal Judgement, paras. 289-290.
[628] *Ibid*., para. 288.

(b) Gashirabwoba Football Field

307. The Appeals Chamber is of the opinion that Bagambiki's position as prefect and his "active involvement in events on the ground"[629] do not unambiguously lend themselves to support a conclusion as to his guilt. The Appeals Chamber notes in particular several instances where the Trial Chamber found that Bagambiki actively intervened to protect refugees.[630] In addition, the Trial Chamber found that on several occasions the prefectural authorities tried to assist refugees by sending *gendarmes* or supplies.[631] The Appeals Chamber observes that, according to the Trial Chamber's findings, Bagambiki never physically participated in an attack on refugees, nor gave orders to assailants. If Bagambiki had ordered (or consented to) the attack at the Gashirabwoba football field, as the Prosecution contends,[632] this would be the single instance where he actively supported an attack.

308. The Prosecution points to Bagambiki's "close association" with Imanishimwe, who was found criminally responsible for the massacre at the Gashirabwoba football field. Bagambiki, on the other hand, denies this association and argues that no evidence existed supporting such a conclusion[633].

309. The Prosecution does not offer a further explanation as to the meaning of the "close association" between Bagambiki and Imanishimwe. In the view of the Appeals Chamber, the fact that Imanishimwe knew about the criminal activities of his soldiers does not necessarily mean that Bagambiki was fully aware of these crimes or Imanishimwe's involvement therein.

310. In addition, the Appeals Chamber notes that the Trial Chamber was not convinced that Bagambiki held *de jure* or *de facto* authority over the soldiers stationed at the Karambo military camp. The Trial Chamber accepted that there was no relationship of subordination between the *préfecture* and the Karambo camp, and found that there was no reliable evidence that Bagambiki ever issued orders to soldiers.[634]

311. Finally, the Prosecution relies on the "close proximity of [Bagambiki's] actions, in time and place, to the crimes" to support its position that the only reasonable conclusion open to the Trial Chamber was a finding of his guilt.[635] In particular, the Prosecution points to the coincidence that Bagambiki was accompanied during his visit to the Gashirabwoba football field by the director of the Shagasha tea factory, whose guards subsequently participated in the attack.[636]

312. However, the Trial Chamber did not find that there were large-scale and indiscriminate attacks by soldiers on refugees prior to the Gashirabwoba football field massacre. In fact, this was the only large-scale attack on refugees in which, according to the Trial Chamber's findings, soldiers participated.[637] On 11 April 1994, one day before the attack, there had been some instances of soldiers maltreating detainees at the Karambo military camp, killing two of them,[638] but there is no specific evidence suggesting that Bagambiki knew about these incidents.

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[629] Prosecution Appeal Brief, para. 20.
[630] Trial Judgement, paras. 311, 581, 313 and 316.
[631] *Ibid*., paras. 309, 313, 480, 482, 534, 538, 580 and 611.
[632] Prosecution Appeal Brief, para. 24, quoting Judge Williams Opinion, paras. 7-8.
[633] Bagambiki Response Brief, paras. 28-29.
[634] Trial Judgement, paras. 641-642. In the notice of appeal, the Prosecution contends that the Trial Chamber erred in law when it found that Bagambiki lacked effective control over the military (Prosecution Notice of Appeal, para. 59). However, the Prosecution Appeal Brief focuses on Bagambiki's position as to the *gendarmerie* and contains only some passing references to soldiers (Prosecution Appeal Brief, paras. 361, 372-381; the only explicit reference to soldiers is to be found in paragraph 371). The issue is discussed below. See below, para. 340.
[635] Prosecution Appeal Brief, para. 27.
[636] *Ibid*., para. 20.
[637] Trial Judgement, para. 640.
[638] *Ibid*., paras. 310, 311 and 408.

313. Considering that in several cases the Trial Chamber found that Bagambiki took action to protect refugees or to prevent attacks on them,[639] the Appeals Chamber finds that it was not unreasonable for the majority of the Trial Chamber to decline to draw the conclusion that Bagambiki ordered the attack at the Gashirabwoba football field on 12 April 1994. Considering further that the Trial Chamber found that this was the only large-scale attack on refugees in the *préfecture* in which soldiers participated, the Appeals Chamber finds that it was equally open to a reasonable trier of fact not to draw the conclusion that Bagambiki acted with the knowledge and consent that the soldiers would attack the refugees.

(c) The killing of 16 Tutsi refugees

314. With regard to the murder of the 16 Tutsi refugees who had been removed from Cyangugu Cathedral and Kamarampaka Stadium, the Trial Chamber found that:

> on 16 April 1994, Bagambiki, Imanishimwe, and others selected twelve Tutsis and one Hutu from the stadium using a pre-established list. The Chamber finds that the twelve Tutsi refugees were executed along with four other Tutsis who had been selected and removed from Cyangugu Cathedral by the same authorities a short while earlier. The Chamber lacks sufficient reliable evidence to determine if the execution of the sixteen Tutsis occurred at Gatandara. A majority of the Chamber, Judge Williams dissenting, lacks sufficient reliable evidence to determine whether Bagambiki or Imanishimwe participated in the execution of these sixteen refugees by either personally killing them, ordering soldiers to kill them, or giving them to *Interahamwe* to be killed.[640]

315. Bagambiki testified that on the 16 and 17 of April 1994, a growing number of assailants made several attempts to attack the refugees at the Kamarampaka Stadium.[641] On the 17th, Bagambiki continued, he was informed by the commander of the *gendarmerie* guarding the stadium that the assailants had given him a list with a number of people, whom they believed to be in contact with RPF.[642] In addition, the commander of the *gendarmerie* told Bagambiki that he was not sure if he could prevent a massacre of the refugees, given the growing number of assailants and the limited number of *gendarmes* available.[643]

316. Bagambiki testified that he consulted the available members of the prefectural security council about the situation. The public prosecutor proposed to question the persons on the list under the protection of the *gendarmerie* to establish that they had no weapons or radios to contact RPF.[644] Bagambiki recalled that he decided that this was the only solution.[645] Bagambiki explained that it was not in his power to request the assistance of the military, as that was the responsibility of the commander of the *gendarmerie*. Finally, Bagambiki added, he was considering what had happened at Nyamasheke earlier, where the assailants had demanded the removal of one particular priest, and had abandoned their attack after this priest had left the Parish.[646]

317. Bagambiki testified that he was informed the next morning that the persons had been brought to the judicial brigade at Rusizi in order to be questioned the following day, but that the building,

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[639] See *supra*, para. 307.
[640] Trial Judgement, para. 337.
[641] Bagambiki, T.1 April 2003, p. 24.
[642] *Ibid*., p. 24.
[643] Bagambiki, T.1 April 2003, p. 25.
[644] Idem.
[645] *Ibid*., p. 26: [a]fter the fact, the decision was risky, even if we were able to protect and stop the attack again, the thousands of refugees who were at the stadium who were still alive today. But when I thought about it, I wondered if I was able to take another solution – find another solution, but at the time we saw no other solution, no other decision; it was the only one which would guarantee the security of the persons on the list and the security of the persons at the stadium.
[646] Bagambiki, T.1 April 2003, p. 26.

which was protected by a few *gendarmes*, was attacked by a crowd of assailants who killed the detainees.[647] The judicial brigade at Rusizi, Bagambiki explained, was where the *inspecteurs de la police judiciaire* had their office and their detention cells, and where persons to be questioned by the public prosecutor were detained.[648]

318. On appeal, Bagambiki submits that he did not have any choice: the assailants, who had already launched several attacks against the cathedral, threatened to attack the stadium, if the refugees on the list were not removed from the stadium. He adds that he knew that it was risky to take these persons away, but that it was, in his view, the only way to protect the refugees at the stadium as well as those whose names were on the list.[649]

319. There is no reliable direct evidence showing that Bagambiki was physically present at the killing of the 16 refugees or gave the order to kill them. Witness LAP was the only witness giving such evidence.[650] However, the Trial Chamber found that there were "numerous indicia that Witness LAP lacks credibility and is not reliable", among them several contradictions to evidence given by other witnesses, inconsistencies in the witness' own testimony, and a request for money in exchange for providing evidence.[651] Although the Prosecution takes issue with the Trial Chamber's decision not to admit certain rebuttal evidence related to Witness LAP's evidence,[652] it appears to accept the Trial Chamber's conclusion that there is no reliable evidence showing Bagambiki's direct participation in the killing. Rather, the Prosecution's argument is that he "substantially contributed" to the crime, having knowledge of the genocidal intent of its perpetrators, thus aiding and abetting the crime.[653]

320. In general, the Prosecution relies on the same set of facts to support its conclusion that Bagambiki "at the very least" aided and abetted the killing of the 16 refugees, in particular Bagambiki's position as a prefect and his "active involvement in events on the ground".[654]

321. The Appeals Chamber observes that Bagambiki had acknowledged that the decision to remove the refugees on the list was a "risky" one.[655] This, however, does not necessarily entail criminal responsibility. Bagambiki had testified that he believed at that time that this decision was the only one to ensure the security of both the persons on the list and the remaining refugees at the stadium.[656] The Appeals Chamber considers that to hold Bagambiki criminally responsible for the killing of the 16 refugees, a reasonable Trial Chamber would have to be satisfied beyond reasonable doubt that he knew that the refugees were to be killed and that he substantially contributed to their killing by his actions. This scenario is incompatible with the conclusion that, although aware of the risk, he was aiming at protecting the refugees by removing them from the stadium.

322. Witness LCJ, on whose testimony Judge Williams relied in his dissenting opinion, testified:

> [Bagambiki] said that the people whose names he was going to read out were people who were disrupting the security of the Hutu who were outside the stadium; in other words, the Hutu population. He added that, people were saying that those people had weapons as well as military

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[647] *Ibid*., p. 28.
[648] Idem.
[649] Bagambiki Response Brief, para. 34.
[650] Trial Judgement, para. 257; Witness LAP, T.10 September 2001, pp. 41-46.
[651] Trial Judgement, paras. 321-322.
[652] See *supra*, paras. 265-268.
[653] Prosecution Appeal Brief, para. 27.
[654] *Ibid*., para. 20.
[655] Bagambiki, T.1 April 2003, p. 26.
[656] *Idem*: given what had happened at Nyamasheke, if we withdraw just like we withdrew Father Ubald – because people said that they didn't want him at Nyamasheke and we transferred him to Cyangugu, the attackers withdrew and no longer attacked the refugees – we thought that in this case, in the same manner, if these persons were moved away, transferred, the other refugees, the assailants would not come back to attack.

uniforms and therefore they were going to be taken away to be questioned and if necessary their fate be decided.[657]

Given the fact that Bagambiki was apparently merely repeating the assailants' reasons why the refugees on the list should be removed from the stadium, the Appeals Chamber finds that a reasonable trier of fact could conclude that this speech did not necessarily put the refugees in a greater risk than they were already in.

323. The fact that the only Hutu among the 17 selected refugees survived does not necessarily lead to the conclusion that Bagambiki knew or had reason to know about the impending fate of the other refugees. First, it is not clear whether Bagambiki knew that this one person was separated from the 16 Tutsi refugees. Second, Bagambiki testified that he was informed after the events that this refugee had been taken to the home of the commander of the *gendarmerie* because there were not enough cells at the Rusizi brigade and she was the only woman among the 17 selected persons.[658]

324. There are also some facts which support Bagambiki's defence. Not every observer thought that the selection of the refugees had a sinister meaning. Thus, when four of the refugees on the list were taken from Cyangugu Cathedral, the Church authorities believed that the request to question them was genuine and that they would not be harmed.[659]

325. Bagambiki stressed in his testimony that he was encouraged in his decision to allow the removal of the 17 refugees by the events in Nyamasheke.[660] The Trial Chamber indeed found that Bagambiki intervened at Nyamasheke Parish on 13 April 1994, negotiated with the assailants and removed the priest, Father Ubald, from the Parish. There were no further attacks on Nyamasheke Parish on 13 or 14 April. However, on 15 April, a massive assault was launched against the Parish, during which most of the refugees there were killed.[661] Bagambiki was informed about this attack on the same day, so that, when on 16 April the decision was taken to remove the 17 refugees from Cyangugu Cathedral and Kamarampaka Stadium, it might be argued that it was at least doubtful if this measure could actually prevent an attack at the stadium. However, Bagambiki's hope – if this was the motive for his decision – that the removal of the 17 refugees would prevent further attacks on the stadium apparently turned out to be justified: according to the Trial Chamber, there were no large-scale attacks at the refugees gathered at the Kamarampaka Stadium after 16 April 1994.[662]

326. The Appeals Chamber notes that the events at Shangi Parish show that the selection of some refugees to satisfy the demands of attackers did not necessarily mean that the selected refugees would be killed. According to the Trial Chamber's findings, Bagambiki sent Théodore Munyangabe on 26 April 1994 to Shangi Parish after he was informed about an impending attack. Munyangabe negotiated with the assailants and agreed to remove a number of refugees from the parish, if the assailants agreed not to attack the remaining refugees. The assailants gave Munyangabe a list with names of persons who, in their view, "caused insecurity".[663] Munyangabe then selected around 40 refugees, who were taken to the *préfecture* and a *gendarmerie* camp. On the way, one of them was killed during an attack by the local population, and several were mistreated in the *gendarmerie* camp, but the rest of them arrived safely at the Kamarampaka Stadium.[664]

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[657] Witness LCJ, T.22 May 2001, pp. 10-11 (closed session).
[658] Bagambiki, T.1 April 2001, p. 28.
[659] Trial Judgement, para. 318.
[660] Bagambiki, T.1 April 2003, p. 26.
[661] Trial Judgement, para. 584.
[662] Trial Judgement, para. 331. There were several instances of refugees being taken away from the stadium, and at least one refugee named George Nkusi was killed (Trial Judgement, para. 325). Witness LBH testified about the large-scale killing of refugees from Kamarampaka Stadium, but, noting contradicting evidence, the Trial Chamber rejected his evidence (Trial Judgement, para. 327).
[663] Trial Judgement, paras. 467, 481.
[664] Trial Judgement, para. 481.

327. In sum, the Appeals Chamber finds that the evidence is not as unequivocal as the Prosecution claims it to be. Many of the factual findings are open to different interpretations. Even if some of the facts would support the conclusion that Bagambiki knew that his participation in the selection of the refugees would lead to their death, this is far from being the only reasonable inference. The Appeals Chamber concludes that a reasonable trier of fact could find that Bagambiki's defence was not refuted by the evidence and conclude that he was not criminally responsible for the death of the 16 refugees.

3. Conclusion

328. For the foregoing reasons, the Prosecution's first and second grounds of appeal are dismissed in their entirety.

F. EMMANUEL BAGAMBIKI'S CRIMINAL RESPONSIBILITY (9TH GROUND OF APPEAL)

329. Under its ninth ground of appeal, the Prosecution submits that the Trial Chamber erred in law when it absolved Bagambiki of individual criminal responsibility under Articles 6 (1) and 6 (3) of the Statute.[665] Although the Prosecution presents its submission under the heading "misapplication of Rwandan law", the Appeals Chamber understands that it raises in fact several broader issues:

- Contrary to the Trial Chamber's conclusions, Bagambiki was criminally responsible for "omissions or gross criminal negligence" and aiding and abetting crimes by acquiescence or tacit encouragement;[666]
- The Trial Chamber erroneously held that there was no superior-subordinate relationship between Bagambiki and the *gendarmes*;[667] and
- The Trial Chamber erred in its application of Article 6 (3) of the Statute when it exonerated Bagambiki from responsibility for the massacre of Tutsi by the Kagano communal police.[668]

1. Criminal responsibility for omissions under Article 6 (1) of the Statute

330. With regard to Bagambiki's responsibility under Article 6 (1) of the Statute, the Prosecution submits in its Notice of Appeal that the Trial Chamber committed an error by finding that the Rwandan law only entailed civil, and not criminal sanctions for a prefect's failure to ensure the protection and safety of the civilian population.[669] In its Appeal Brief, the Prosecution expands this argument and submits that Bagambiki was not only responsible for criminal omissions, but that his inaction and silence, despite his knowledge of the massive crimes, amount to conduct that was tantamount to acquiescence in the crimes or their tacit encouragement.[670]

(a) Culpable omission

331. With regard to Bagambiki's criminal liability for omissions or gross criminal negligence, the Prosecution argues that the Trial Chamber erred in relying exclusively on Rwandan law. According to the Tribunal's jurisprudence, the Prosecution argues, it is a well-established principle that an accused can be held liable under Article 6 (1) for culpable omission; a principle, the Prosecution adds, which is also embraced by the Rwandan Penal Code.[671] Therefore, the Prosecution concludes, Bagambiki was

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[665] Prosecution Appeal Brief, para. 360.
[666] *Ibid*., para. 364.
[667] *Ibid*., paras. 372-381.
[668] *Ibid*., para. 362.
[669] Prosecution Notice of Appeal, para. 59 (a).
[670] Prosecution Appeal Brief, paras. 364, 370.
[671] *Ibid*., para. 367.

criminally responsible, because he failed to "prevent or to punish the perpetrators" of the killings and acts of violence, despite his knowledge of the crimes.[672]

332. Bagambiki responds that the Trial Chamber drew a distinction between his general obligation to ensure the safety of the population of the *préfecture*, and his obligation to assist individual persons in danger who had explicitly asked for his assistance.[673] The Trial Chamber's reasoning regarding Rwandan law, Bagambiki submits, was relevant only to the first charge that Bagambiki failed to meet his obligations deriving from his position as a prefect.[674] In this respect, Bagambiki argues, the Trial Judgement was consistent with the jurisprudence and the Statute of the Tribunal.[675]

333. The Prosecution takes issue with the Trial Chamber's conclusions in paragraphs 658 through 660 of the Trial Judgement. At the outset, the Trial Chamber defined the requirements for criminal responsibility for an omission as a principal perpetrator:

> (a) the accused must have had a duty to act mandated by a rule of criminal law; (b) the accused must have had the ability to act; (c) the accused failed to act intending the criminally sanctioned consequences or with awareness and consent that the consequences would occur; and (d) the failure to act resulted in the commission of the crime.[676]

The Trial Chamber then found that Bagambiki, under Rwandan domestic law, had an obligation to ensure the protection of the population of his *préfecture*. The Trial Chamber went on to determine whether Bagambiki had the ability to act. It considered that, as the prefect, he could request the intervention of the Armed Forces, but that he had no authority to determine or control how the Armed Forces executed an operation. In addition, it found that "the evidence d[id] not indicate what other specific means were available to a prefect".[677] The Trial Chamber concluded that "this legal duty was not mandated by a rule of criminal law. Thus, any omission of this legal duty under Rwandan law, even if proven, does not result in criminal liability under Article 6 (1) of the Statute".[678]

334. It is not disputed by the parties that an accused can be held criminally responsible for omissions under Article 6 (1) of the Statute.[679] Neither do they dispute that any criminal responsibility for omissions requires an obligation to act. The issue is rather whether this obligation to act must stem from a rule of criminal law, or, as the Prosecution appears to contend, any legal obligation is sufficient. The Appeals Chamber notes that the *Blaskić* Appeal Judgement, on which the Prosecution relies in its Reply,[680] does not address this issue.[681]

335. In the context of the present case, it is not necessary to discuss this issue further. The Trial Chamber based its conclusion on two different arguments: The duty of the prefect was not mandated

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[672] *Ibid*., para. 369.
[673] Bagambiki Response Brief, para. 290.
[674] *Ibid*., para. 293.
[675] *Ibid*., para. 294.
[676] Trial Judgement, para. 659 (footnote omitted).
[677] *Ibid*., para. 660.
[678] Idem.
[679] See e. g. *Blaskić* Appeal Judgement, para. 663 (regarding Article 7 (1) of the ICTY Statute).
[680] Prosecution Brief in Reply, para. 75.
[681] *Blaskić* Appeal Judgement, fn. 1385 to para. 663, cites Article 86 (1) of Additional Protocol I: "The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so", indicating that not every failure to act gives rise to *criminal* responsibility. In *Blaskić*, the duty to act was qualified as one imposed by the "laws and customs of war" (*Blaskić* Appeal Judgement, para. 668). *Cf.* also *Bagilishema* Appeal Judgement, para. 36: "The line between those forms of responsibility which may engage the criminal responsibility of the superior under international law and those which may not can be drawn in the abstract only with difficulty" and *A. Cassese*, International Criminal Law, p. 202: "It should be noted that *serious* violations of *many* of the above positive obligations […] amount to a war crime" (emphasis added).

by a rule of criminal law, and it was not clear what means were available to Bagambiki to fulfil this duty. The Appeals Chamber also notes the Separate Opinion of Judge Ostrovsky:

> In my view, the Prosecutor simply failed to introduce sufficient evidence concerning what additional resources were available to the *préfecture* to stem the tide of violence and to provide greater protection to the refugees. On the basis of the totality of the reliable and credible evidence presented in this case, I am not convinced that Bagambiki, with the resources available to him, could do more for the protection of refugees in Cyangugu prefecture.[682]

The Prosecution has not indicated which possibilities were open to Bagambiki to fulfil his duties under the Rwandan domestic law. Thus, even if the failure to fulfil the duty of a Rwandan prefect to protect the population of his prefecture could entail responsibility under international criminal law, the Prosecution has not shown that the alleged error of the Trial Chamber invalidated its decision.

336. Moreover, the Appeals Chamber notes that the Prosecution does not identify any particular instances of Bagambiki's alleged failure to fulfil this obligation under this ground of appeal.

(b) Aiding and abetting by tacit approval

337. The Prosecution submits that Bagambiki's

> "knowledge of such massive crimes and his inaction or silence amount to culpable omission or gross negligence or conduct that is tantamount to acquiescence in, tacit approval of, or aiding and abetting the crimes".[683]

Citing the *Aleksovski* Trial Judgement, the Prosecution argues that when a superior was aware of crimes committed by his subordinates his silence could only be interpreted as a sign of approval, even when he was not present at the crime scene.[684]

338. In the view of the Appeals Chamber, criminal responsibility for an omission, which leads to a conviction as the principal perpetrator of the crime, has to be distinguished from aiding and abetting a crime by encouragement, tacit approval or omission, amounting to a substantial contribution to the crime. In the Notice of Appeal, the Prosecution's arguments are exclusively related to the issue of criminal responsibility for an omission. The issue of Bagambiki's responsibility for aiding and abetting the crimes by his tacit approval is raised only in the Appeal Brief, without the Prosecution having first sought leave to vary its grounds of appeal.[685] Accordingly, the Appeals Chamber declines to address this issue further.

2. Superior responsibility under Article 6 (3) of the Statute

(a) Superior-subordinate relationship between Bagambiki and the gendarmes

339. The Prosecution challenges the Trial Chamber's finding that Bagambiki had neither *de jure* nor *de facto* authority over the *gendarmes*. The Prosecution submits that the Trial Chamber erred in its definition of a superior under Article 6 (3) of the Statute.[686]

340. In its Notice of Appeal, the Prosecution submitted that the Trial Chamber erred in finding "that Bagambiki lacked effective control over the gendarmes *and the military*".[687] However, in the

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[682] Judge Ostrovsky Opinion, para. 17.
[683] Prosecution Appeal Brief, para. 370.
[684] *Idem*, quoting *Aleksovski* Trial Judgement, paras. 87-88.
[685] *Cf.* Practice Directions on Formal Requirements for Appeals from Judgement, 4 July 2005, Article 2.
[686] Prosecution Appeal Brief, paras. 372-373.
[687] Prosecution Notice of Appeal, para. 59 (b) (emphasis added).

Appeal Brief, the Prosecution's arguments are focused on Bagambiki's effective control over the gendarmes, leading to the conclusion that Bagambiki had

> "the necessary *material ability* required to prevent or punish crimes by the *gendarmes* he requisitioned".[688]

The Appeals Chamber will therefore concentrate on the issue of Bagambiki's responsibility for the crimes committed by the *gendarmes*.

341. The Prosecution asserts that the

> "Trial Chamber confined the definition of a superior to a military-style structure, where the superior can give orders or punish or prevent transgressions through issuing orders or taking disciplinary actions".[689]

The paragraph of the Trial Judgement, to which the Prosecution refers, reads:

> After reviewing the relevant provisions of Rwandan law, the Chamber is not convinced that Bagambiki's ability to requisition *gendarmes* gave him *de jure* authority to give orders to them during the execution of an operation. […] The law contains no provision indicating that a prefect had the legal authority as a superior to prevent a *gendarme* from committing a crime by giving an order during the execution of an operation or to punish a *gendarme* who had committed a crime during the execution of an operation.[690]

In the next paragraph, the Trial Chamber went on to determine whether Bagambiki had *de facto* authority over the gendarmes, and found that

> [w]hile there is ample evidence that Bagambiki requisitioned *gendarmes* to provide security at a number of sites, there is insufficient evidence that he maintained any control over how these *gendarmes* carried out their mission upon deployment.[691]

Although the Trial Chamber in this paragraph did not explicitly refer to Bagambiki's ability to prevent the commission of the offence or to punish the offenders, its finding has to be read in the context of the Trial Chamber's general definition of superior responsibility:

> a superior-subordinate relationship is established by showing a formal or informal hierarchical relationship. The superior must have possessed the power or the authority, *de jure* or *de facto*, to prevent or punish an offence committed by his subordinates. The superior must have had effective control over the subordinates at the time the offence was committed. Effective control means the material ability to prevent the commission of the offence or to punish the principal offenders.[692]

This definition is consistent with the settled jurisprudence of both this Tribunal and the ICTY.[693] In particular, the Appeals Chamber recalls the conclusion of the ICTY Appeals Chamber in *Blaškić*:

> The indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate.[694]

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[688] Prosecution Appeal Brief, para. 379 (emphasis added).
[689] *Ibid*., para. 376.
[690] Trial Judgement, para. 636.
[691] *Ibid*., para. 637.
[692] *Ibid*., para. 628 (footnotes omitted).
[693] *Bagilishema* Appeal Judgement, paras. 50 and 55; *Kajelijeli* Appeal Judgement, para. 87; *Čelebići* Appeal Judgement, para. 196-198; *Blaškić* Appeal Judgement, paras. 67-69.
[694] *Blaškić* Appeal Judgement, para. 69 (footnotes omitted).

342. The Trial Chamber's definition and paragraph 637 of the Trial Judgement clearly show that the Trial Chamber was aware that "effective control" as the prerequisite for superior responsibility is tantamount to the material ability to prevent or punish criminal conduct.[695] Therefore, the Appeals Chamber finds that the Trial Chamber did not err in its definition of superior-subordinate relationship.

343. The Appeals Chamber does not agree with the Prosecution's argument that the Trial Chamber, in its analysis of Bagambiki's *de jure* position "subordinated substantive legislation to ministerial instructions relating to the *gendarmerie*".[696] The Trial Chamber's analysis encompassed not only the Rwandan Ministerial Instruction on the Maintenance and Re-establishment of Order,[697] but also the Rwandan law on the *gendarmerie*.[698] The Prosecution submits that the Trial Chamber should have also considered the Law on the Organisation and Functioning of the *Préfecture*, which gave the prefect an "extensive obligation to ensure tranquillity, order and security of people and property".[699] The Prosecution does not indicate any particular provisions of this law to support its argument. The Appeals Chamber notes that Article 8 (2) of the Law on Organisation and Functioning of the *Préfecture* indeed obliges the prefect to "ensure the tranquillity, the public order and the security of persons and property".[700] To fulfil this obligation, the law empowered the prefect to request the intervention of the Armed Forces "in accordance with the Law on the Establishment of the *gendarmerie*".[701] In other words, the Law on Organisation and Functioning of the *Préfecture* concretized the prefect's obligation by a reference to the Rwandan law on the *gendarmerie*, which the Trial Chamber duly took into account.

344. In addition, the Prosecution relies on paragraph 78 of the *Aleksovski* Trial Judgement, which held that

> [t]he possibility of transmitting reports to the appropriate authorities suffices once the civilian authority, through its position in the hierarchy, is expected to report whenever crimes are committed, and that, in the light of this position, the likelihood that those reports will trigger an investigation or initiate disciplinary or even criminal measures is extant.[702]

In his Response, Bagambiki points to the testimony of Prosecution expert witness, André Guichaoua, that in 1994 in Cyangugu the judiciary and the prosecution were not in a position to carry out their tasks satisfactorily: "These people were never known for having arrested or prevented any murder."[703] And, in addition, Bagambiki argues:

> "Should [Bagambiki] be blamed for not having submitted reports to the Interim Government whose members are currently under trial in this jurisdiction?"[704]

345. It fell to the Prosecution to identify the authorities to which, in its view, Bagambiki should have submitted reports in order to prevent the crimes or to punish their perpetrators. This it failed to do. In the view of the Appeals Chamber, the theoretical possibility of submitting reports of crimes

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[695] *Kajelijeli* Appeal Judgement, para. 86.
[696] Prosecution Appeal Brief, para. 375.
[697] Exhibit D-EBA 3(ii) "Instruction ministérielle n°01/02 du 15 septembre 1978 – Maintien et rétablissement de l'ordre", Trial Judgement, para. 635.
[698] Exhibit D-EBA 3(iii) "*Décret-loi du 23 Janvier 1974 – Création de la Gendarmerie*", Trial Judgement, para. 635.
[699] Prosecution Appeal Brief, para. 375.
[700] Exhibit D-EBA 3(i), "Décret-loi n°10/75 du 11 mars 1975 – Organisation et fonctionnement de la préfecture": "assurer la tranquillité, l'ordre public et la sécurité des personnes et des biens".
[701] Exhibit D-EBA 3(i), "Décret-loi n°10/75 du 11 mars 1975 – Organisation et fonctionnement de la préfecture", Article 11: "Le préfet peut […] requérir l'intervention des forces armées pour le rétablissement de l'ordre public, et ce, conformément à la procédure prévue par les lois en vigueur et, notamment, par le Décret-Loi du 23 janvier 1974 portant création de la Gendarmerie".
[702] Prosecution Appeal Brief, para. 378, quoting *Aleksovski* Trial Judgement, para. 78.
[703] Expert Witness André Guichaoua, T.24 September 2001, pp. 175-176.
[704] Bagambiki Response Brief, para. 329.

committed against Tutsi refugees to the same authorities who, as the Prosecution argues in other cases, were actively organizing and ordering massacres of Tutsi throughout Rwanda is not sufficient to establish Bagambiki's criminal responsibility.

346. The Prosecution itself argues that in April 1994 the monopoly of power lay with the prefects,[705] which is not easily reconcilable with the idea that Bagambiki should have submitted reports of criminal acts to the "appropriate authorities" in order to prevent and punish crimes. Regarding the argument that the prefects held the monopoly of power, the Appeals Chamber observes that general statements of the situation in Rwanda in April 1994 may be illustrative as to the background of the case, but they are not suited to prove the individual guilt of the Accused.

347. To demonstrate that Bagambiki exercised "effective control" over the *gendarmes*, the Prosecution had to prove that he had the material ability to prevent and punish crimes. This it failed to do. The Appeals Chamber concludes that the Prosecution has not demonstrated any error in the Trial Chamber's reasoning as to Bagambiki's *de jure* or *de facto* position of authority *vis-à-vis* gendarmes.

(b) Bagambiki's responsibility for the crimes of the Kagano communal police

348. The Prosecution submits that the Trial Chamber erred in finding Bagambiki not liable for the massacre of Tutsi refugees at the Nyamasheke Parish on 15 April 1994, in which members of the Kagano communal police participated.[706] The Prosecution argues that the Trial Chamber had found that Bagambiki was a superior with effective control over the Kagano communal police, but nevertheless acquitted him, because there was no evidence that he was informed of the attack.[707] This, the Prosecution contends, is "hardly to reconcile" with the Trial Chamber's finding that Bagambiki, due to his position, ought to have known about the various attacks.[708] In addition, the Prosecution argues that the Trial Chamber misconstrued the "ought to have known or had reason to know" test required under Article 6 (3) of the Statute.[709]

349. The Appeals Chamber first of all notes that the argument that the Trial Chamber misconstrued the "knew or had reason to know" test set forth in Article 6 (3) of the Statute is raised in the Appeal Brief for the first time, and, in addition, is unrelated to the claim that the Trial Chamber misapplied Rwandan law.[710] The Appeals Chamber further notes that the Prosecution did not seek leave to vary its grounds of appeal in order to include this new allegation.[711] Accordingly, the Appeals Chamber declines to address this issue further.

350. With regard to Bagambiki's knowledge about the participation of his subordinates in the Nyamasheke parish massacre, the Trial Chamber noted:

> The Chamber has no evidence that Bagambiki was informed while Bagambiki visiting Nyamasheke parish with Kamana and others on 13 April 1994 that Kagano *commune* police participated in the attack on that date. There is also no indication in the evidence that Bagambiki was informed of the 15 April 1994 attack at Nyamasheke until after it was completed.[712]

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[705] Prosecution Appeal Brief, para. 380.
[706] *Ibid*., paras. 382-384, referring to Trial Judgement, paras. 645-649.
[707] *Ibid*., para. 382 (emphasis omitted).
[708] Idem.
[709] *Ibid*., para. 383.
[710] Prosecution Notice of Appeal, paras. 58-60.
[711] *Cf*. Practice Directions on Formal Requirements for Appeals from Judgement, 4 July 2005, Article 2.
[712] Trial Judgement, para. 649.

The Trial Chamber went on to conclude that Bagambiki should have known that the *bourgmestre* of Kagano, Kamana, also participated in the attack. With regard to the Kagano communal police, it found:

> The Chamber lacks sufficient reliable evidence to determine whether Bagambiki should have known about the involvement of Kagano commune police in the 15 April 1994 attack, given the limited testimony about their involvement in the attacks against Nyamasheke parish, the limited number of attacks in which they participated, and the fact that they did not report directly to the prefect unless specially requisitioned by him.[713]

351. The Appeals Chamber finds that the Prosecution misreads the Trial Judgement when it argues that the Trial Chamber found that "there was no evidence that [Bagambiki] was *informed* of the attack".[714] In fact, the Trial Chamber found that Bagambiki was informed about the attack, and as a consequence, suspended *Bourgmestre* Kamana.[715] The Trial Chamber found Bagambiki not responsible for the attack because it lacked evidence showing that Bagambiki should have known about the *involvement* of the Kagano communal police in the attack. The Prosecution has not shown that this finding was unreasonable.

3. Conclusion

352. The Prosecution's ninth ground of appeal is dismissed in its entirety.

G. NATURE OF SAMUEL IMANISHIMWE'S CRIMINAL RESPONSIBILITY FOR THE EVENTS OF GASHIRABWOBA (10TH GROUND OF APPEAL)

353. The Trial Chamber found Imanishimwe guilty of genocide (Count 7 of the Bagambiki/Imanishimwe Indictment), extermination as a crime against humanity (Count 10) and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II (Count 13) pursuant to Article 6 (3) of the Statute for the acts committed by his subordinates at the Gashirabwoba football field on 12 April 1994.

354. The Prosecution submits that the finding that Imanishimwe incurs criminal responsibility pursuant only to Article 6 (3) of the Statute

> "fails to capture the true nature of Imanishimwe's role and participation in the massacre at Gashirabwoba football field".[716]

The Prosecution argues that the only finding that a reasonable trier of fact could have made from the established facts was that Imanishimwe was directly responsible for having ordered, or at the very least for having aided and abetted, the crimes committed on 12 April 1994 at Gashirabwoba.[717] The Prosecution also submits that Imanishimwe should have been found guilty for having "participated in a joint criminal enterprise as a co-perpetrator in a position to issue orders".[718] In short, the Prosecution alleges that the Trial Chamber erred in not finding Imanishimwe criminally responsible on the basis of Article 6 (1) of the Statute.

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[713] Idem.
[714] Prosecution Appeal Brief, para. 382.
[715] Trial Judgement, paras. 581 and 586. The Trial Chamber did not find explicitly that Bagambiki knew about the second attack on 15 April 1994, but it accepted Bagambiki's testimony that he was informed about the attack by *Bourgmestre* Kamana and suspended him because he was not convinced by his explanations, Trial Judgement, paras. 568 and 586.
[716] Prosecution Appeal Brief, para. 392.
[717] Prosecution Notice of Appeal, para. 63; Prosecution Appeal Brief, para. 389.
[718] Prosecution Appeal Brief, sub-heading (ii), p. 145. In this case the Prosecution refers to its arguments under his 3rd ground of appeal.

355. In response to the Prosecution's arguments, Imanishimwe submits that he should not have been convicted of the events that occurred in Gashirabwoba. On the one hand, he contends that the acts allegedly committed by soldiers at Gashirabwoba on 12 April 1994 are not pleaded in the Indictment. On the other, he alleges that the Prosecution adduced no evidence to establish that the soldiers said to have massacred the refugees were his subordinates.[719] Imanishimwe is in fact repeating hence the arguments that he develops to buttress his first and second grounds of appeal. With regard to the finding that he incurred criminal responsibility on the basis of Article 6 (1), Imanishimwe merely states that the arguments advanced by the Prosecution

> "are specious, as they contain no evidence whatsoever that Samuel Imanishimwe was present during the massacre at Gashirabwoba on 12 April 1994".[720]

1. Findings by the Trial Chamber

356. Upon examination of the evidence adduced by the parties on the events at Gashirabwoba, the Trial Chamber made the following factual findings:

> 435. […] A majority of the Chamber, Judge Ostrovsky dissenting, finds that on 11 April 1994 after the refugees had repulsed an attack, Bagambiki, Imanishimwe, and soldiers came to the field [of Gashirabwoba] between 2:30 and 3:00 p.m., and the refugees told Bagambiki that they were being attacked by assailants from Bumazi and Gashirabwoba sectors. [...] At about 7:00 p.m. that evening, soldiers returned to the field and asked the refugees if they were all Tutsis.
>
> […]
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> 437. From Witness LAC's testimony, the Chamber further finds that, on 12 April 1994, the refugee population at the field had swelled to nearly 3,000. That morning, thousands of assailants from the surrounding area and the Shagasha tea factory began attacking the refugees at the football field. A majority of the Chamber, Judge Ostrovsky dissenting, finds that Bagambiki and Nsabimana, the director of the Shagasha tea factory, came to the field for about thirty minutes. From Witness LAC's evidence, the majority accepts that Bagambiki promised to send soldiers to protect the refugees. An hour later, armed factory guards and at least fifteen soldiers surrounded the refugees and, after the refugees had raised their hands and asked for peace, fired and threw grenades at them for thirty minutes. The *Interahamwe* then killed the survivors and looted their personal possessions.
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> […]
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> 439. [...] The Chamber notes that Witness LAC, whose testimony the Chamber accepted, did not see Bagambiki or Imanishimwe on the football field immediately prior to the soldiers' attack.

357. The Appeals Chamber notes that the Trial Chamber indicated at paragraph 624 of the Trial Judgement that it would consider Imanishimwe's individual criminal responsibility "as a superior under Article 6 (3) or for 'ordering', under Article 6 (1) [of the Statute]". A few paragraphs later, the Trial Chamber seems to widen the scope of the analysis by stating that it would like to assess the nature and form of criminal responsibility and participation for each of the accused "under Articles 2 (3) and 6 (1)".[721]

358. On the basis of its factual findings, the Trial Chamber made the following legal findings regarding Imanishimwe's criminal responsibility:

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[719] Imanishimwe Response Brief, paras. 170-194.
[720] *Ibid*., para. 195; see also AT. 6 February 2006, pp. 94-95.
[721] Trial Judgement, para. 626.

653. The Chamber has found that, on 12 April 1994, soldiers participated in the attack on the refugees at the Gashirabwoba football field. The Chamber lacks sufficient reliable evidence to find that Imanishimwe ordered his soldiers to participate in the attack within the meaning of Article 6 (1) [emphasis added].

654. The Chamber however finds that Imanishimwe knew or should have known about the participation of his soldiers in the attack at the Gashirabwoba football field. In reaching this conclusion, the Chamber recalls that Imanishimwe was present at the Gashirabwoba football field on 11 April 1994 and thus was fully aware of the presence of refugees and of their plight. His soldiers returned later that evening to determine whether the refugees were entirely Tutsi. On 12 April 1994, at least fifteen soldiers surrounded the refugees and killed them after the refugees asked for peace. Given the relatively small size of the camp, Imanishimwe's control over his soldiers, and the fact that he remained in regular contact with his soldiers stationed away from the camp, the Chamber cannot accept that fifteen or more soldiers would have participated in such a systematic, large-scale attack without the knowledge of their commander. The Chamber notes that there is no evidence that Imanishimwe took any steps to prevent the attack or to punish any soldier at Karambo camp for participating in the massacre. Thus, the Chamber finds that Imanishimwe can be held criminally responsible under Article 6 (3) for the actions of his subordinates at the Gashirabwoba football field. [emphasis added][722]

[…]

695. As the majority has determined that Imanishimwe is criminally responsible for genocide as a superior under Article 6 (3), the Chamber finds that Imanishimwe is not guilty on Count 8 of the indictment against him for complicity in genocide, which is based on the same facts as Count 7 and does not charge Imanishimwe with criminal responsibility under Article 6 (3).[723]

359. The Appeals Chamber notes that with regard to Gashirabwoba, the Trial Chamber makes a direct pronouncement only on Imanishimwe's responsibility as superior and for having ordered the crimes. However, it is apparent from its findings on all the allegations made against Imanishimwe that the Trial Chamber did not restrict its examination only to these two forms of criminal responsibility. Note should be taken, for example, of the guilty verdict against Imanishimwe for aiding and abetting acts of torture and cruel treatment perpetrated in Karambo camp.[724] In the opinion of the Appeals Chamber, the Trial Chamber's silence over the other forms of criminal responsibility with regard to Gashirabwoba can be explained by the very nature of its factual findings: the Trial Chamber plainly considered that no form of criminal responsibility other than the ones envisaged in the body of the Trial Judgement was capable of describing the criminal conduct of the Accused.

360. It is now left for the Appeals Chamber to determine, in light of the factual findings made by the Trial Chamber, whether the Trial Chamber erred in finding Imanishimwe criminally responsible for the events at Gashirabwoba on the basis of Article 6 (3) of the Statute only.

2. Responsibility for participation in a joint criminal enterprise

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[722] See also Trial Judgement, para. 691: "the Chamber finds that Imanishimwe is criminally responsible for the acts of his subordinates at the Gashirabwoba football field pursuant to Article 6 (3) of the Statute because he failed to prevent the crime. The Chamber also recalls that Imanishimwe did not punish any soldier for this attack, which additionally shows that he acquiesced in the soldiers' participation in the massacre; para. 694: "The Chamber finds beyond a reasonable doubt that Imanishimwe is criminally responsible under Article 6 (3) of the Statute for genocide because he failed to prevent the killing of members of the Tutsi ethnic group by his subordinates in relation to the events at the Gashirabwoba football field on 12 April 1994 […]".

[723] See also paras. 744, 749 and 794 for the other counts.

[724] Trial Judgement, paras. 763 and 802.

361. The Prosecution argues that Imanishimwe should have been found guilty as a "co-perpetrator in a position to issue orders"[725] for the crimes at Gashirabwoba on the strength of his participation in a joint criminal enterprise.

362. The Appeals Chamber recalls its finding above that the Trial Chamber did not err in deciding not to take into consideration responsibility for participation in a joint criminal enterprise, on the ground that the Prosecution had not pleaded this form of responsibility in the Indictment.[726] Consequently, the Appeals Chamber considers that the Prosecution has no basis for invoking to this form of responsibility here. The Appeals Chamber will therefore not consider the Prosecution's arguments in this respect any further.

3. Responsibility for ordering the commission of crimes

363. The Prosecution submits that Imanishimwe should have been held criminally responsible under Article 6 (1) of the Statute for ordering the massacre perpetrated at the Gashirabwoba football field. The Prosecution argues that the Trial Chamber should have inferred from the corpus of evidence that Imanishimwe had not "simply *acquiesced in*" but rather "ordered"[727] the participation of his soldiers in the massacre. It recalls in support of its argument that "[t]he fact that an order was given can be proved through circumstantial evidence" and that "[p]roof of all forms of criminal responsibility can be given by direct or circumstantial evidence".[728] For the Prosecution, it is clear from the factual findings made by the Trial Chamber that the soldiers would not have participated in the Gashirabwoba massacre "without Imanishimwe's express order or at least, some form of assistance from him",[729] as the Chamber had established *inter alia* that Imanishimwe exercised effective control over the soldiers of Karambo camp; that he had issued unlawful orders to them resulting in his conviction on the basis of Article 6 (1) for other crimes committed during the same period as the massacre, and that a massacre of that magnitude could not have taken place without his knowledge.[730]

364. On this issue, the Trial Chamber found that it lacked sufficient reliable evidence to find that Imanishimwe ordered his soldiers to participate in the attack within the meaning of Article 6 (1) of the Statute.[731]

365. The Appeals Chamber has on many occasions recalled the constitutive elements of this mode of responsibility:

(1) the material element (or *actus reus*) is established when a person uses his position of authority to order [732] another person to commit a crime;
(2) the requisite mental element (or *mens rea*) is established when such person acted with direct intent to give the order.[733]

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[725] Prosecution Appeal Brief, sub-heading (ii), p. 145.
[726] See *supra*, para. 45.
[727] Prosecution Appeal Brief, para. 403. The Prosecution cites the following passage from the *Galić* Trial Judgement, para. 170: "In situations where a person in authority under duty to suppress unlawful behaviour of subordinates of which he has notice does nothing to suppress that behaviour, the conclusion is allowed that that person, by positive acts or culpable omissions, directly participated in the commission of the crimes through one or more of the modes of participation described in Article 7 (1)."
[728] Prosecution Appeal Brief, para. 402, citing *Galić* Trial Judgement, para. 171, and *Blaškić* Trial Judgement, para. 281.
[729] Prosecution Appeal Brief, para. 405. See also CRA(A) 6 February 2006, p. 55.
[730] Prosecution Appeal Brief, paras. 393-405.
[731] Trial Judgement, para. 653.
[732] *Semanza* Appeal Judgement, paras. 360-361, referring to *Kordić and Čerkez* Appeal Judgement, para. 28.
[733] *Kordić and Čerkez* Appeal Judgement, para. 29. The Appeals Chamber notes that, in the *Blaskić* Appeal Judgement, the ICTY Appeals Chamber reached the conclusion that another articulation of *mens rea* different from direct intent exists, namely the act of ordering "an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order". (*Blaskić* Appeal Judgement, para. 42).

366. Applying these legal requirements to the Trial Chamber's factual findings, the Appeals Chamber does not consider that the Trial Chamber erred in its legal findings. The evidence presented before the Trial Chamber does not establish that Imanishimwe in one way or another, explicitly or implicitly, gave instructions to his subordinates to attack the Tutsi who had sought refuge at the Gashirabwoba football field. Accordingly, the Trial Chamber correctly found that Imanishimwe could not incur responsibility for "ordering" the crimes committed on 12 April 1994 at Gashirabwoba. This sub-ground of appeal is dismissed.

4. Responsibility for aiding and abetting the commission of crimes

367. Lastly, the Prosecution alleges that the Trial Chamber erred in not considering whether Imanishimwe was criminally responsible under Article 6 (1) of the Statute for aiding and abetting the massacre perpetrated at Gashirabwoba on 12 April 1994.[734] A reasonable tribunal, according to it,

> "would, at the barest minimum, have found that Imanishimwe aided and abetted in the killing of Tutsi refugees at the Gashirabwoba football field on 12 April 2004 by having knowledge that his soldiers would participate in the attack and by allowing them to do so".[735]

The Prosecution submits that the *actus reus* of aiding and abetting in this instance is established by Imanishimwe's omission to prevent his soldiers from going to Gashirabwoba, and that this omission had a decisive effect on their ability to participate in the attack.[736] It further contends that Imanishimwe possessed the requisite knowledge to be an aider and abettor in the Gashirabwoba massacre,[737] given that the Trial Chamber found that he knew or should have known about the participation of his soldiers in the attack.[738]

368. The Appeals Chamber notes that the Trial Chamber did not expressly rule on the issue as to whether Imanishimwe could have incurred criminal responsibility for aiding and abetting the crimes committed at the Gashirabwoba football field on 12 April 1994. This notwithstanding, the Appeals Chamber does not conclude that the Trial Chamber failed to consider this form of responsibility. It indeed transpires from the legal findings made by the Trial Chamber that this form of responsibility was considered and even accepted when the facts lent themselves to it. The Appeals Chamber understands the Trial Chamber's silence with respect to aiding and abetting as an indication that it was not established that the Accued's conduct could in this particular instance be characterized as aiding and abetting.[739]

369. Accordingly, the issue is for the Appeals Chamber to inquire into whether this finding is one which a reasonable trier of fact could have made.

370. To establish the material element (or *actus reus*) of aiding and abetting under Article 6 1) of the Statute, it must be proven that the aider and abettor committed acts specifically aimed at assisting, encouraging, lending moral support[740] for the perpetration of a specific crime, and that the said support

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[734] Prosecution Appeal Brief, para. 406.
[735] *Ibid*., para. 407.
[736] *Ibid*., para. 408. In support of its line of reasoning, the Prosecution cites the *Blaškić* Trial Judgement, para. 284: "the *actus reus* of aiding and abetting may be perpetrated through an omission, provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*." (footnote omitted).
[737] Prosecution Appeal Brief, paras. 409-410, referring to *Tadić* Appeal Judgement, para. 229 and *Krstić* Appeal Judgement, para. 140.
[738] *Ibid*., para. 410, citing Trial Judgement, para. 654.
[739] See *supra*, para. 359.
[740] The Appeals Chamber notes that the phrase "assist, encourage or lend no support" originally used by the Appeals Chamber in the *Tadić* (para. 229), *Aleksovski* (para. 163), *Vasiljević* (para. 102) and *Blaškić* (para. 45) Appeal Judgements has been translated as "*aider, encourager ou fournir un soutien moral*" in the French versions of the said Judgements. The Appeals Chamber considers that this translation may mislead the reader, given that "aided and abetted" is rendered in the French text of the Statute by "*aidé et encourage*".

had a substantial effect on the perpetration of the crime. The Appeals Chamber adds that the *actus reus* of aiding and abetting may, in certain circumstances, be perpetrated through an omission.[741] The requisite *mens rea* is the fact that the aider and abettor knows that his acts assist in the commission of the specific crime of the principal.[742]

371. In the instant case, the Trial Chamber considered that it was not established that the Accused had ordered or was present during the attack launched at Gashirabwoba on 12 April 1994.[743] On the other hand, it found that the soldiers responsible for the attack could not have participated in the attack without their superior, Samuel Imanishimwe, being aware of it.[744] For the Trial Chamber, the fact that Imanishimwe did not punish any of the incriminated soldiers showed that he "acquiesced in the soldiers' participation in the massacre".[745]

372. Firstly, the Appeals Chamber notes that, contrary to Imanishimwe's assertion,[746] proof that he was present during the massacre is not necessary here. The ICTY Appeals Chamber has had occasion to point out that an aider and abettor may participate before, during or after the crime has been perpetrated and at a certain distance from the scene of the crime.[747] The Appeals Chamber adopts these findings and holds that Imanishimwe's argument is irrelevant.

373. The Appeals Chamber concludes that the facts as established by the Trial Chamber did not oblige a reasonable trier of fact to find Imanishimwe criminally responsible for aiding and abetting the commission of the crimes of genocide, extermination and murders perpetrated at Gashirabwoba.

374. Although the Trial Chamber finds that Imanishimwe "acquiesced in" the participation of his soldiers in the massacre, it does not establish that such acquiescence was a substantial contribution to the perpetration of the crime. A reasonable trier of fact could not have concluded from the evidence that the soldiers implicated in the massacre were aware of the acquiescence in question, nor have determined the extent to which it might have influenced the said soldiers. In these circumstances, the Trial Chamber cannot be taken to task for not finding Imanishimwe responsible for aiding and abetting the perpetrators of the massacre.

375. The Prosecution submits that the omission by Imanishimwe to prevent his soldiers from going to Gashirabwoba had a decisive effect on their ability to participate in the attack. The Appeals Chamber holds that the findings of the Trial Chamber do not permit it to be established that Imanishimwe's omission was specifically aimed at giving the soldiers the possibility of going to perpetrate the massacre, or that he was aware of the assistance he was lending them. Moreover, the Prosecution does not demonstrate that no reasonable trier of fact would have failed to make the same findings on the basis of the evidence admitted by the Trial Chamber.

376. The Appeals Chamber holds that the Prosecution failed to demonstrate that the Trial Chamber committed an error when it refused to conclude that Samuel Imanishimwe acted or omitted to act – for example, by not holding back his soldiers – in the knowledge that his act or omission would assist, encourage or lend moral support[748] to the perpetration of crimes against the persons who had taken refuge at the Gashirabwoba football field. The Appeals Chamber accordingly holds that the

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[741] See *Blaskić* Appeal Judgement, para. 47.
[742] *Vasiljević* Appeal Judgement, para. 102; *Blaskić* Appeal Judgement, para. 45; *Kvočka et al*. Appeal Judgement, paras. 89-90, 188.
[743] Trial Judgement, paras. 439 and 653.
[744] *Ibid*., para. 654.
[745] *Ibid*., para. 691. See also paras. 744 and 795.
[746] See *supra*, para. 355.
[747] *Blaskić* Appeal Judgement, para. 48.
[748] See *supra*, note 740.

Prosecution has not demonstrated that the Trial Chamber erred in rejecting this form of responsibility when characterizing Imanishimwe's participation in the massacre of 12 April 1994.

5. Conclusion

377. For the foregoing reasons, the Appeals Chamber finds that the Prosecutor failed to demonstrate that the Trial Chamber committed an error when it refused, on the basis of its factual findings, to hold Samuel Imanishimwe individually responsible pursuant to Article 6 (1) of the Statute for ordering or aiding and abetting the perpetration of the Gashirabwoba massacre. The Appeals Chamber declined to consider Imanishimwe's responsibility for participation in a joint criminal enterprise inasmuch as he was not informed that the Prosecution intended to plead this form of responsibility against him. The Appeals Chamber dismisses this ground of appeal in its entirety.

IV. SAMUEL IMANISHIMWE'S APPEAL

A. SUPERIOR RESPONSIBILITY UNDER ARTICLE 6 (3) OF THE STATUTE (2ND GROUND OF APPEAL)

378. In his second ground of appeal, Imanishimwe alleges that the Trial Chamber erred by finding him responsible as a superior pursuant to Article 6 (3) of the Statute although it had not been established that the soldiers alleged to have massacred refugees at the Gashirabwoba football field were under his authority.[749]

379. As the Appeals Chamber has accepted Imanishimwe's first ground of appeal and consequently decided to set aside his convictions under Article 6 (3) of the Statute for the events at the Gashirabwoba football field, this ground of appeal has become moot, and hence does not need to be considered by the Appeals Chamber.

B. CONVICTION ON THE BASIS OF ARTICLE 4 OF THE STATUTE (4TH GROUND OF APPEAL)

380. The Trial Chamber found Imanishimwe guilty of serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II thereto (Count 13 of the Bagambiki/Imanishimwe Indictment) for acts perpetrated at Karambo camp and at the Gashirabwoba football field. In his fourth ground of appeal, Imanishimwe requests the Appeals Chamber to quash the conviction under Article 4 (a) of the Statute for the acts committed at Gashirabwoba.[750] He submits that the approach of the Trial Chamber "clearly demonstrates its bias and complacency"[751] by basing his "guilt in respect of the Gashirabwoba events on a fragmented account of events".[752] He also submits that the Trial Chamber failed to establish a nexus between the alleged acts and the armed conflict.[753]

381. As the Appeals Chamber has accepted Imanishimwe's first ground of appeal and consequently decided to set aside his convictions under Article 6 (3) of the Statute for the events at the Gashirabwoba football field, this ground of appeal has become moot, and hence does not need to be considered by the Appeals Chamber.

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[749] Imanishimwe Notice of Appeal, paras. 1[5]-1[6], Imanishimwe Appeal Brief, paras. 69-106.
[750] *Ibid*., par. 21, as explained by Imanishimwe Appeal Brief, paras. 142-164.
[751] Imanishimwe Appeal Brief, para. 153.
[752] *Ibid*., part 4.1, p. 43.
[753] *Ibid*., para. 4.2, p. 44. The Appeals Chamber notes incidently that Imanishimwe puts forward no relevant argument in support of this ground appeal, contenting himself with repeating his arguments regarding the absence of any superior-subordinate relationship between him and the soldiers directly responsible for the Gashirabwoba massacre, the subject of his second ground of appeal.

C. ASSESSMENT OF EVIDENCE IN RESPECT OF KARAMBO MILITARY CAMP (5TH GROUND 5 OF APPEAL)

382. In his fifth ground of appeal, Imanishimwe raises two errors, of law and of fact, with regard to the evidence of the events that took place in Karambo camp. Imanishimwe submits that the Trial Chamber erred by being biased in its assessment of the credibility of the witnesses who appeared before it and by merely relying on speculations and inferences to find him responsible, thus denying him the benefit of presumption of innocence.

1. Credibility of witnesses

383. Imanishimwe complains that the Trial Chamber refused to give any credence to the military witnesses called by the Defence.[754] He denounces the Trial Chamber's insufficient justification for dismissing the testimony of these eyewitnesses whose statements were corroborated by four other witnesses, namely PNF, PBA, PNB and Essono, who were non military.[755] He submits that the Trial Chamber's argument that the military witnesses, as interested parties, were biased should, if valid, also have applied to Witnesses LI, MG, MA, LCJ and LAC who are portrayed by the Prosecution as victims of the acts for which Imanishimwe is held responsible.[756]

384. Imanishimwe concomitantly complains that the Trial Chamber gave undue credence to Witnesses LI and MG.[757] As regards Witness LI, Imanishimwe submits that the improbability of his statement casts doubt on his presence at Karambo camp at the time of the events that he claimed to describe, and blames the Trial Chamber for disregarding the statement by Prosecution Witness Essono, demonstrating, according to him, the "absurdity of Witness LI's account".[758] As regards Witness MG, Imanishimwe submits that several of his allegations were contradicted by Defence Witness PNB and that the Trial Chamber nevertheless wrongly ignored this testimony.[759]

385. In its Response Brief, the Prosecution argues that Imanishimwe's allegations are unfounded and that he has not demonstrated that no reasonable trier of fact could have reached similar conclusions.[760] It adds that Imanishimwe merely proposes alternative conclusions that may have been open to the Trial Chamber.[761] The Prosecution further argues that the Chamber did not reject the testimonies of the Defence witnesses wholesale or because of their status as accomplices but that it carried out a balanced examination of Defence and Prosecution testimonies in an equitable and rational manner.[762] The Prosecution alleges, moreover, that Imanishimwe fails to demonstrate that the Trial Chamber did not take into account the evidence of Witnesses PFN, PBA, PGN and Essono;[763] it submits that, on the contrary, the Trial Chamber took into account all the evidence explicitly[764] even though it is not required to refer to evidence adduced or to detail why it accepted or rejected a particular testimony.[765]

386. In reply, Imanishimwe alleges that the Trial Chamber treated Prosecution witnesses more favourably than Defence witnesses (i) by not finding Witnesses LI, MA and MG "self-interested"

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[754] Although they are not specifically identified in Imanishimwe's Appeal Brief, the Appeals Chamber considers that Imanishimwe refers particularly to Witnesses PNC, PNE, PKB, PCC, PCD, and PCE.
[755] Imanishimwe Appeal Brief, paras. 165-166, citing para. 399 of the Trial Judgement.
[756] *Ibid*., para. 168.
[757] *Ibid*., para. 169.
[758] *Ibid*., para. 170.
[759] *Ibid*., para. 177.
[760] Prosecution Response Brief, paras. 192 and 198.
[761] *Ibid*., para. 199.
[762] *Ibid*., para. 194.
[763] *Ibid*., para. 202, 203.
[764] *Ibid*., paras. 206, 207, 209, 212.
[765] *Ibid*., para. 210, citing *Musema* Appeal Judgement, para. 20, citing itself *Čelebići* Appeal Judgement, para. 483.

because of their Tutsi origin and "the need to take revenge on the Accused, who are of Hutu origin",[766] and (ii) by wrongly rejecting the Defence testimonies, in particular that of Essono, as lacking in credibility owing to the time lapse.[767]

387. The Appeals Chamber recalls that the admissibility of evidence is governed by Rule 89 (C) of the Rules, which provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value". Moreover, ICTR and ICTY case-law has, over the years, developed a number of guidelines for the assessment of evidence, depending on its nature.

388. Concerning direct evidence in form of statements made by witnesses in court, it must be presumed to be credible at the time it is admitted. That these statements are taken under oath and that witnesses can be cross-examined constitute at that stage satisfactory indicia of reliability. The decision to admit them does not in any way prejudice the weight and credibility that the Trial Chamber will, in its own discretionary assessment, accord to the evidence. In this regard, the Appeals Chamber of ICTY recently had the opportunity to recall that:

> Determinations as to the credibility of witnesses are bound up in the weight afforded to their evidence, as is readily apparent from any Trial Judgement.[768]

389. The Appeals Chamber notes that in the instant case, the Trial Chamber reviewed all the Prosecution and Defence testimonies about the events that took place in Karambo camp, and that it set out the main points thereof in paragraphs 341 to 385 of the Trial Judgement. In paragraphs 386 to 400, it proceeded to state its factual findings on these events, systematically indicating the evidence on which it relied and the credibility it accorded to that evidence. The Appeals Chamber will now analyse the Trial Chamber's assessment of the credibility of the Defence witnesses on the one hand and of the Prosecution witnesses on the other.

390. A reading of the hearing transcripts shows that the credibility of the Defence military witnesses was tested during their cross-examination by the Prosecution.[769] The Trial Chamber did not assess the credibility of these witnesses piecemeal. Having heard all the Prosecution and Defence witnesses, it accepted certain portions of the testimonies of the military witnesses called by Imanishimwe (in particular, PNC, PNE, PKB, PCE and Essono) with regard to the layout of Karambo camp.[770] It did not, however, find credible certain testimonies of the same witnesses according to which "soldiers were never brought to or mistreated [*sic*] at the camp".[771] In so doing, it noted that it believed that those witnesses were not "credible or reliable *on this point*"[772] and set out its justification as follows:

> […] the Imanishimwe Defence witnesses are biased and self-interested because they previously served as soldiers under Imanishimwe's command and because acknowledging that civilians were brought to the camp would implicate them or their colleagues in the mistreatment.[773]

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[766] Imanishimwe Brief in Reply, para. 128.
[767] *Ibid*., para. 125.
[768] *Kvočka et al*. Appeal Judgement, para. 659. See also for the assessment of a witness's credibility: *Musema* Appeal Judgement, para. 20; *Kvočka et al*. Appeal Judgement, para. 23; *Ntakirutimana* Appeal Judgement, paras. 215 and 254; *Kamuhanda* Appeal Judgement, para. 248.
[769] For Witness PNC, see T.7 October 2002, pp. 40-43, pp. 46-47 and pp. 63-64 (closed session); for Witness PNE, see T.10 October 2002, pp. 16-17; for Witness PKB, see T.17 October 2002, pp. 4-6; for Witness PCD, see T.29 October 2002, pp. 52, 53 and 64-65; for Witness PCE, see T.30 October 2002, p. 42. Moreover, it was established that Witness PCC was on duty at the airport and that he had not gone to Karambo camp; see T.29 October 2002, p. 7 (closed session) and T.29 October 2002, p. 11.
[770] Trial Judgement, para. 400.
[771] *Ibid*., para. 399. (A reading of the whole paragraph shows that the Trial Chamber refers in this sentence to the statements by Imanishimwe and his witnesses that no *civilian* was ever brought to or mistreated at the camp).
[772] Trial Judgement, para. 399 (emphasis added).
[773] *Ibid*., para. 399.

391. With specific reference to Imanishimwe's complaint that the Trial Chamber disregarded the testimony by Defence Witness Essono, which, according to him, demonstrated "the absurdity of Witness LI's account", the Appeals Chamber notes that the Trial Chamber had the opportunity to test Witness LI's credibility.[774] The Trial Chamber nonetheless accepted as credible Witness LI's allegations about the incarceration and the mistreatment of civilians by soldiers in Karambo camp at various times between April and July 1994,[775] as well as his escape.[776] It considered that the version of events given by Witness LI corroborated that of Witnesses MA and MG, who provided "similar first-hand and detailed accounts".[777] It is on the basis of this corroboration that the Trial Chamber found that soldiers had incarcerated and questioned civilians, and mistreated Witnesses LI and MG.

392. As regards Witness PNB, the Appeals Chamber notes that the Trial Chamber did not fail to take his testimony into consideration; rather it weighed the testimonies of Witnesses MG and PNB and found that Witness MG's testimony was more probative, as clearly shown in the Trial Judgement.[778]

393. The Appeals Chamber is of the view that the Trial Chamber applied the same treatment to the Defence witnesses and to Prosecution Witnesses LI and MG in assessing their credibility. After a balanced consideration of all Prosecution and Defence testimonies, and given that the testimonies of LI and MG corroborated one another,[779] the Trial Chamber accepted their credibility on the specific points of incarceration and mistreatment of civilians at various times between April and July 1994 by soldiers in Karambo camp.

394. For the above reasons, the Appeals Chamber finds that the Trial Chamber did not treat the witnesses differently when assessing their credibility, and that therefore it did not err in that regard.

2. Violation of the presumption of innocence

395. In his Appeal Brief, Imanishimwe contests the deductive approach adopted by the Trial Chamber, which, according to him, amounts to applying a presumption of guilt to Imanishimwe.[780] In support of this argument, Imanishimwe points to several findings made by the Trial Chamber on the basis of "speculations" and without sufficient evidence or despite evidence to the contrary: (1) Imanishimwe's presence during the raid at Kamembe on 6 June 1994;[781] (2) the order given by Imanishimwe to his soldiers to kill MG and his family[782] and (3) Imanishimwe's responsibility for the alleged murder of Witness LI's brother and a former classmate, as well as Witness MG's sister and her cellmate Mbembe.[783]

396. Imanishimwe denounces "the absurdity" of the two findings made by the Trial Chamber using this inferential approach, to the effect that: (i) the soldiers allegedly tried to have MG and his family killed by the *Interahamwe* when they could have done it themselves;[784] (ii) soldiers from Karambo camp, who were fewer and less fit, would, under Lieutenant Imanishimwe's command, went

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[774] See, *inter alia*, T.30 January 2001, pp. 53-54 (closed session); T.30 January 2001, pp. 77-78.
[775] Trial Judgement, para. 392.
[776] *Ibid*., paras. 692, 799.
[777] *Ibid*., para. 398.
[778] *Ibid*., para. 393.
[779] *Ibid*., para. 398.
[780] Imanishimwe Appeal Brief, para. 171 (referring to para. 394 of the Trial Judgement), para. 172 (referring to paras. 656, 685, 735 of the Trial Judgement) para. 173 (referring to paras. 685, 735 of the Trial Judgement), para. 174 (referring to paras. 656, 685, 735 of the Trial Judgement), para. 175 (referring to paras. 655, 656, 687, 736, 739, 740 to 743, 746, 754 to 756, 761, 798, 801, 824 of the Trial Judgement) and para. 176.
[781] Imanishimwe Appeal Brief, para. 173.
[782] *Ibid*., paras. 171-173.
[783] *Ibid*., para. 175.
[784] *Ibid*., para. 172.

and pulled out people from the *gendarmerie* which was under the command of a Lieutenant-Colonel, and whose soldiers were more physically fit and had better logistical means.[785]

397. The Prosecution responds that the Trial Chamber was

> "entitled to rely on circumstantial evidence, or to draw reasonable inferences from given circumstances".[786]

It contends that Imanishimwe failed to demonstrate that the Trial Chamber made unreasonable findings or in what way its inferences were tantamount to a violation of the principle of presumption of innocence. It adds that Imanishimwe reads the Trial Judgement piecemeal,[787] whereas the Trial Chamber duly applied an approach consistent with the established jurisprudence of the Tribunal. That approach consists in first considering the Prosecution evidence and assessing its reliability, and next considering the Defence evidence, which was not sufficient to cast reasonable doubt on the circumstances of the case.[788]

398. The Appeals Chamber recalls that the Trial Chamber has the inherent discretion to decide what approach it deems most appropriate for the assessment of evidence in the circumstances of the case;[789] however,

> "whenever such approach leads to an unreasonable assessment of the facts of the case, it becomes necessary to consider carefully whether the Trial Chamber did not commit an error of fact in its choice of the method of assessment or in its application thereof, which may have occasioned a miscarriage of justice".[790]

399. The Appeals Chamber recalls its findings in respect of the method of assessment of circumstantial evidence.[791] With regard to the inferential approach as a means of assessing circumstantial evidence, it refers to its previous exposition that the required standard of proof – beyond a reasonable doubt – necessitates that the accused can be found guilty on the basis of circumstantial evidence only where this is the sole possible reasonable inference from the available evidence. The same requirement must apply in inferring from the available evidence that there is an act upon which the accused's guilt depends and in inferring a finding upon which the accused's guilt depends from several distinct factual findings.[792]

400. The Appeals Chamber will now consider the specific findings challenged by Imanishimwe.

(a) Imanishimwe's presence during the search at Kamembe market

401. The Trial Chamber found that Imanishimwe was present at the Kamembe search on 6 June 1994 on the basis of MG's testimony,[793] which it held to be credible. The Appeals Chamber notes that in challenging this finding, Imanishimwe argues that the Chamber did not take into account (1) the account given by Defence witnesses, including Bagambiki, according to which the search was organized by the competent civilian authorities with the support of the *gendarmerie*; (2) the Decree of 23 January 1974[794] establishing the Rwandan National *Gendarmerie*. On this second point,

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[785] *Ibid*., para. 173.
[786] Prosecution Response Brief, paras. 189, 214 (citing *Rutaganda* Appeal Judgement, paras. 577-581).
[787] Prosecution Response Brief, paras. 215-216.
[788] Prosecution Response Brief, paras. 185-187, referring to *Rutaganda* Appeal Judgement, paras. 177-178, para. 216.
[789] *Rutaganda* Appeal Judgement, para. 28.
[790] *Kayishema and Ruzindana* Appeal Judgement, para. 119.
[791] See *supra,* paras. 304-306.
[792] See *supra*, para. 306.
[793] Trial Judgement, paras. 394, 405, 686, 735, 789; Witness MG, T.12 February 2001, pp. 13-19.
[794] Imanishimwe Appeal Brief, para. 173 (referring to Exhibit DIS12).

Imanishimwe submits that the search on 6 June 1994 took place in accordance with the Decree, that is, according to him, under the authority of the commanding officer of the Cyangugu *Gendarmerie*.[795]

402. The Appeals Chamber notes in the first place that Imanishimwe mentions only Bagambiki as a Defence witness whose account would invalidate the finding that Imanishimwe was present at the Kamembe market search, without specifying the portion of the testimony that supports his contention. The Appeals Chamber notes further that Imanishimwe does not specify how the Defence witnesses' account could prove that Imanishimwe's presence at the search on 6 June 1994 was not established beyond a reasonable doubt. It notes, moreover, that Imanishimwe does not show, by his abstract, unelaborated reference to the 1974 Decree, that the Trial Chamber could reasonably have made a different finding when it found that Imanishimwe was present at the search on 6 June 1994.

403. The lack of precision and clarity of this submission, and of the references to the parts of the appeal record mentioned by Imanishimwe, do not permit the Appeals Chamber to establish that the Trial Chamber could reasonably have made any finding other than that Imanishimwe was present at the Kamembe market search on 6 June 1994.

(b) Order given by Imanishimwe to his soldiers to kill MG and his family on their way to the *gendarmerie*

404. In order to assess whether the Trial Chamber's finding that Imanishimwe had ordered his soldiers to kill MG and his family needed to be established beyond a reasonable doubt, it must first be determined whether the order in question is an "an act upon which the Accused's guilt depends". In this regard, the Appeals Chamber notes that in making this submission, Imanishimwe is challenging the guilty verdict against him on the basis of Article 6 (1) of the Statute for murder, torture and imprisonment, as crimes against humanity, and for serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.

405. A careful reading of the portion of the Trial Judgement on the Trial Chamber's legal findings reveals several references to the order which the Trial Chamber inferred was given by Imanishimwe to kill MG and his family on their way to the *gendarmerie*. The first reference appears in paragraph 656 of the Trial Judgement, in the analysis of Imanishimwe's responsibility. Together with other findings, it played part in the Trial Chamber's finding that

> "the Chamber finds that Imanishimwe can be held criminally responsible under Article 6 (1) for ordering his subordinates to commit these acts".[796]

The second reference appears in paragraph 686 of the Trial Judgement, under the Trial Chamber's consideration of the facts constituting genocide. There is a further reference to the disputed order in paragraphs 735 and 789 of the Trial Judgement, in the analysis of the offences constituting crimes against humanity and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II respectively.

406. First, the Appeals Chamber notes that the Trial Chamber mentions the order disputed by Imanishimwe in what can be regarded as an introductory summary,[797] before its analysis of the specific acts constituting crimes against humanity.

407. The Appeals Chamber notes that, to find Imanishimwe guilty of murder as a crime against humanity under Article 6 (1) of the Statute, the Trial Chamber relied specifically on the murder of Witness LI's brother and his former classmate, and of Witness MG's sister and her cellmate

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[795] Imanishimwe Appeal Brief, para. 173.
[796] Trial Judgement, para. 656.
[797] *Ibid*., paras 730-737.

Mbembe.[798] It did not rely on the attack on MG and his family when they were taken from Kamembe market to the *gendarmerie*, and hence the order allegedly given by Imanishimwe did not constitute a fact on which his guilt depended for that count. Consequently, the Appeals Chamber finds that the Trial Chamber was not required to establish this fact beyond a reasonable doubt.

408. As regards the guilty verdict for imprisonment as a crime against humanity under Article 6 (1) of the Statute, the Appeals Chamber is of the view that an order for incarceration should be distinguished from an order for murder. While the first is clearly prohibited under imprisonment as a crime against humanity, the second cannot be considered in the same light, falling rather under murder as a crime against humanity. The Trial Chamber found Imanishimwe guilty on the count of imprisonment as a crime against humanity, and it noted the

> "incarceration of Witness LI and the six refugees arrested with him, Witness MG, his father, and two sisters, and Witness MA".[799]

This finding, which is unrelated to the soldiers' attack on MG and his family just after the Kamembe market search, was not made on the basis of the order disputed by Imanishimwe, and his guilt for the crime of imprisonment was not based on that order.

409. In finding Imanishimwe guilty of torture as a crime against humanity, the Trial Chamber held as established that soldiers under Imanishimwe's effective control

> "partly in his presence mistreated seven refugees in their custody upon arresting them near Cyangugu Cathedral on 11 April 1994"[800]

and that they "in his presence severely beat Witness MG and another detainee",[801] thus explicitly referring to mistreatment inflicted inside Karambo camp. Furthermore, the mistreatment inflicted is once again a different act from murder. For the count of torture as a crime against humanity and for the two other counts referred to earlier, the Appeals Chamber cannot regard the order given by Imanishimwe to kill MG and his family as an act on which Imanishimwe's guilt was based.

410. The Appeals Chamber considers that the same reasoning must apply to the guilty verdict against Imanishimwe for serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. The Trial Chamber makes reference to the order challenged by Imanishimwe in what must be regarded as an introductory summary,[802] before it analysis of the specific acts constituting serious violations under Article 4 (a) of the Statute (murder, torture and cruel treatment). It did not, however, consider the attack on MG and his family when they were being taken from Kamembe market square to the *gendarmerie* under any of these three headings.

411. Accordingly, the Appeals Chamber cannot consider that the order given by Imanishimwe to kill MG and his family when they were being taken to the *gendarmerie* constitutes an act upon which Imanishimwe's guilt for serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II depended and to which the standard of the only reasonable inference should have been applied. Consequently, the Appeals Chamber rejects this argument and holds that the Trial Chamber was not required to establish this fact beyond a reasonable doubt because the conviction was based on other evidence.

(c) Order given by Imanishimwe to kill Witness LI's brother and a former classmate, as well as Witness MG's sister and her cellmate Mbembe

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[798] *Ibid*., paras. 739, 740, 743.
[799] *Ibid*., para. 756.
[800] *Ibid*., para. 758.
[801] *Ibid*., para. 759.
[802] *Ibid*., paras. 784-791.

412. The Appeals Chamber notes first that Imanishimwe challenges in his Appeal Brief only the Trial Chamber's finding that Imanishimwe gave orders to his soldiers to kill Witness LI's brother and a former classmate, as well as Witness MG's sister and her cellmate Mbembe.[803] He does not challenge the finding that he ordered the incarceration of the above-mentioned persons.

413. The Appeals Chamber must consider whether the disputed order for the murder of Witness LI's brother and a former classmate, as well as Witness MG's sister and her cellmate Mbembe, is an "act upon which the Accused's guilt depends". The Appeals Chamber will analyse below the guilty verdicts against Imanishimwe on the basis of Article 6 (1) of the Statute in order to determine the standard of proof required to establish Imanishimwe's order for the murder of these persons.

414. The Appeals Chamber has already noted that the Trial Chamber explicitly based the convictions for murder as a crime against humanity on the order given to the soldiers by Imanishimwe to kill Witness LI's brother and a former classmate, as well as Witness MG's sister and her cellmate Mbembe.[804] That order must therefore be considered as an act upon which Imanishimwe's guilt depended for this count. Such a conclusion is equally imperative to the extent that, contrary to what was stated earlier about the order to kill MG and his family on their way to the *gendarmerie*, the order given by Imanishimwe to kill Witness LI's brother and a former classmate, as well as Witness MG's sister and her cellmate Mbembe, appears both in the introductory summary[805] that precedes the analysis of the acts constituting crimes against humanity and in the actual analysis of murder as a crime against humanity.[806]

415. In this respect, the Trial Chamber found that there was an order from Imanishimwe to kill Witness LI's brother and a former classmate, as well as Witness MG's sister and her cellmate Mbembe, on the basis of Witness LI's evidence.[807] It may reasonably be thought that several of the Trial Chamber's factual findings established on the basis of testimonies by several witnesses supported this finding:

- MG, his father and his two sisters were taken by soldiers to Karambo camp on 7 June 1994;[808]
- LI was arrested by soldiers on 11 April 1994 at the same time as his brother and a former classmate;[809]
- They were taken to Karambo camp where they were held together in captivity;[810]
- When they arrived at Karambo camp, Imanishimwe was there while soldiers mistreated them;[811]
- During the mistreatment of LI by the soldiers, they threatened him with death;[812]
- During the mistreatment of LI by the soldiers, soldiers took away some refugees, and these did not return;[813]
- MG's sister was detained at Karambo camp in the same cell as Mbembe;[814]
- The name of MG's sister and that of Mbembe were called out one night during their incarceration at Karambo camp; they were subsequently taken away;[815]

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[803] Imanishimwe Appeal Brief, para. 175.
[804] See Trial Judgement, para. 743.
[805] *Ibid*., para. 736.
[806] *Ibid*., paras. 739, 740, 743.
[807] *Ibid*., para. 392, 411 and 743.
[808] *Ibid*., para. 395; T.12 February 2001, pp. 35 and 48.
[809] *Ibid*., paras. 310, 392; T.30 January 2001, pp. 14-17; T.30 January 2001, pp. 44-45 (closed session).
[810] *Ibid*., para. 392; T.30 January 2001, pp. 17-20; T.31 January 2001, pp. 9-10.
[811] *Ibid*., para. 395; T.30 January 2001, pp. 17-21 and 84.
[812] *Ibid*., para. 392.
[813] *Ibid*., para. 395; T.30 January 2001, p. 24.
[814] Trial Judgement, para. 395; T.13 February 2001, pp. 66-67.
[815] Idem.

- Since then, MG's sister had not been found, while Mbembe's body was found at Kadasomwa;[816]
- LI's brother and LI's former classmate are dead;[817]
- The soldiers at Karambo camp soldiers were under Imanishimwe's command.[818]

416. Having found that LI's brother and a former classmate,[819] as well as Witness MG's sister and her cellmate Mbembe,[820] had been killed at Karambo camp, the only inference made by the Trial Chamber from the factual findings was to find that the soldiers could not have participated in the murder of those persons "without Imanishimwe's knowledge and consent or orders".[821] Despite the vague – or even equivocal – nature of this formulation, the Appeals Chamber notes that it must be read in the light of paragraph 410 of the Trial Judgement, which clarifies it as follows:

> "the Chamber cannot accept that soldiers at the Karambo camp would have undertaken these activities, particularly on such a large scale, without orders from Imanishimwe."

417. Moreover, the Appeals Chamber stresses that to reach the conclusion that "Imanishimwe issued orders authorizing the arrest, detention, mistreatment, and execution of civilians with suspected ties to the RPF",[822] the Trial Chamber also took into account "the pattern and frequency of civilians being arrested and brought to the camp" and Imanishimwe's presence "during the detention and mistreatment of some of these civilians" as well as "the nature of a military command structure and hierarchy, the relatively small size of the camp, Imanishimwe's presence at the camp, Imanishimwe's testimony that he had control over the Karambo camp soldiers, the absence of any evidence suggesting that he lacked control over the soldiers, and the absence of any evidence of Imanishimwe preventing soldiers from mistreating civilians or punishing them for their abuse".[823]

418. For the foregoing reasons, the Appeals Chamber considers that a reasonable trier of fact could conclude that the only reasonable inference in the basis of the evidence was that Imanishimwe ordered the soldiers to kill Witness LI's brother and a former classmate, as well as Witness MG's sister and her cellmate Mbembe.

419. This conclusion in respect of Imanishimwe's conviction for murder as a crime against humanity also applies to the other convictions established on the basis of Article 6 (1) of the Statute and renders moot the question whether the order to kill Witness LI's brother and a former classmate, as well as Witness MG's sister and her cellmate Mbembe, was also a determining factor in finding Imanishimwe guilty of torture and imprisonment as crimes against humanity and of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.

420. The Appeals Chamber thus considers that a reasonable trier of fact could arrive by inference at the conclusions challenged by Imanishimwe without violating Imanishimwe's presumption of innocence. Accordingly, the Appeals Chamber dismisses Imanishimwe's fifth ground of appeal.

D. CUMULATIVE CONVICTIONS (3RD GROUND OF APPEAL)

421. Imanishimwe submits that the Trial Chamber erred in entering multiple convictions based on Articles 2, 3 and 4 of the Statute.[824] He argues that in order to be concurrent, convictions must bear no

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[816] *Ibid*., paras. 395, 396; T.13 February 2001, pp. 64-68.
[817] *Ibid*., para. 392; T.30 January 2001, pp. 26-27.
[818] *Ibid*., para. 392; T.30 January 2001, p. 18.
[819] Trial Judgement, para. 392.
[820] *Ibid*., para. 396.
[821] *Ibid*., para. 655. See also para. 656.
[822] *Ibid*., para. 410. See also para. 687.
[823] Trial Judgement, para. 410.
[824] Imanishimwe Notice of Appeal, paras. 17-20.

relationship to one another: one must not be "special" in relation to the other, nor must it be the means of perpetrating the other or the "logical or natural consequence" of the other.[825]

422. In the first place, Imanishimwe takes issue with the Trial Chamber for convicting him, on the basis of the same facts, both of genocide under Article 2 of the Statute (Count 7) and of extermination as a crime against humanity under Article 3 (b) of the Statute (Count 10). He argues that the two charges are not concurrent*, in that extermination is the means of perpetrating genocide, extermination being the "means crime" and genocide being the "end crime".[826] He further argues that the statutory provisions governing the two crimes defend the one and same value: "the sacred and inviolable nature of life and its protection against extermination".[827] Finally, he contends that the specific crime – genocide reason of its *mens rea* – should have been retained instead of general crime – extermination.[828] He also contends that the Trial Chamber committed an error by convicting him, on the basis of the same facts, of murder and torture as crimes against humanity under Articles 3 (a) and 3 (f) of the Statute (Counts 9 and 12) and of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II under Article 4 (a) of the Statute (Count 13). He submits that Articles 3 and 4 of the Statute have the objective of ensuring the protection of the same "human values"[829] but also that the constitutive elements of the offences concerned are basically the same.[830]

423. To illustrate the prejudice he considers he suffered, Imanishimwe relies on the Separate and Dissenting Opinion of Judge Hunt and Judge Bennouna in the *Čelebići* Appeal Judgement, which refers to the social stigmatization inherent in being convicted of a crime and to the impact of cumulative convictions on the length of the sentence and on measures that may be taken while it is being served, for example early release.[831]

424. In response, the Prosecution submits that the Trial Chamber made no error in applying the principles that govern cumulative convictions.[832] It contends that the reasoning put forward by Imanishimwe stems from misinterpretation of the Appeals Chamber's jurisprudence on cumulative convictions. Relying on the test laid down in the *Čelebići* Appeal Judgement, the Prosecution affirms that multiple criminal convictions entered under different provisions of the Statute but based on the same conduct are permissible only if each provision involved has a materially distinct element not contained in the other.[833] The Prosecution then recalls that the Appeals Chamber has on several occasions considered that multiple convictions under Articles 2 and 3 (b) of the Statute based on the same facts are possible, as each of the crimes has a materially distinct element not contained in the other, namely specific intent in the case of Article 2 and the existence of a "widespread or systematic attack against a civilian population" in the case of Article 3 (b).[834] With regard to the convictions on the basis of the same facts pursuant to Articles 3 and 4 of the Statute, the Prosecution submits that they

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[825] Imanishimwe Appeal Brief, para. 110.
[826] *Ibid*., paras. 111-116, 119. See also para. 122.
[827] *Ibid*., para. 117, referring to *Kupreškić et al*. Trial Judgement, para. 694.
[828] *Ibid*., paras. 118-120. In support of his argument, Imanishimwe refers to the *Kupreškić et al*. Trial Judgement, para. 707, and the following excerpt from the *Čelebići* Appeal Judgement, para. 413: "If a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision", Imanishimwe Appeal Brief, fn. 68. See also Imanishimwe Reply Brief, paras. 113-115.
* Translator's note: In the English version of the Appeal Brief, the word "not" is missing in the first sentence of paragraph 111.
[829] Imanishimwe Appeal Brief, para. 138, referring to *Čelebići* Appeal Judgement, para. 149.
[830] *Ibid*., paras. 139-140.
[831] *Ibid*., paras. 125 and 137, citing the Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, *Čelebići* Appeal Judgement, para. 23.
[832] Prosecution Response Brief, para. 136.
[833] *Ibid*., paras. 140-141, citing *Čelibići* Appeal Judgement, paras. 412-413, and referring, *inter alia*, to *Musema* Appeal Judgement, paras. 358-370; *Rutaganda* Appeal Judgement, paras. 582-583; *Ntakirutimana* Appeal Judgement, para. 542; *Kordić* and *Čerkez* Appeal Judgement, paras. 1032-1033.
[834] Prosecution Response Brief, paras. 141-142, referring to *Musema* Appeal Judgement, paras. 369-370; *Krstić* Appeal Judgement, paras. 219-227; *Ntakirutimana* Appeal Judgement, para. 542.

may be cumulative, as each of these provisions contains a materially distinct element: while Article 3 requires proof of the existence of a widespread or systematic attack against a civilian population, Article 4 requires proof of the existence of a nexus between the alleged crimes and the armed conflict.[835]

425. In line with the principles laid down in the *Čelebići* Appeal Judgement, the Appeals Chamber has already established that cumulative convictions entered under different provisions of the Statute but based on the same facts are permissible only if each of the provisions involved has a materially distinct constitutive element not contained in the other.[836] An element is materially distinct from another if it requires proof of a fact that is not required by the other.[837]

426. The Appeals Chamber emphasizes that, having accepted Imanishimwe's first ground of appeal and accordingly having set aside his convictions under Article 6 (3) of the Statute for the events at the Gashirabwoba football field, the question of cumulative convictions for genocide (Article 2 of the Statute) and extermination as a crime against humanity (Article 3 (b) of the Statute) has become moot. Nevertheless, the Appeals Chamber wishes to recall that it has already established that multiple convictions may be entered for genocide and crime against humanity based on the same facts, as each of these crimes has a materially distinct constitutive element that is not contained in the other: "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" for the former, and the existence of a "widespread or systematic attack against a civilian population" for the latter.[838]

427. With regard to the convictions under Articles 3 and 4 of the Statute on the basis of the same facts, the Appeals Chamber observes that each of them requires a materially distinct element not required for the other. Whereas conviction under Article 3 requires proof of a widespread or systematic attack against a civilian population, conviction under Article 4 requires the existence of a nexus between the acts in question and the armed conflict.[839] The Appeals Chamber finds that the Trial Chamber committed no error by entering cumulative convictions under Articles 3 (murder and torture) and 4 (murder and cruel treatment) of the Statute based on the same set of facts.

428. Imanishimwe's third ground of appeal is dismissed.

V. GROUNDS RELATING TO THE SENTENCE

A. INTRODUCTION

429. Under Article 24 of the Statute, the Appeals Chamber may "affirm, reverse or revise" a sentence imposed by a Trial Chamber. However, the Appeals Chamber recalls that Trial Chambers exercise a considerable amount of discretion in determining appropriate sentencing. This stems largely from their obligation to individualize a penalty to fit the individual circumstances of the accused and the gravity of the crime.[840] As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a discernible error in exercising its discretion, or has failed to follow the applicable law.[841]

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[835] Prosecution Response Brief, para. 151, referring to *Rutaganda* Appeal Judgement, para. 583.
[836] See *Musema* Appeal Judgement, paras. 358-370, citing, *inter alia, Čelebići* Appeal Judgement, paras. 412-413. See also *Ntakirutimana* Appeal Judgement, para. 542; *Semanza* Appeal Judgement, para. 315.
[837] *Čelebići* Appeal Judgement, para. 412. See also *Musema* Appeal Judgement, paras. 361-363. The criterion was clarified in the *Kunarac* Appeal Judgement, paras. 168-174. See also *Krstić* Appeal Judgement, para. 218; *Ntakirutimana* Appeal Judgement, para. 542.
[838] See *Musema* Appeal Judgement, paras. 365-367, 370; *Ntakirutimana* Appeal Judgement, para. 542; *Semanza* Appeal Judgement, para. 318; see also *Krstić* Appeal Judgement, paras. 219-227.
[839] *Rutaganda* Appeal Judgement, para. 583.
[840] *Naletilic and Martinovic* Appeal Judgements, para. 593, referring to the *Čelebići* Appeal Judgement, para. 717.
[841] *Naletilic and Martinovic* Appeal Judgement, para. 593; *Musema* Appeal Judgement, para. 379; *Tadic* Sentencing Appeal Judgement, para. 22; *Jokic* Sentencing Appeal Judgement, para. 8.

430. The factors that a Trial Chamber is obliged to take into account in sentencing a convicted person are set forth in Article 23 of the Statute and Rule 101 of the Rules. Under Rule 101 (B) (ii), a Trial Chamber is legally required to take into account any mitigating circumstances. However, what constitutes a mitigating circumstance[842] and the weight to be accorded thereto[843] is a matter for the Trial Chamber to determine in the exercise of its discretion.

431. The Trial Chamber sentenced Imanishimwe to two concurrent terms of 15 years' imprisonment for his convictions pursuant to Article 6 (3) of the Statute[844] for genocide (Count 7) and extermination as a crime against humanity (Count 10) in relation to the killings perpetrated by his subordinates at the Gashirabwoba football field. For the convictions under Counts 9, 11, 12 and 13,[845] it imposed concurrent sentences of 10, 3, 10 and 12 years imprisonment respectively,[846] giving a total term of 27 years' imprisonment.[847] In doing so, the Trial Chamber considered relevant sentencing practices, Rwandan law, as well as Imanishimwe's individual circumstances.[848] It further determined that the command role played by Imanishimwe in Cyangugu prefecture constituted an aggravating factor,[849] and noted the failure by Imanishimwe to present any submissions concerning "significant personal, medical or other relevant circumstances that could influence sentencing" in his favour.[850] The Trial Chamber did not consider his background, as submitted, to constitute a mitigating factor.[851]

B. Increase in sentence imposed for Genocide and Extermination (Prosecution's 11th ground of appeal)

432. The Prosecution submits under its eleventh ground of appeal that the Trial Chamber committed a discernable error in sentencing Imanishimwe to 15 years' imprisonment for Genocide and Extermination.[852]

433. The Appeals Chamber has accepted Imanishimwe's first ground of appeal and set aside his convictions under Article 6 (3) of the Statute for the events at the Gashirabwoba football field. These were his only convictions for genocide and extermination as a crime against humanity. Accordingly, this ground of appeal has become moot, and the Appeals Chamber declines to discuss it further.

C. Consideration given to mitigating factors (Imanishimwe's 6th ground of appeal)

434. Imanishimwe submits under his sixth ground of appeal that the Trial Chamber erred in fact by failing to consider all mitigating factors in Imanishimwe's favour. Imanishimwe contends that the mitigating factors were dismissed because they were not pleaded in his closing argument.[853] He notes that in light of the Trial Chamber's request for brevity, given the detailed written submissions provided by both parties in their Closing Briefs,[854] he decided to address the Prosecution's closing

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[842] *Musema* Appeal Judgement, para. 395.
[843] *Ibid*., para. 396; *Čelebići* Appeal Judgement, para. 775; *Kambanda* Appeal Judgement, para. 124.
[844] Trial Judgement, paras. 821-823.
[845] Murder (Count 9), imprisonment (Count 11) and torture (Count 12) as crimes against humanity under Article 6 (1) of the Statute and serious violations of Article 3 Common to the Geneva Conventions for murder, torture and cruel treatment (Count 13) under Articles 6 (1) and 6 (3) of the Statute.
[846] Trial Judgement, para. 825.
[847] *Ibid*., para. 827.
[848] *Ibid*., para. 822.
[849] *Ibid*., para. 819.
[850] *Ibid*., para. 820.
[851] Idem.
[852] Prosecution Appeal Brief, para. 430.
[853] Imanishimwe Appeal Brief, paras. 178-184.
[854] *Ibid*., para. 179, referring to the hearing of 11 August 2003.

arguments rather than rehash arguments relating to mitigation set out in his written submissions.[855] Imanishimwe makes reference to the relevant paragraphs in his Closing Brief, emphasising that his non-involvement in any previous criminal activity, his young age and his relatively low rank in the Rwandan military hierarchy constitute mitigating circumstances which should have been taken into account in determining his sentence.[856]

435. The Prosecution submits that none of the factors offered in mitigation of sentence could carry any weight given the crimes committed and Imanishimwe's role in their commission.[857] The Prosecution maintains that even if it were accepted that there were mitigating factors in Imanishimwe's favour that were not considered, such omission is inconsequential, in light of "the seriousness of the crimes he perpetrated, his active participation in those crimes, and his position of command and authority that he abused".[858]

436. Although the Trial Chamber has an obligation to take any mitigating circumstances into account in determining the appropriate sentence, the weight to be accorded to such circumstances lies within the discretion of a Trial Chamber, which is under no obligation to set out in detail each and every factor relied upon.[859] The Appeals Chamber notes that the Trial Chamber nonetheless expressly refers to Imanishimwe's Closing Brief in its discussion of mitigating circumstances[860] and that this constitutes *prima facie* evidence that Imanishimwe's submissions were taken into account.[861]

437. Thus, the Appeals Chamber notes that specific reference is made to paragraphs 31 and 33 of Imanishimwe's Closing Brief in which his educational and professional background is presented. These paragraphs form part of a section of the Closing Brief which seeks to provide an objective presentation of Imanishimwe[862] under the title "Presenting the Accused", and includes other paragraphs describing his allegedly low rank within the Rwandan military,[863] the insignificance of the Karambo camp,[864] his previous lack of a criminal record,[865] and the fact that he was a young officer.[866] These are the factors Imanishimwe contends the Trial Chamber ought to have taken into account in mitigation of his sentence.[867] Although the Trial Chamber does not expressly refer to paragraphs 1203 and 1204 of Imanishimwe's Closing Brief, included under the heading "Mitigating Factors: First Offender", the substance of those paragraphs is subsumed within the section "Presenting the Accused".[868] There is therefore no reason to conclude that these submissions were not duly considered by the Trial Chamber.

438. The Appeals Chamber finds that the wording of paragraph 820 of the Trial Judgement that the "Defence made no sentencing submissions" simply reflects the fact that no oral sentencing submissions were made and not, as submitted by Imanishimwe, that his sentencing submissions were overlooked in their entirety.

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[855] *Ibid*., para. 180.
[856] *Ibid*., paras. 181-184.
[857] Prosecution Response Brief, para. 232.
[858] Prosecution Response Brief, para. 231.
[859] *Kupreškic et al*. Appeal Judgement, para. 430.
[860] Trial Judgement, fn. 1685.
[861] *Jokić* Sentencing Appeal Judgement, para. 53; *Kupreškic et al*. Appeal Judgement, para. 430.
[862] Imanishimwe Closing Brief, paras. 30-42.
[863] *Ibid*., paras. 34-37.
[864] *Ibid*., para. 38.
[865] *Ibid*., paras. 39-40.
[866] *Ibid*., para. 41.
[867] Imanishimwe Appeal Brief, paras. 182-183.
[868] This is highlighted by Imanishimwe himself. See Imanishimwe Appeal Brief, paras. 181-183.

439. The fact that the Trial Chamber decided that there were insufficient reasons to conclude that there were any mitigating factors in this case was within its discretion.[869] The factors referred to, namely, Imanishimwe's background, his "young" age at the time the crimes were committed, his lack of a previous criminal record, and his allegedly low rank within the greater Rwandan military hierarchy, are not such as to affect the sentence imposed on Imanishimwe. The lack of a previous criminal record is a common characteristic among many accused persons which is accorded little if any weight in mitigation absent exceptional circumstances.[870] Imanishimwe was 32 years old when he participated in the crimes[871] and it might be considered that the Trial Chamber, in underscoring the principle of gradation in sentencing, would have taken into account his relative position of authority in this connection.[872]

440. The Appeals Chamber finds that Imanishimwe has not shown that the Trial Chamber failed to consider his submissions on individual and mitigating circumstances or that its discretion was improperly exercised, such that his sentence should be reduced.

441. For the foregoing reasons, the Appeals Chamber dismisses Imanishimwe's sixth ground of appeal in its entirety.

D. CONSEQUENCES OF THE APPEALS CHAMBER'S CONCLUSIONS

442 The Appeals Chamber recalls having set aside the convictions entered against Imanishimwe on the basis of Article 6 (3) of the Statute for the crimes committed at the Gashirabwoba football field for genocide (Count 7 of the Bagambiki/Imanishimwe Indictment).[873] Therefore, the sentences pronounced by the Trial Chamber under Counts 7 and 10 – two concurrent sentences of 15 years to be served consecutively with the other sentences pronounced under the other counts[874] – must be set aside.

443. Having rejected the grounds of appeal relating thereto,[875] the Appeals Chamber upholds the convictions entered on the basis of Article 6 (1) of the Statute for murder (Count 9 of the Bagambiki/Imanishimwe Indictment), imprisonment (Count 12 of the Bagambiki/Imanishimwe Indictment) and torture (Count 12 of the Bagambiki/Imanishimwe Indictment) as crimes against humanity. The Appeals Chamber therefore upholds the concurrent sentences of 10, 3 and 10 years pronounced respectively for those Counts.[876]

444. Having found Imanishimwe guilty of murder, torture and cruel treatment constituting serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 13 of the Bagambiki/Imanishimwe Indictment) on the basis of Articles 6 (1) and 6 (3) of the Statute,[877] the Appeals Chamber sentences Imanishimwe to 12 years imprisonment to run concurrently with the

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[869] *Kamuhanda* Appeal Judgement, para. 354.
[870] *Babic* Sentencing Appeal Judgement, paras. 49-50; *Banovic* Sentencing Judgement, para. 75; *Furundzija* Trial Judgement, para. 284.
[871] By way of example young age was considered in the following cases: Drazen Erdemovic was 23, *Erdemovic* Appeal Judgement, para. 16 (i); Anto Furundzija was 23, *Furundzija* Trial Judgement, para. 284; and Esad *Landzo* was 19, *Celebici* Trial Judgement, para. 1283. In *Kvočka et al*. Milojica Kos' young age was taken into account. He was 29 years old. The Trial Chamber noted that he was the youngest of his co-accused, and had little experience and training as a police officer at the time he took up his duties in the camp. It also found that because he did not hold a position of high esteem in the community prior to his position in Omarska, he likely would not have been a role model for the guards and thus his silence would not carry the same degree of complicity in encouraging or condoning crimes. *Kvočka et al*. Trial Judgement, para. 732.
[872] Trial Judgement, paras. 815-816.
[873] See *supra*, para. 165.
[874] Judgement, paras. 822, 823 and 827.
[875] See *supra*, paras. 420 and 428.
[876] Judgement, para. 825.
[877] For separate acts.

sentences pronounced under Counts 9, 11 and 12.[878] The Appeals Chamber recalls having set aside the conviction entered under that Count on the basis of Article 6 (3) of the Statute for the crimes committed at the Gashirabwoba[879] football field, and upheld the sentence pronounced on the basis of Article 6 (1) of the Statute.[880] Given the seriousness of the crimes of which Imanishimwe was found guilty under Article 6 (3) of the Statute, the Appeals Chamber considers that it is needless to reconsider the sentence of 12 years pronounced under Count 13 following the setting aside of the conviction entered on the basis of Article 6 (1) of the Statute. The Appeals Chamber is of the unanimous opinion that partial review of the verdict does not affect the 12 years sentence that is to run concurrently with the other sentences pronounced under Counts 9, 11, 12 and imposed by the Trial Chamber under Count 13. By a majority, with Judge Schomburg dissenting, the Appeals Chamber concludes that the total sentence imposed on Imanishimwe is 12 years.

[878] Judgement, para. 825.
[879] See *supra*, para. 165.
[880] See *supra*, paras. 420 and 428.

VI. DISPOSITION

For the foregoing reasons,

THE APPEALS CHAMBER

PURSUANT to Article 24 of the Statute and Rule 118 of the Rules;

NOTING the written submissions of the parties and their oral arguments presented at the hearings on 6 and 7 February 2006;

SITTING in open session;

RECALLS having unanimously dismissed the grounds of appeal raised by the Prosecutor against the Judgement in respect of André Ntagerura and Emmanuel Bagambiki and upheld their acquittal in the Disposition of the Appeal Judgement on the Prosecutor's appeal against the acquittal of André Ntagerura and Emmanuel Bagambiki pronounced on 8 February 2006;

DISMISSES, unanimously, the other grounds of appeal raised by the Prosecutor;

GRANTS, unanimously, the first ground of appeal raised by Samuel Imanishimwe against the convictions entered against him on the basis of Article 6 (3) of the Statute for the events that occurred at the Gashirabwoba football field;

SETS ASIDE, accordingly, the convictions entered against Samuel Imanishimwe on the basis of Article 6 (3) of the Statute for the crimes of genocide, extermination as crime against humanity, and serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II under Counts 7, 10 and 13 of the Bagambiki/Imanishimwe Indictment;

FINDS moot the second and fourth grounds of appeal raised by Samuel Imanishimwe against the convictions entered against him on the basis of Article 6 (3) of the Statute for the events that occurred at the Gashirabwoba football field;

DISMISSES, unanimously, the third, fifth and sixth grounds of appeal raised by Samuel Imanishimwe regarding the cumulative convictions, the assessment of the evidence relating to the Karambo military camp, and the sentence;

UPHOLDS, unanimously, the convictions entered against Samuel Imanishimwe on the basis of Article 6 (1) of the Statute for murder, imprisonment and torture as crimes against humanity under Counts 9, 11 and 12 of the Bagambiki/Imanishimwe Indictment and for murder, torture and cruel treatment constituting serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II under Count 13 of the Bagambiki/Imanishimwe Indictment;

REVERSES, unanimously, the two concurrent sentences of 15 years' imprisonment pronounced against Samuel Imanishimwe for genocide and extermination as crime against humanity under Counts 7 and 10 of the Bagambiki/Imanishimwe Indictment to be served consecutively with the other sentences pronounced under the other Counts;

UPHOLDS the four concurrent sentences of 10, 3, 10 and 12 years' imprisonment pronounced against Samuel Imanishimwe under Counts 9, 11, 12 and 13 of the Bagambiki/Imanishimwe Indictment giving, with Judge Schomburg dissenting, a total term of 12 years' imprisonment;

RULES that this Judgement shall be enforced immediately pursuant to Rule 119 of the Rules;

ORDERS, in accordance with Rules 103 (B) and 107 of the Rules of Procedure and Evidence, that Samuel Imanishimwe remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where he will serve his sentence.

Done in English and French, the French text being authoritative.

Judge Schomburg has appended a dissenting opinion to this Judgement.

Delivered on 7 July 2006 at Arusha, Tanzania.

[Signed] : Fausto Pocar ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron ; Wolfgang Schomburg

VII. Judge Schomburg's Dissenting Opinion

1. I concur entirely with the decision concerning André Ntagerura and Emmanuel Bagambiki.

2. However, I am of the opinion that not only is the Indictment against André Ntagerura vague, but it must also be declared null and void as none of the crimes with which the Accused is charged is sufficiently pleaded and the scope of the charges is not sufficiently defined. Thus, the Indictment against André Ntagerura does not satisfy the two main functions of any indictment, namely:

- informing the accused of the charges against him or her (*information function* which enshrines the fundamental right to be heard) and
- limiting the individual and material scope of the charges (*limitation function*)

The Indictment against Emmanuel Bagambiki and Samuel Imanishimwe satisfies these basic functions only in respect of some counts.

3. Moreover, if these documents are considered to be partly or entirely void, it should be noted that it is not for the Appeals Chamber to determine if the maxim *ne bis in idem* (a person shall not be tried or punished twice for the same crime)[1] applies to the instant case. It is for the Prosecutor of this Tribunal,[2] first, (cf. Article 8 of the Statute) or any other representative of the public prosecutor's office within a competent jurisdiction, to try the crimes in question, determine the timeliness of commencing fresh criminal proceedings on the basis of a new indictment to the extent that the principle of *res judicata* does not bar the re-prosecution of André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe.[3]

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[1] In principle, this maxim is applicable only to the same country/State. See for example Article 14 (7) of the International Convention on Civil and Political Rights and Article 4 of Protocol N°7 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ETS N°17). It became internationally applicable by means, *inter alia*, of Article 54 of the Convention on the Implementation of the Schengen Agreement of 14 June 1985 between the Governments of the Benelux Economic Union, the Federal Republic of Germany and the Republic of France on the gradual elimination of control on the common borders, signed in Schengen on 19 June 1990 (CISA). Cf. Case N°C. 436/04 (Case of *Belgium v. Van Esbroeck*) Court of Justice of the European Communities, Judgement of 9 March 2006 (http://www.curia.eu.int), point 2 of the disposition: ["the existence of a body of inextricably linked facts, independently of the legal characterization of such facts or of the protected legal interest …"]

[2] The same supranational court/tribunal by analogy to the "same country/State"?

[3] For a distinction of formal defects (see *supra*, para. 2, line 2) resulting in acquittal on grounds of procedural defects, and the other defects tainting the indictment, see *Meyer-Goßner*, Strafprozessordnung, 49th ed., Munich 2006, para. 200, N°26 and 27, referring to the case-law of Federal Court of Germany (Bundesgerichtshof).

4. May I recall that André Ntagurera was acquitted solely – and Emmanuel Bagambiki and Samuel Imanishimwe were mainly acquitted – on procedural grounds, for, to some extent, there was no indictment – the primary accusatory instrument – that could be cured. Absent such indictment, there cannot be a trial or, in any event, a fair trial, for the principle of fairness also takes into account the interests of victims and their families.

Done in English and French with the French text being authoritative.

Delivered on 7 July 2006 at Arusha, Tanzania.

[Signed] : Wolfgang Schomburg

Annex A: Procedural Background

1. The main aspects of the appeal proceedings are summarized below.

A. Filing of briefs

2. The Trial Judgement was delivered on 25 February 2004.

1. The Prosecution's Appeal

3. The Prosecution filed its Notice of Appeal on 25 March 2004 and its Appeal Brief on 8 June 2004. After having been granted an extension of time to file their respective Respondent's Briefs on 24 June 2004,[1] Bagambiki and Ntagerura each filed a "Response" to the Prosecution Notice of Appeal on 8 October 2004.[2] Because of substantial translation errors in the French translation of the Trial Judgement, the Pre-Appeal Judge ordered two weeks later the suspension of the time-limits for filing the appeal briefs until a new certified French version of the Trial Judgement was served on the Parties.[3] On 10 November 2004, at the request of the Prosecution,[4] the Pre-Appeal Judge ruled that Bagambiki and Ntagerura's Responses were inadmissible, on the ground that neither the Rules nor the Practice Directions applicable to appeal proceedings provided for a response to a notice of appeal.[5] In the said Decision, the Pre-Appeal Judge reminded Bagambiki and Ntagerura that their Respondent's Briefs should be filed within 20 days of the notification of the new certified French version of the Trial Judgment. Imanishimwe, Bagambiki and Ntagerura subsequently filed their Respondent's Briefs on 14, 16 and 17 February 2005, respectively. The Prosecution filed its Brief in Reply on 3 March 2005.

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[1] Décision relative à la Requête d'André Ntagerura pour le report du délai de dépôt du Mémoire de l'Intimé, 24 June 2004; Décision relative à la Requête de la Défense d'Emmanuel Bagambiki en vue du report du délai de dépôt du Mémoire de l'Intimé, 24 June 2004. See also Décision relative à la Requête de Samuel Imanishimwe aux fins de prorogation des délais de dépôt du Mémoire de l'Intimé, filed on 16 July 2004, whereby the Pre-Appeal Judge granted the same extension of time to Imanishimwe.

[2] Réponse de l'Intimé André Ntagerura à l'Acte d'appel du Procureur selon l'article 2 de la Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal, 8 October 2004; Réponse de la Défense de Monsieur Emmanuel Bagambiki à l'Acte d'appel du Procureur conformément au paragraphe 2 de la Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal, 8 October 2004 (together "Responses").

[3] *Ordonnance*, 21 October 2004.

[4] Prosecutor's Urgent Motion for Rejection of the Responses to the Prosecutor's Notice of Appeal filed by Respondents André Ntagerura and Emmanuel Bagambiki, 12 October 2004.

[5] Décision (Requête urgente du Procureur aux fins de rejet des réponses à l'Acte d'appel du Procureur, Requête de la Défense d'Emmanuel Bagambiki en vue du report de délai de dépôt de sa réponse), 10 November 2004.

2. Samuel Imanishimwe's Appeal

4. On 3 March 2004, Imanishimwe filed a motion seeking an extension of time for filing both his Notice of Appeal and Appellant's Brief on the ground that he had not yet received the Trial Judgement in a language that he and his Counsel understood, namely, French.[6] On 24 March 2004, the Pre-Appeal Judge granted the requested extension, ordering Imanishimwe to file his Notice of Appeal no later than 30 days from the day the French version of the Trial Judgement was served on him, and his Appellant's Brief within 75 days of the filing of his Notice of Appeal.[7] Imanishimwe filed his Notice of Appeal on 2 September 2004. On 21 October 2004, because of some substantial translation errors in the French version of the Trial Judgement, the Pre-Appeal Judge ordered the suspension of the time-limits for filing the Appeal Briefs until a new certified French version of the Trial Judgement was served on the Parties.[8] Imanishimwe's Appeal Brief was filed on 25 February 2005 and the Prosecution Response Brief on 5 April 2005. Following a motion seeking an extension of time,[9] Imanishimwe was given 15 days from the day the French version of the Prosecution Response Brief was served on him to file his Brief in Reply.[10] He eventually filed his Brief in Reply on 12 July 2005.

B. Assignment of Judges

5. On 23 March 2004, the following Judges were assigned to hear the appeal of Imanishimwe: Judge Theodor Meron, Presiding Judge; Judge Florence Mumba; Judge Mehmet Güney; Judge Fausto Pocar; and Judge Inés Mónica Weinberg de Roca.[11] Judge Mehmet Güney was designated as the Pre-Appeal Judge.[12] Following the filing of the Prosecution Notice of Appeal, the Presiding Judge of the Appeals Chamber ordered on 29 March 2004 that both appeals be heard as a single case by the same bench.[13] On 25 January 2005, Judge Wolfgang Schomburg was assigned to replace Judge Theodor Meron.[14] On 15 July 2005, Judge Andrésia Vaz was assigned to replace Judge Inés Mónica Weinberg de Roca.[15] Judge Mehmet Güney then became Presiding Judge. Having become Presiding Judge of the Appeals Chamber on 17 November 2005, Judge Fausto Pocar became Presiding Judge in the matter. On 18 November 2005, Judge Theodor Meron was assigned to replace Judge Florence Mumba.[16]

C. Additional Evidence

6. On 10 May 2004, the Prosecution filed a motion pursuant to Rule 115 of the Rules for the admission of two witness statements as additional evidence.[17] In Decisions rendered on 18 and 19 May 2004, the Pre-Appeal Judge granted leave to Bagambiki and Ntagerura to file their Response to said

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[6] Extremely Urgent Motion for Extension of Time Limit for filing a Notice of Appeal and an Appellant's Brief against the Judgement of 25 February 2004 entered against Samuel Imanishimwe – Rule 3, 108 and 116 of the Rules of Procedure and Evidence and Article 20 of the Statute, 3 March 2004.

[7] Decision on "Requête en extrême urgence aux fins de prorogation des délais de dépôt de l'Acte d'appel et du Mémoire en appel contre le Jugement rendu le 25 février 2004 contre Samuel Imanishimwe", 24 March 2004.

[8] *Ordonnance*, 21 October 2004.

[9] Requête aux fins de suspension du délai de dépôt de la duplique [sic] de Samuel Imanishimwe conformément aux articles 20 du Statut, 3, 113 et 116 du Règlement de procédure et de preuve, 11 April 2005.

[10] Décision relative à la Requête de Samuel Imanishimwe aux fins de suspension du délai de dépôt du Mémoire en réplique, 13 April 2005.

[11] Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 23 March 2004.

[12] Idem.

[13] *Ibid*., 29 March 2004.

[14] Order of the Presiding Judge Replacing a Judge in a Case before the Appeals Chamber, 25 January 2005.

[15] Order Replacing a Judge in a Case Before the Appeals Chamber, 15 July 2005.

[16] *Ibid*., 18 November 2005.

[17] Prosecution Motion for Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 10 May 2004.

motion within 10 days of their being served with the French translation.[18] On 2 June 2004, the Pre-Appeal Judge issued an order enjoining the Prosecution to file confidentially a new motion appending the unredacted versions of the two witness statements of which it sought admission, and inviting the Prosecution to attach to this new motion the up-to-date details justifying the protective measures requested.[19] Pursuant to this order, the Prosecution filed on 7 June 2004 the unredacted versions of statements by the two witnesses under seal.[20] On the same day, the Prosecution filed a motion in which it renewed its application for protective measures for the two witnesses.[21] On 10 December 2004, the Appeals Chamber denied the motion for additional evidence on the ground that it was not persuaded that, had the evidence of the two witnesses been adduced at trial, it would have changed the outcome of the trial.[22]

D. Hearing of the Appeal

7. The appeal hearing was held in Arusha/Tanzania on 6 and 7 February 2006. On 8 February 2006, after the closing of the appeal hearing, the Appeals Chamber confirmed Ntagerura's and Bagambiki's acquittal.[23] The Appeals Chamber dismissed the Prosecution's grounds of appeal against Ntagerura's and Bagambiki's acquittal, indicating that the reasons for this decision would be delivered at the same time as the Appeal Judgement on the Prosecution's remaining grounds of appeal and on Imanishimwe's appeal.[24]

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[18] Décision relative à la requête de la Défense d'Emmanuel Bagambiki en vue du report du délai du dépôt de la réponse à une requête du Procureur, 18 May 2004; Décision relative à la requête d'André Ntagerura pour report du délai de réponse à la requête du Procureur, 19 May 2004.
[19] *Ordonnance*, 2 June 2004.
[20] Witness Statements Filed Confidentially in Relation to Prosecution's Motion for Additional Evidence under Rule 115, Under Seal, 7 June 2004.
[21] Prosecution Motion for Protective Measures for Witnesses whose Evidence is being tendered under Rule 115, 7 June 2004.
[22] Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004.
[23] Dispositif de l'Arrêt concernant l'appel du Procureur s'agissant de l'acquittement d'André Ntagerura et Emmanuel Bagambiki, 8 February 2006.
[24] Dispositif de l'Arrêt concernant l'appel du Procureur s'agissant de l'acquittement d'André Ntagerura et Emmanuel Bagambiki, 8 February 2006.

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Decision on Disclosure of Closed Session Testimony of Witness PBB 18 September 2006 (ICTR-99-46)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Emmanuel Bagambiki, Samuel Imanishimwe and André Ntagerura – Gratien Kabiligi – Disclosure of Closed Session Testimony in another Trial, Application mutatis mutandis of the witness protection order – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 75 (G) (ii)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on Disclosure of Sealed Exhibits of Witness DM-12, 25 May 2006 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Disclosure of Closed Session Testimony of BDR-1 and LK-2, 29 August 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion to Request the Communication of Closed Sessions Transcripts", etc., filed by the Kabiligi Defence on 14 September 2006;

HEREBY DECIDES the motion.

The Kabiligi Defence requests disclosure of the closed session testimony of Witness PBB in the trial of *Ntagerura et al*. This same witness will shortly appear in the present trial on behalf of the Kabiligi Defence, which seeks to review the prior testimony as part of its preparation.

As no Chamber is currently seized of the *Ntagerura et al*. trial, this request is properly made before this Chamber under Rule 75 (G) (ii) of the Rules of Procedure and Evidence.[1] The witness has apparently revealed his protected status to the Defence; accordingly, there is no reason not to order the disclosure of these Tribunal records, on the understanding that the applicable witness protection orders will apply *mutatis mutandis* to any party in the present case in receipt of the protected information.[2]

FOR THE ABOVE REASONS, THE CHAMBER

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[1] Final judgement on appeal was rendered on 7 July 2006.

[2] See *Bagosora et al*., Decision on Disclosure of Closed Session Testimony of BDR-1 and LK-2 (TC), 29 August 2006, para. 4; *Nahimana et al*., Decision on Disclosure of Sealed Exhibits of Witness DM-12 (TC), para. 7.

GRANTS the motion;

ORDERS the Registry to disclose the closed session transcripts and sealed exhibits of Witness PBB to the Kabiligi Defence;

ORDERS that the Kabiligi Defence and any other party in receipt of the protected information, including the Accused, are bound *mutatis mutatis* by the terms of the witness protection order governing the testimony of Witness PBB.

Arusha, 18 September 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Le Procureur c. Emmanuel BAGAMBIKI, Samuel IMANISHIMWE et André NTAGURERA

Affaire N° ICTR-99-46

Fiche technique: Emmanuel Bagambiki

• Nom: Bagambiki

• Prénom: Emmanuel

• Date de naissance: 1948

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: Préfet à Cyangugu

• Date de confirmation de l'acte d'accusation: 10 octobre 1997

• Date de jonction d'instance (dossier *Cyangugu*): 11 octobre 1999 – Ntagerura et Imanishimwe (aff. N° ICTR-99-46)

• Chefs d'accusation: génocide, complicité de génocide, entente en vue de commettre le génocide, incitation directe et publique à commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date et lieu de l'arrestation: 5 juin 1998, au Togo

• Date du transfert: 10 juillet 1998

• Date de la comparution initiale: 19 avril 1999

• Précision sur le plaidoyer: non coupable

• Date du début du procès: 18 septembre 2000

• Date et contenu du prononcé de la peine: 25 février 2004, acquittement (libération conditionnelle)

• Appel : 8 février 2006, rejeté, acquittement

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Fiche technique: Samuel Imanishimwe

• Nom: IMANISHIMWE

• Prénom: Samuel

• Date de naissance: 25 octobre 1961

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: Lieutenant des Forces Armées Rwandaises (FAR)

• Date de confirmation de l'acte d'accusation: 10 octobre 1997

• Chefs d'accusation: génocide, complicité de génocide, entente en vue de commette le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date de jonction d'instance (dossier *Cyangugu*): 11 octobre 1999 – Bagambiki et Ntagerura (aff. N° ICTR-99-46)

• Date et lieu de l'arrestation: 11 août 1997, au Kenya

• Date du transfert: 11 août 1997.

• Date de la comparution initiale: 27 novembre 1997

• Précision sur le plaidoyer: non coupable

• Date du début du procès: 18 septembre 2000

• Date et contenu du prononcé de la peine: 25 février 2004, condamné à 27 ans d'emprisonnement

• Appel: 7 juillet 2006, peine réduite à 12 ans

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Fiche technique: André Ntagerura

• Nom: NTAGERURA

• Prénom: André

• Date de naissance: 2 janvier 1950

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: Ministre du Transport

• Date de confirmation de l'acte d'accusation: 10 août 1996

• Date de jonction d'instance (dossier *Cyangugu*): 11 octobre 1999 – Imanishimwe et Bagambiki (aff. N° ICTR-99-46)

• Date des modifications subséquentes portées à l'acte d'accusation: 29 janvier 1998

• Chefs d'accusation: génocide, conspiration en vue de commettre le génocide, complicité dans le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date et lieu de l'arrestation: 27 mars 1996, au Cameroun

• Date du transfert: 23 janvier 1997

• Date de la comparution initiale: 20 février 1997

• Précision sur le plaidoyer: non coupable

• Date du début du procès: 18 septembre 2000

• Date et contenu du prononcé de la peine: 25 février 2004, acquittement (libération conditionnelle)

• Appel: 8 février 2006, acquittement, rejeté

Décision relative à la requête aux fins de prorogation du mandat du co-conseil de Samuel Imanishimwe
30 janvier 2006 (ICTR-99-46-A)

(Original : Français)

Chambre d'appel

Juges : Fausto Pocar, Président de Chambre ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron ; Wolfgang Schomburg

Emmanuel Bagambiki, Samuel Imanishimwe and André Ntagerura – Fonction du Greffier, Questions relatives à la rémunération des conseils, Préalable épuisement des autres voies de recours – Requête rejetée

Instruments internationaux cités :

Directive relative à la commission d'office de Conseils de la défense, art. 30 ; Règlement de Procédure et de preuve, art. 108 bis (B) et 108 bis (E) ; Statut, art. 20 (2) et 20 (4)

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Ferdinand Nahimana et consorts, Decision on Appellant Ferdinand Nahimana's Motion for Assistance From the Registrar in the Appeals Phase, 3 mai 2005 (ICTR-99-52)

T.P.I.Y. : Chambre d'appel, Le Procureur c. Nikola Šainović, Décision relative à l'appel interlocutoire concernant la Requête aux fins de l'octroi de fonds supplémentaires, 13 novembre 2003 (IT-99-37)

LA CHAMBRE D'APPEL du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 (« Tribunal »),

VU les appels interjetés par le Procureur[1] et Samuel Imanishimwe[2] contre le jugement et la sentence prononcés dans la présente affaire par la Chambre de première instance III le 25 février 2004 ;

VU l'Ordonnance portant calendrier du 7 décembre 2005 ordonnant la tenue des audiences en appel les lundi 6 et mardi 7 février 2006 à Arusha, Tanzanie ;

VU la « Requête en extrême urgence aux fins de prorogation du mandat du co-conseil – articles 20 alinéas 2 et 4 (b) du Statut du Tribunal pénal international pour le Rwanda et 108 *bis* (B) du Règlement de procédure et de preuve » déposée par le conseil principal de Samuel Imanishimwe (« Défense ») le 19 janvier 2006 (« Requête »), par laquelle la Défense conteste la décision du Greffe

[1] Acte d'appel du Procureur, 25 mars 2004.
[2] Acte d'appel du verdict et de la peine prononcés contre Samuel Imanishimwe, introduit conformément aux articles 24 du Statut, 108 du Règlement de procédure et de preuve et de la décision rendue le 24 mars 2004 par la Chambre d'appel du TPIR, 2 septembre 2004.

d'allouer 100 heures supplémentaires au co-conseil prélevées sur les 175 heures accordées au conseil principal ;

VU que la Défense demande à la Chambre d'appel d'inviter le Greffe à

> « proroger le mandat de Monsieur Jean-Pierre FOFE comme Co-Conseil dans le dossier de Samuel Imanishimwe en lui attribuant un supplément d'heures indépendamment des heures allouées au Conseil Principal »

ou, dans l'alternative, de

> « reprogrammer les audiences de la Chambre d'appel dans deux mois pour permettre au Conseil principal de préparer les plaidoiries dans les deux procédures » ;

ATTENDU qu'au soutien de sa Requête, la Défense invoque les articles 20 (2) et (4) du Statut du Tribunal et 108 *bis* (B) et (E) du Règlement de procédure et de preuve et fait valoir que la complexité de l'affaire ainsi que le volume de travail engendré par la double procédure d'appel nécessite une augmentation du nombre d'heures allouées au co-conseil afin que celui-ci puisse préparer et présenter la plaidoirie relative à l'appel du Procureur;

CONSIDÉRANT que bien que le Procureur n'ait pas encore déposé de réponse, le fait de statuer sur la présente Requête sans que le Procureur n'ait eu la possibilité d'y répondre ne porte nullement préjudice à ce dernier ;

CONSIDÉRANT de surcroît que les circonstances de l'espèce exigent que la Requête de la Défense soit tranchée dans les meilleurs délais ;

ATTENDU que c'est au Greffier qu'il revient au premier chef de trancher les questions relatives à la rémunération des conseils[3] ;

ATTENDU que la Chambre d'appel n'est compétente pour examiner la décision du Greffe, vu l'obligation que lui impose le Statut de veiller à l'équité du procès, qu'après que le requérant ait épuisé la voie de recours expressément prévue par l'article 30 de la Directive relative à la commission d'office de Conseils de la défense (« Directive »)[4] ;

CONSIDÉRANT que la Défense ne fait pas état dans sa Requête d'un quelconque recours introduit contre la décision contestée du Greffe en vertu de l'article 30 de la Directive ;

CONSIDÉRANT de surcroît que la décision du Greffe n'a pas d'incidence sur l'équité du procès propre à justifier le report des audiences en appel ;

PAR CES MOTIFS,

REJETTE la Requête ;

INVITE la Défense à suivre la procédure applicable au règlement des différends concernant la rémunération des conseils commis d'office par le Tribunal prévue par la Directive ; et

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[3] Voir *Le Procureur c. Milutinović, Ojdanić et Sainović*, affaire n°IT-99-37-AR73.2, Décision relative à l'appel interlocutoire concernant la Requête aux fins de l'octroi de fonds supplémentaires, 13 novembre 2003, par. 19.

[4] Voir *Le Procureur c. Milutinović, Ojdanić et Sainović*, affaire n°IT-99-37-AR73.2, Décision relative à l'appel interlocutoire concernant la Requête aux fins de l'octroi de fonds supplémentaires, 13 novembre 2003, par. 19; *Le Procureur c. Nahimana et consorts*, affaire n°ICTR-99-52-A, *Decision on Appellant Ferdinand Nahimana's Motion for Assistance From the Registrar in the Appeals Phase*, 3 mai 2005, par. 4.

RAPPELLE à la Défense que l'éventuel engagement d'une telle procédure ne l'exonère pas de son obligation de représenter son client devant la Chambre d'appel lors des audiences en appel, ce conformément à l'Ordonnance portant calendrier du 7 décembre 2005.

Fait en français et en anglais, le texte français faisant foi.

Fait le 30 janvier 2006, à La Haye, Pays-Bas.

[Signé] : Fausto Pocar

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Dispositif de l'arrêt concernant l'appel du Procureur s'agissant de l'acquittement d'André Ntagerura et Emmanuel Bagambiki 8 février 2006 (ICTR-99-46-A)

(Original : Français)

Chambre d'appel

Juges : Fausto Pocar, Président de Chambre ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron ; Wolfgang Schomburg

Emmanuel Bagambiki, Samuel Imanishimwe and André Ntagerura – Confirmation de l'acquittement d'André Ntagerura et Emmanuel Bagamabiki

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 118 ; Statut, art. 24

LA CHAMBRE D'APPEL du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et le scitoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 (« Tribunal »),

VU le jugement et la sentence prononcé dans la présente affaire par la Chambre de première instance III le 25 février 2004 ;

VU l'article 24 du Statut du tribunal et l'article 118 du Règlement de Procédure et de preuve ;

VU les écritures respectives des parties et leurs arguments oraux à l'audience des 6 et 7 février 2006 ;

SIEGEANT en audience publique ;

REJETTE à l'unanimité les motifs d'appel soulevés par le Procureur à l'encontre du jugement du 25 février 2004 de la Chambre de première instance III pour ce qui est de l'acquittement d'André Ntagerura et Emmanuel Bagamabiki, la motivation écrite de la présente décision devant être rendue dans les meilleurs délais avec l'arrêt disposant des motifs d'appel soulevés par le Procureur pour ce qui est de Samuel Imanishimwe ainsi que de l'appel de ce dernier ;

CONFIRME l'acquittement d'André Ntagerura et Emmanuel Bagamabiki ;

ORDONNE au Greffier de prendre sans aucun délai toute mesure nécessaire afin de donner plein effet à la confirmation de l'acquittement d'André Ntagerura et Emmanuel Bagamabiki.

Fait en anglais et en français, le texte français faisant foi.

Fait à Arusha (Tanzanie), le 8 février 2006.

[Signé] : Fausto Pocar ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron ; Wolfgang Schomburg

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Ordonnance portant calendrier
23 mai 2006 (ICTR-99-46-A)

(Original : Français)

Chambre d'appel

Juges : Fausto Pocar, Président de Chambre ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron ; Wolfgang Schomburg

Emmanuel Bagambiki, Samuel Imanishimwe et André Ntagerura – Calendrier, Absence d'un juge lors du prononcé pour cause d'activités se rapportant au Tribunal et ayant été autorisées, Prononcé en l'absence de ce juge, Intérêts de la justice

Instrument international cité :

Règlement de Procédure et de preuve, art. 15 bis (A) et 118 (D)

LA CHAMBRE D'APPEL du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 (« Tribunal »),

VU l'article 15 *bis* (A) du Règlement de procédure et de preuve du Tribunal (« Règlement ») qui dispose que lorsque

> « (i) pour cause de maladie ou d'autres raisons personnelles urgentes, ou d'activités se rapportant au Tribunal et ayant été autorisées, un juge ne peut continuer à siéger dans une affaire en cours pendant une période qui semble devoir être de courte durée »

et que « (ii) les autres juges de la Chambre sont convaincus que l'intérêt de la justice le commande », ces derniers « peuvent continuer à entendre l'affaire en l'absence du premier juge durant une période n'excédant pas cinq jours de travail » ;

VU que M. le Juge Theodor Meron ne peut être présent pour le prononcé de l'arrêt en cette affaire (« Arrêt ») pour cause d'activités se rapportant au Tribunal et ayant été autorisées ;

ATTENDU que les autres juges de la Chambre d'appel sont convaincus que l'intérêt de la justice commande le prononcé de l'Arrêt malgré l'absence du Juge Meron ;

EN APPLICATION des articles 15 *bis* (A) et 118 (D) du Règlement ;

ORDONNE la tenue d'une audience publique en l'absence du Juge Meron à Arusha, Tanzanie, le 7 juillet 2006 à 9 h 30 afin de procéder au prononcé de l'Arrêt.

Fait en français et en anglais, le texte français faisant foi.

Fait le 23 mai 2006, à La Haye, Pays-Bas.

[Signé] : Fausto Pocar

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Arrêt
7 juillet 2006 (ICTR-99-46-A)

(Original : Français)

Chambre d'appel

Juges : Fausto Pocar, Président de Chambre ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron ; Wolfgang Schomburg

Emmanuel Bagambiki, Samuel Imanishimwe et André Ntagerura – Droit applicable aux actes d'accusation, Question préliminaire : analyse de l'examen par la Chambre de première instance des vices de l'acte d'accusation, Raisonnement de la Chambre d'appel sur base du jugement seulement, Erreur de la chambre de première instance qui ne précise pas aux Accusés qu'elle les juge sur base d'actes d'accusation reconnus viciés, Nécessité d'un débat contradictoire, Pas de lecture des Actes d'accusation comme un document unique, Purge des vices de l'acte d'accusation, Erreur de la Chambre de première instance omettant de préciser si les vices ont été corrigés, Charge du Procureur de prouver que le procès n'a pas été rendu inéquitable, Condamnation pour des faits non visés dans l'acte d'accusation, Obligation du Procureur présenter de façon circonstanciée les faits essentiels fondant les accusations, Obligation du Procureur d'étayer chacune des accusations s'il entend plaider plusieurs modes de responsabilité, Pas de condamnation possible pour des accusations non portées dans l'acte d'accusation – Principe d'établissement de la preuve au-delà de tout doute raisonnable, Preuve au-delà de tout doute raisonnable de chaque élément de l'infraction ou du point en litige, Obligation de la Chambre de première instance d'examiner tous les éléments de preuve dans leur globalité, Processus d'établissement des faits, Chaîne de preuves, Distinction entre et élément de preuve, Preuve de faits connexes – Présomption d'innocence – Déposition des complices, Examen des témoignages avec circonspection, Recherche des motifs précis de la déposition, Qualification préalable du témoin en tant que complice, Responsabilité de la Chambre de première instance d'exercer un contrôle sur les modalités de l'interrogatoire des témoins et l'ordre dans lequel ils interviennent, Possibilité de poser des questions sur des points ayant trait à la crédibilité du témoin lors de son contre-interrogatoire – Crédibilité des témoins présumée au moment de leur admission – Pouvoir de la Chambre de première instance de décider si au vu des circonstances l'exigence d'un procès équitable interdit le versement au dossier d'un élément de preuve particulier, Principes applicables aux éléments de preuve circonstancielle : culpabilité déclarée que si elle est la seule déduction raisonnable – Engagement de la responsabilité pénale d'Emmanuel Bagambiki, Distinction

entre l'obligation générale d'assurer la protection de la population de sa préfecture et l'obligation d'aider des personnes en danger ayant expressément demandé assistance, Pas de responsabilité pénale par omission fondée sur l'article 6 (1) du Statut, Responsabilité du supérieur hiérarchique en vertu de l'article 6 (3) du Statut, Contrôle effectif sur les gendarmes: capacité matérielle d'empêcher la commission de l'infraction ou d'en punir les auteurs principaux, Interprétation du critère « savait ou avait des raisons de savoir » – Nature de la responsabilité pénale de Samuel Imanishimwe, Pas de responsabilité pour participation à une entreprise criminelle commune au motif que le Procureur n'avait pas plaidé ladite forme de responsabilité dans l'acte d'accusation, Responsabilité pour avoir ordonné la commission des crimes, Définition de l'actus reus et de la mens rea, Pas d'examen par la Chambre de première instance de l'approbation de l'accusé sur les actes des auteurs, Conclusion à l'existence d'un ordre vu : le caractère répétitif, la fréquence des arrestations de civils, la nature de la structure de commandement, la hiérarchie militaire, la taille du camp, la présence d'Imanishimwe au camp, la reconnaissance d'Imanishimwe du contrôle qu'il exerçait sur les soldats du camp de Karambo, l'absence de tout moyen de preuve donnant à penser qu'il ne les contrôlait pas et qu'il les avait empêchés de maltraiter des civils ou qu'ils les avait punis à ce titre – Cumul de déclarations de culpabilité sur la base de différentes dispositions du Statut mais à raison d'un même fait n'est possible que si chacune des dispositions comporte un élément constitutif matériellement distinct qui fait défaut dans l'autre – Entreprise criminelle commune, Théorie invoquée le premier jour du procès à l'occasion de la Déclaration liminaire du Procureur : invocation tardive – Allégation d'entente en vue de commettre le génocide, Pas d'allégations factuelles soutenant l'existence d'un accord – Peine, Révision partielle du verdict : réduction de la peine d'emprisonnement de Samuel Imanishimwe

Instruments internationaux cités :

Directive pratique relative aux conditions formelles applicables au recours en appel contre un jugement, 4 juillet 2005, para. 4 (b) (ii) ; Règlement de Procédure et de preuve, art. 2, 47, 47 (B), 47 (C), 48, 50, 66 (A) (ii), 72 (A) (ii), 87 (A), 88 (C), 89 (C), 90 (E), 90 (G) (i), 98 bis, 101, 101 (B) (ii), 103 (B), 107, 118 et 119 ; Statut, art. 2, 3 (b), 4 (a), 6 (1), 6 (3), 17, 17 (4), 18, 19, 19 (3), 20, 20 (2), 20 (3), 20 (4) (a), 20 (4) (b), 22 (2), 23 et 24

Jurisprudence internationale citée :

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T.P.I.Y. : Chambre d'appel, Le Procureur c. Dražen Erdemović, Arrêt, 7 octobre 1997 (IT-96-22) ; Chambre de première instance, Le Procureur c. Anto Furundžija, Jugement, 10 décembre 1998 (IT-95-17/1) ; Chambre d'appel, Le Procureur c. Zlatko Aleksovski, Arrêt relatif à l'appel du Procureur concernant l'admissibilité d'éléments de preuve, 16 février 1999 (IT-95-14/1) ; Chambre de première instance, Le Procureur c. Milorad Krnojelac, Décision relative à l'exception préjudicielle de la Défense pour vice de forme de l'acte d'accusation, 24 février 1999 (IT-97-25) ; Chambre d'appel, Le Procureur c. Duško Tadić, Arrêt, 15 juillet 1999 (IT-94-1) ; Chambre de première instance, Le Procureur c. Milorad Krnojelac, Décision relative à l'exception préjudicielle pour vices de forme de l'acte d'accusation modifié, 11 février 2000 (IT-97-25) ; Chambre d'appel, Le Procureur c. Zlatko Aleksovski, Arrêt, 24 mars 2000 (IT-95-14/1) ; Chambre de première instance, Le Procureur c. Radoslav Brđanin et Momir Talić, Décision relative à l'exception préjudicielle soulevée par Momir Talić pour vices de forme de l'acte d'accusation modifié, 20 février 2001 (IT-99-36) ; Chambre d'appel, Le Procureur c. Zdravko Mucić et consorts, Arrêt, 20 février 2001 (IT-96-21) ; Chambre d'appel, Le Procureur c. Duško Tadić, http://www.icty.org/x/cases/tadic/acjug/fr/vuj-aj010227f.pdf*Arrêt confirmatif relatif aux allégations d'outrage formulées à l'encontre du précédent Conseil, Milan Vujin, 27 février 2001 (IT-94-1) ; Chambre de première instance, Le Procureur c. Radoslav Brđanin et Momir Talić, Décision relative à la forme du nouvel acte d'accusation modifié et à la Requête de l'accusation aux fins de modification dudit acte, 26 juin 2001 (IT-99-36) ; Chambre d'appel, Le Procureur c. Zoran Kupreškić, Arrêt, 23 octobre 2001 (IT-95-16) ; Chambre d'appel, Le Procureur c. Stanislav Galić, Décision relative à la demande de l'accusation aux fins d'autorisation d'interjeter appel, 14 décembre 2001 (IT-98-29) ; Chambre de première instance, Le Procureur c. Momčilo Krajišnik et Biljana Plavšić, Décision relative à la requête de l'Accusation aux fins d'autorisation de modifier l'acte d'accusation consolidé, 4 mars 2002 (IT-00-39 et IT-00-40) ; Chambre d'appel, Le Procureur c. Stanislav Galić, Jugement, 7 juin 2002 (IT-98-29) ; Chambre de première instance, Le Procureur c. Želijko Mejakić et consorts, Décision relative à l'exception préjudicielle déposée par Dusko Knezević pour vice de forme de l'acte d'accusation, 4 avril 2003 (IT-02-65) ; Chambre de première instance, Le Procureur c. Milomir Stakić, Jugement, 31 juillet 2003 (IT-97-24) ; Chambre d'appel, Le Procureur c. Milorad Krnojelac, Jugement, 17 septembre 2003 (IT-97-25) ; Chambre de première instance, Le Procureur c. Predrag* Banović, *Jugement, 28 octobre 2003 (IT-02-65/1) ; Chambre de première instance, Le Procureur c. Jovica Stanišić, Décision relative aux exceptions préjudicielles soulevées par la Défense, 14 novembre 2003 (IT-03-69); Chambre de première instance, Le Procureur c. Radoslav Brđanin,* http://www.icty.org/x/cases/brdanin/tdec/fr/031128f.pdf*Décision relative à la requête aux fins d'acquittement introduite en vertu de l'article 98* bis *du règlement, 28 novembre 2003 (IT-99-36) ; Chambre d'appel, Le Procureur c. Mitar Vasiljević, Arrêt, 25 février 2004 (IT-98-32) ; Chambre d'appel, Le Procureur c. Radislav Krstić, Jugement, 19 avril 2004 (IT-98-33) ; Chambre d'appel, Le Procureur c. Tihomir Blaškić, Jugement, 29 juillet 2004 (IT-95-14) ; Chambre d'appel, Le Procureur c. Dario Kordić et Mario Čerkez, Arrêt, 17 décembre 2004 (IT-95-14/2) ; Chambre d'appel, Le Procureur c. Miroslav Kvočka, Arrêt, 28 février 2005 (IT-98-30/1) ; Chambre d'appel, Le Procureur c. Milan Babić, Arrêt relatif à la sentence, 18 juillet 2005 (IT-03-72) ; Chambre d'appel, Le Procureur c. Mladen Naletilić et Vinko Martinović, Arrêt, 3 mai 2006 (IT-98-34)*

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Canada : Cour suprême du Canada, Nadeau c. La Reine, 13 décembre 1984, [1984] 2 R.C.S. 570 ; Cour suprême du Canada, R. c. Morin, 17 novembre 1988, [1988] 2 R.C.S. 345

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I. Introduction

10. La Chambre d'appel du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'États voisins entre le 1er janvier et le 31 décembre 1994 (« Chambre d'appel » et « Tribunal » respectivement) est saisie des appels interjetés par Samuel Imanishimwe et le Procureur contre le Jugement rendu par la Chambre de première instance III dans l'affaire *Le Procureur c. André Ntagerura, Emmanuel Bagambiki et Samuel Imanishimwe* le 25 février 2004 (« Jugement » ou « Jugement de première instance »).

A. André Ntagerura, Emmanuel Bagambiki et Samuel Imanishimwe

11. André Ntagerura (« Ntagerura ») est né le 2 janvier 1950 dans la préfecture de Cyangugu, au Rwanda. De mars 1981 à juillet 1994, il a été membre du Gouvernement rwandais, son dernier poste étant celui de Ministre des transports et des communications dans le Gouvernement intérimaire[1].

12. Emmanuel Bagambiki (« Bagambiki ») est né le 8 mars 1948 dans la préfecture de Cyangugu, au Rwanda. Du 4 juillet 1992 au 17 juillet 1994, il a exercé les fonctions de préfet de Cyangugu[2].

13. Samuel Imanishimwe (« Imanishimwe ») est né le 25 octobre 1961 dans la préfecture de Gisenyi, au Rwanda. Lieutenant des Forces armées rwandaises, il a exercé les fonctions de commandant par intérim du camp militaire de Cyangugu (appelé également camp militaire de Karambo) d'octobre 1993 jusqu'à son départ du Rwanda, en juillet 1994[3].

B. Le Jugement

14. Le Jugement de première instance a été rendu sur la base de deux actes d'accusation distincts. Dans un premier acte d'accusation, déposé le 9 août 1996 et modifié le 29 janvier 1998, Ntagerura était accusé de génocide, d'entente en vue de commettre le génocide, d'extermination constitutive de crime contre l'humanité, de violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II, de deux chefs de complicité de génocide, à la fois à titre individuel en vertu de l'article 6 (1) et comme supérieur hiérarchique, au sens de l'article 6 (3) du Statut du Tribunal (« Statut »). Dans un acte d'accusation distinct, déposé le 9 octobre 1997 et modifié le 10 août 1999, Bagambiki et Imanishimwe étaient accusés de génocide, de complicité dans le génocide, d'entente en vue de commettre le génocide, d'assassinat, d'extermination et d'emprisonnement constitutifs de crimes contre l'humanité et de violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II. Imanishimwe était de surcroît accusé d'actes de torture constitutifs de crime contre l'humanité.

15. Ntagerura, Bagambiki et Imanishimwe étaient jugés par la Chambre de première instance sur la base des faits résumés ci-dessous :

Le soir du 6 avril 1994, après avoir reçu la nouvelle de la mort du Président Habyarimana, Imanishimwe s'est adressé aux soldats du camp militaire de Karambo et a immédiatement placé son camp en état d'alerte[4] ;

Le 7 avril, des réfugiés ont commencé à affluer aux paroisses de Shangi et Mibilizi[5] ;

Le 8 avril, des réfugiés principalement tutsis fuyant la violence qui avait gagné leurs quartiers ont commencé à se rassembler à la cathédrale de Cyangugu pour finalement atteindre le nombre de 5 000.

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[1] Jugement, par. 5.
[2] Jugement, par. 12.
[3] Jugement, par. 13.
[4] Jugement, par. 389.
[5] Jugement, par. 479 (Shangi) et 529 (Mibilizi).

Les autorités préfectorales ont envoyé de deux à quatre gendarmes au moins pour protéger les réfugiés à la cathédrale[6]. Le même jour, Bagambiki a envoyé des gendarmes garder la paroisse de Shangi à la demande des autorités de la paroisse[7]. Toujours le même jour, des assaillants hutus ont commencé à attaquer des maisons de Tutsis dans la commune de Gisuma et, après plusieurs jours d'affrontement, un certain nombre de réfugiés se sont rassemblés au terrain de football de Gashirabwoba[8] ;

Entre le 9 et le 11 avril 1994, quatre gendarmes ont été postés à la paroisse de Mibilizi[9] ;

Le 10 avril, des attaques quotidiennes ont commencé à la paroisse de Shangi. Le sous-préfet s'est rendu sur place pour s'enquérir de la situation[10] ;

Le 11 avril, un groupe d'*Interahamwe* s'est rendu à la cathédrale et a tiré en l'air, créant désordre et panique parmi les réfugiés. Bagambiki s'est rendu à la cathédrale après cette attaque afin de parler brièvement aux réfugiés[11]. Le même jour, des soldats ont arrêté sept réfugiés qui se trouvaient près de la cathédrale et les ont emmenés au camp militaire de Karambo, où ils ont été maltraités, ce en présence d'Imanishimwe[12]. D'autres réfugiés arrêtés ont été renvoyés à la cathédrale après que le témoin LY eut demandé à Bagambiki d'intervenir[13]. Toujours le même jour, les gendarmes stationnés à la cathédrale ont empêché deux attaques à l'encontre des réfugiés se trouvant là[14] ;

Le 11 avril 1994, on comptait environ 500 réfugiés rassemblés sur le terrain de football de Gashirabwoba. Au matin, les réfugiés ont repoussé une attaque. L'après-midi, Bagambiki et Imanishimwe sont arrivés au terrain de football et ont emmené Côme Simugomwa, le responsable local du PL, dont le corps a été retrouvé le long d'une rivière dans la commune de Karengera après le génocide. Le soir, des soldats sont arrivés au terrain de football[15] ;

Le 11 et le 12 avril, des *Interahamwe* de la région ont attaqué la paroisse de Mibilizi et les réfugiés ont repoussé les attaques[16] ;

Le 11 avril, une délégation comprenant un sous-préfet s'est rendue à la paroisse de Nyamasheke, où un certain nombre de Tutsis avaient cherché refuge[17]. Le même jour, des soldats ont tué plusieurs des civils détenus au camp militaire de Karambo[18] ;

Le 12 avril, le sous-préfet Munyangabe a fourni des médicaments à la paroisse de Shangi[19]. Le même jour, la population réfugiée sur le terrain de football de Gashirabwoba avait presque atteint 3 000 personnes. Ce matin-là, des milliers d'assaillants ont commencé à attaquer les réfugiés au terrain de football. Bagambiki et Nsabimana, le directeur de l'usine à thé de Shagasha, se sont rendus sur place, et Bagambiki a promis d'envoyer des soldats pour protéger les réfugiés. Une heure plus tard, des soldats et des gardes armés de l'usine à thé sont arrivés au terrain de football et ont commencé à tirer et jeter des grenades sur les réfugiés. Des *Interahamwe* ont alors achevé les survivants et ont pillé leurs effets personnels[20] ;

Le même jour, des *Interahamwe* ont attaqué la paroisse de Nyamasheke. Personne n'a été tué au cours de cette attaque. Le lendemain, les assaillants sont revenus à l'assaut et ont lancé une attaque similaire. Au cours de cette attaque, un gendarme a tiré et tué trois *Interahamwe*, mettant un terme à celle-ci. Bagambiki s'est rendu à la paroisse après avoir été informé de l'attaque[21] ;

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[6] Jugement, par. 309.
[7] Jugement, par. 479.
[8] Jugement, par. 435.
[9] Jugement, par. 529.
[10] Jugement, par. 480 et 481.
[11] Jugement, par. 309.
[12] Jugement, par. 310.
[13] Jugement, par. 311.
[14] Jugement, par. 313.
[15] Jugement, par. 435.
[16] Jugement, par. 530.
[17] Jugement, par. 577, 579.
[18] Jugement, par. 408.
[19] Jugement, par. 480.
[20] Jugement, par. 437.
[21] Jugement, par. 580 et 581.

Le 13 avril, la préfecture a envoyé des gendarmes et fourni un véhicule pour apporter un chargement de nourriture à la paroisse de Shangi. Le même jour ou le lendemain, une attaque de grande envergure s'est produite, entraînant, selon une estimation, la mort de 800 réfugiés[22] ;

Le même jour ou le lendemain, Bagambiki a empêché une attaque contre les réfugiés rassemblés à la cathédrale de Cyangugu lorsqu'il a personnellement arrêté un groupe d'assaillants armés qui se dirigeaient vers celle-ci. Le 14 avril, les autorités ecclésiastiques ont organisé une réunion avec Bagambiki et Imanishimwe parce que ces dernières estimaient qu'elles ne pouvaient plus assurer la sécurité des réfugiés. Bagambiki a décidé que les réfugiés devaient être transférés au stade Kamarampaka[23]. Le même jour, un groupe de réfugiés qui tentaient de se rendre au stade Kamarampaka ont été arrêtés par des soldats. Certains d'entre eux sont allés chercher Bagambiki ; celui-ci s'est brièvement adressé aux réfugiés. Après son départ, des *Interahamwe* sont sortis des buissons et ont tué certains d'entre eux[24] ;

Le 14 avril, Bagambiki et d'autres se sont rendus à la paroisse de Mibilizi pour discuter de la situation avec des délégations d'*Interahamwe* de la région et des réfugiés[25] ;

Le 15 avril, des réfugiés de la cathédrale de Cyangugu ont été transférés au stade Kamarampaka. Bagambiki et l'évêque ont accompagné la colonne des réfugiés, laquelle était protégée par des gendarmes[26]. Les réfugiés ont rejoint les 50 à 100 personnes qui se trouvaient au stade depuis le 9 avril 1994. D'autres réfugiés venant de diverses localités de la préfecture sont arrivés ultérieurement[27]. Par la suite, des gendarmes ont gardé les réfugiés du stade[28] ;

Le même jour, il y a eu un autre affrontement entre les réfugiés et les assaillants locaux à la paroisse de Mibilizi[29]. À la paroisse de Nyamasheke, des assaillants ont lancé une attaque de grande envergure, tuant la plupart des réfugiés qui s'y trouvaient[30] ;

Le 16 avril, des assaillants qui menaçaient d'attaquer le stade Kamarampaka ont communiqué à Bagambiki et Imanishimwe une liste de noms de personnes suspectées d'être liées au FPR[31]. Par la suite, Bagambiki et Imanishimwe ont recherché et emmené 17 réfugiés de la cathédrale de Cyangugu et du stade Kamarampaka. Bagambiki s'est adressé aux autres réfugiés et a déclaré que les autorités allaient emmener et interroger les 17 réfugiés afin d'assurer la sécurité des autres réfugiés au stade. 16 des 17 réfugiés ont été tués le soir même ou la nuit suivante[32] ;

Le même jour, la paroisse de Nyamasheke a été attaquée une nouvelle fois et la plupart des réfugiés qui avaient survécu à l'attaque du 15 avril ont été tués. Par la suite, Bagambiki a suspendu le bourgmestre Kamana à cause de sa participation à l'attaque[33] ;

Le 18 avril, la paroisse de Mibilizi a subi de multiples attaques. Le sous-préfet Munyangabe y a été envoyé et a tenté de négocier avec les assaillants. Il n'est pas arrivé à empêcher une attaque de grande envergure lors de laquelle les assaillants ont tué de nombreux réfugiés[34]. Le 20 avril, les assaillants sont retournés à la paroisse, ont emmené entre 60 et 100 réfugiés et les ont tués[35] ;

Le 26 avril, Bagambiki a été informé de l'imminence d'une attaque de grande envergure contre les réfugiés rassemblés à la paroisse de Shangi. Sur l'insistance de Bagambiki, Munyangabe s'est rendu à la paroisse afin de tenter d'empêcher l'attaque. Munyangabe a négocié avec les assaillants et a accepté d'emmener environ 40 réfugiés de la paroisse si les assaillants s'engageaient à ne pas attaquer les autres réfugiés. Les réfugiés désignés ont été conduits au stade Kamarampaka. Sur le trajet, les

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[22] Jugement, par. 480.
[23] Jugement, par. 313 et 314.
[24] Jugement, par. 594.
[25] Jugement, par. 530.
[26] Jugement, par. 316.
[27] Jugement, par. 316, 317 et 335.
[28] Jugement, par. 329.
[29] Jugement, par. 530.
[30] Jugement, par. 584.
[31] Jugement, par. 614.
[32] Jugement, par. 318 et 320.
[33] Jugement, par. 585 et 586.
[34] Jugement, par. 534.
[35] Jugement, par. 536.

réfugiés ont été attaqués et maltraités, et l'un d'entre eux a été tué. Les autres sont enfin arrivés au stade[36] ;

Vers le 27 avril, un certain nombre de réfugiés désignés ont été enlevés du stade Kamarampaka. L'un d'entre eux a été tué sans que le sort des autres n'ait été déterminé[37] ;

Le 28 ou le 29 avril, une attaque de grande envergure a été lancée contre la paroisse de Shangi, tuant la plupart des réfugiés qui s'y trouvaient[38] ;

Le 30 avril, des gendarmes ont tenté, en vain, d'empêcher une attaque contre la paroisse de Mibilizi, qui a fait entre 60 et 80 morts[39] ;

Au mois de mai, les autorités préfectorales ont transféré les réfugiés du stade Kamarampaka à un nouveau camp à Nyarushishi, dans lequel les réfugiés disposaient de meilleures conditions. Le camp était protégé par des gendarmes qui ont repoussé au moins une tentative d'attaque entre le 11 mai et l'arrivée des forces françaises de l'opération Turquoise, le 23 juin[40]. Les survivants des paroisses de Shangi et Mibilizi ont également été transférés dans ce camp[41] ;

Le 6 juin, dans la ville de Kamembe, des soldats ont, en présence de Bagambiki et d'Imanishimwe, arrêté environ 300 personnes. Quelques-unes des personnes arrêtées ont été tuées sur les ordres d'Imanishimwe. Par la suite, un certain nombre des détenus incarcérés au camp militaire de Karambo ont été interrogés et maltraités en présence d'Imanishimwe[42].

16. La Chambre de première instance a acquitté Ntagerura et Bagambiki de tous les chefs d'accusation dont ils devaient répondre[43]. En cours de procès, en application de l'article 98 *bis* du Règlement de procédure et de preuve du Tribunal (« Règlement »), elle avait déjà acquitté Imanishimwe du chef d'entente en vue de commettre le génocide[44]. Dans le Jugement, Imanishimwe a été déclaré coupable, à la majorité des juges, de génocide (Chef 7), d'extermination constitutive de crime contre l'humanité (Chef 10) et de violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II (Chef 13) au titre de l'article 6 (3) du Statut[45]. À l'unanimité, la Chambre de première instance l'a déclaré non coupable de complicité de génocide, mais coupable d'assassinat (Chef 9), d'emprisonnement (Chef 11) et d'actes de torture (Chef 12) constitutifs de crimes contre l'humanité et de violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II (Chef 13) en vertu de l'article 6 (1) du Statut. Elle a condamné Imanishimwe à deux peines d'emprisonnement confondues de 15 ans pour l'avoir reconnu coupable des chefs 7 et 10[46]. Pour les déclarations de culpabilité prononcées sur la base des chefs 9, 11, 12 et 13, elle a infligé des peines d'emprisonnement confondues de dix, trois, dix et douze ans respectivement[47]. La Chambre de première instance a décidé que les peines dont la confusion avait été prononcée pour les chefs d'accusation 9, 11, 12 et 13 devaient être purgées consécutivement aux peines dont la confusion avait également été prononcée pour les chefs d'accusation 7 et 10. Imanishimwe a donc été condamné à un total de 27 années d'emprisonnement[48].

C. LES APPELS

17. Le Procureur invoque onze motifs d'appel, dont deux concernent exclusivement Imanishimwe. Dans ses neuf premiers motifs d'appel, le Procureur conteste les conclusions de la Chambre de

[36] Jugement, par. 482.
[37] Jugement, par. 325.
[38] Jugement, par. 483.
[39] Jugement, par. 538.
[40] Jugement, par. 609 à 611.
[41] Jugement, par. 483 (Shangi) et 539 (Mibilizi).
[42] Jugement, par. 394 et 395.
[43] Jugement, par. 829.
[44] Jugement, par. 807; CRA du 6 mars 2002, p. 2.
[45] Jugement, par. 806.
[46] Jugement, par. 822 et 823.
[47] Jugement, par. 825 et 826.
[48] Jugement, par. 827.

première instance sur la forme des actes d'accusation, soutient que la Chambre de première instance a versé dans l'erreur dans la manière dont elle a apprécié la preuve et avance que Bagambiki aurait dû être reconnu coupable de plusieurs crimes jugés établis par la Chambre de première instance. Le Procureur fait ensuite valoir qu'Imanishimwe aurait dû être reconnu coupable en vertu de l'article 6 (1) du Statut pour les crimes commis au terrain de football de Gashirabwoba et que la peine prononcée à son encontre est trop clémente.

18. Imanishimwe invoque six motifs d'appel qui se rapportent à des vices de forme de l'acte d'accusation, à sa condamnation en vertu de l'article 6 (3) du Statut pour les événements survenus à Gashirabwoba, aux condamnations multiples prononcées contre lui, à l'application de l'article 4 du Statut, à l'administration de la preuve et à la détermination de la peine.

19. La Chambre d'appel rappelle avoir rejeté à l'unanimité les motifs d'appel soulevés par le Procureur à l'encontre du Jugement s'agissant d'André Ntagerura et Emmanuel Bagambiki et confirmé l'acquittement de ces derniers dans le Dispositif de l'arrêt concernant l'appel du Procureur s'agissant de l'acquittement d'André Ntagerura et Emmanuel Bagambiki prononcé à la suite des audiences en appel le 8 février 2006. Le présent Arrêt s'attache donc à donner les motivations écrites de cette décision tout en disposant des motifs d'appel soulevés par le Procureur s'agissant d'Imanishimwe ainsi que de l'appel de ce dernier.

D. CRITÈRES APPLICABLES À L'EXAMEN EN APPEL

20. La Chambre d'appel rappelle les critères applicables à l'examen en appel sous l'empire de l'article 24 du Statut, tels que récapitulés dans l'Arrêt *Kamuhanda*[49]. L'article 24 du Statut porte sur les erreurs sur un point de droit qui invalident la décision et les erreurs de fait qui ont entraîné un déni de justice. La partie qui allègue une erreur sur un point de droit doit avancer des arguments à l'appui de sa thèse et expliquer en quoi l'erreur invalide la décision. Toutefois, même si les arguments de l'appelant n'étayent pas sa thèse, la Chambre d'appel peut prendre l'initiative d'accueillir, pour des raisons différentes, l'allégation d'erreur de droit[50].

21. En ce qui concerne les erreurs de fait, il est de jurisprudence constante que la Chambre d'appel n'infirme pas à la légère les conclusions de fait dégagées par une Chambre de première instance. Lorsqu'une erreur de fait est alléguée, la Chambre d'appel se doit de porter crédit à l'appréciation de la Chambre de première instance qui a entendu les dépositions, celle-ci étant mieux placée pour apprécier les dépositions, y compris le comportement des témoins. La Chambre d'appel n'infirmera les constatations de la Chambre de première instance que lorsqu'aucun juge des faits raisonnable n'aurait pu parvenir à la même conclusion ou lorsque celle-ci est totalement erronée. Une conclusion de fait erronée ne sera infirmée ou réformée que si l'erreur a entraîné un déni de justice[51].

22. La Chambre d'appel peut d'emblée rejeter, sans avoir à les examiner sur le fond, les arguments présentés par une partie qui n'ont aucune chance d'aboutir à l'annulation ou à la réformation de la décision attaquée[52]. La partie appelante doit fournir les références précises renvoyant aux pages pertinentes du compte rendu d'audience ou aux paragraphes du jugement attaqué[53]. Par ailleurs,

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[49] Arrêt *Kamuhanda*, par. 6 et 7.
[50] Voir Arrêt *Semanza*, par. 7 ; Arrêt *Kamuhanda*, par. 6.
[51] Arrêt *Niyitegeka*, par. 8 ; Arrêt *Semanza*, par. 8 ; Arrêt *Kamuhanda*, par. 7. Voir également Arrêt *Tadić*, par. 64 ; Arrêt *Aleksovski*, par. 63 ; Arrêt *Čelebići*, par. 434 ; Arrêt *Krnojelac*, par. 11 à 13 ; Arrêt *Vasiljević*, par. 8 ; Arrêt *Krstić*, par. 40.
[52] Arrêt *Kajelijeli*, par. 6. Voir également, par exemple, Arrêt *Rutaganda*, par. 18, Arrêt *Blaškić*, par. 13; Arrêt *Ntakirutimana*, par. 13.
[53] Directive pratique relative aux conditions formelles applicables au recours en appel contre un jugement, 4 juillet 2005, par. 4 (b) (ii). Voir également Arrêt *Kayishema et Ruzindana*, par. 137 ; Arrêt *Rutaganda*, par. 19 ; Arrêt *Vasiljević*, par. 11 ; Arrêt *Niyitegeka*, par. 10 ; Arrêt *Blaškić*, par. 13; Arrêt *Ntakirutimana*, par. 14 ; Arrêt *Kajelijeli*, par. 7.

« on ne saurait s'attendre à ce que la Chambre d'appel examine en détail les conclusions des parties si elles sont obscures, contradictoires ou vagues, ou si elles sont entachées d'autres vices de forme flagrants »[54].

23. Enfin, il convient de rappeler que la Chambre d'appel dispose d'un pouvoir discrétionnaire inhérent pour déterminer quels sont les arguments qui méritent une réponse motivée par écrit[55]. Elle rejettera donc sans motivation détaillée les arguments qui sont manifestement mal fondés[56].

II. Motifs d'appel relatifs aux actes d'accusation

A. INTRODUCTION

24. Au titre de son troisième motif d'appel, le Procureur fait valoir que la Chambre de première instance a commis une erreur sur un point de droit en concluant que la théorie de l'entreprise criminelle commune n'avait pas été plaidée dans les actes d'accusation établis contre Ntagerura, Bagambiki et Imanishimwe (« Actes d'accusation ») et, par voie de conséquence, en refusant au Procureur la possibilité d'invoquer cette forme de responsabilité pour engager la responsabilité pénale individuelle des accusés[57]. En son quatrième motif, il fait valoir que la Chambre de première instance a également versé dans l'erreur (1) en refusant d'examiner si le Procureur avait, au moyen de ses écritures postérieures à la mise en accusation, remédié à tout vice entachant les Actes d'accusation[58] ; (2) en concluant, après la clôture des débats, que les Actes d'accusation étaient viciés, bien qu'ayant conclu auparavant qu'ils ne l'étaient pas[59] ; (3) en s'abstenant de lire les Actes d'accusation ensemble, malgré leur jonction[60] ; et (4) en lisant les paragraphes des Actes d'accusation indépendamment les uns des autres, et sans tenir compte des chefs d'accusation[61].

25. En son premier motif d'appel, Imanishimwe soutient que la Chambre de première instance a versé dans l'erreur en le déclarant coupable des faits survenus au terrain de football de Gashirabwoba alors que, selon ses dires, ces faits n'avaient pas été exposés dans l'acte d'accusation établi à son encontre[62].

26. Avant de procéder à l'analyse détaillée des motifs d'appel relatifs aux Actes d'accusation, la Chambre d'appel souhaite brièvement rappeler les développements procéduraux principaux survenus lors de la phase préalable au procès. Statuant sur une exception préjudicielle soulevée par Imanishimwe pendant la phase de mise en état, la Chambre de première instance a ordonné au Procureur de clarifier le paragraphe 3.14 de l'Acte d'accusation initial Bagambiki/Imanishimwe[63]. Le paragraphe 3.14 modifié et l'Acte d'accusation initial Bagambiki/Imanishimwe contenaient la version définitive des accusations portées contre Imanishimwe et Bagambiki (« Acte d'accusation Bagambiki/Imanishimwe »)[64].

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[54] Arrêt *Vasiljević,* par. 12. Voir également, par exemple, Arrêt *Kunarac et consorts*, par. 43 et 48 ; Arrêt *Niyitegeka*, par. 10 ; Arrêt *Blaškić*, par. 13 ; Arrêt *Kajelijeli*, par. 7.
[55] Arrêt *Kajelijeli*, par. 8. Voir également, par exemple, Arrêt *Kunarac et consorts*, par. 47 ; Arrêt *Rutaganda*, par. 19 ; Arrêt *Niyitegeka*, par. 11 ; Arrêt *Ntakirutimana*, par. 15 ; Arrêt *Semanza*, par. 11.
[56] Arrêt *Kajelijeli*, par. 8. Voir également, par exemple, Arrêt *Kunarac et consorts,* par. 48 ; Arrêt *Niyitegeka*, par. 11 ; Arrêt *Ntakirutimana*, par. 15 ; Arrêt *Semanza*, par. 11.
[57] Acte d'appel du Procureur, par. 15 et 16.
[58] Acte d'appel du Procureur, par. 20, 22 et 24, renvoyant au Jugement, par. 64 à 70.
[59] Acte d'appel du Procureur, par. 26.
[60] Acte d'appel du Procureur, par. 29, renvoyant au Jugement, par. 41 à 48, 51 à 70, 82 et 202.
[61] Acte d'appel du Procureur, par. 36 et 38, renvoyant au Jugement, par. 41 à 48, 50 à 56 et 62 à 70.
[62] Acte d'appel d'Imanishimwe, par. 8 à 14.
[63] Le Procureur c. Emmanuel Bagambiki, Samuel Imanishimwe et Yussuf Munyakazi, affaire n°ICTR-97-36-I, *Decision on the Defence Motion on Defects in the Form of the Indictment*, 25 septembre 1998 (« Décision relative à l'Acte d'accusation initial Bagambiki/Imanishimwe »), dispositif.
[64] Voir Jugement, par. 15.

27. Saisie d'une autre exception préjudicielle par Ntagerura, la Chambre de première instance a ordonné au Procureur de préciser plusieurs passages de l'Acte d'accusation initial Ntagerura[65]. L'acte d'accusation modifié contenait la version définitive des accusations portées contre Ntagerura (« Acte d'accusation Ntagerura »)[66].

28. Le 11 octobre 1999, en vertu de l'article 48 du Règlement, la Chambre de première instance a fait droit à la requête formée par le Procureur aux fins de jonction de l'instance de Ntagerura avec celle de Bagambiki et Imanishimwe[67].

29. La Chambre d'appel tient à présent à rappeler le droit régissant la forme d'un acte d'accusation.

B. DROIT APPLICABLE AUX ACTES D'ACCUSATION

30. La jurisprudence du Tribunal de céans et du Tribunal Pénal International pour l'ex-Yougoslavie (« TPIY ») sont constantes et concordantes s'agissant du droit applicable aux actes d'accusation. Les deux tribunaux ont été amenés à préciser que les articles 17 (4), 20 (2), 20 (4) (a) et 20 (4) (b) du Statut et l'article 47 (C) du Règlement imposent au Procureur l'obligation d'énoncer les faits essentiels sur lesquels reposent les accusations portées dans l'acte d'accusation, mais non les éléments de preuve permettant d'établir ces faits[68].

31. Si l'accusé doit attendre que le Procureur dépose son mémoire préalable au procès ou que le procès proprement dit s'ouvre pour être dûment informé des faits essentiels caractérisant l'activité criminelle qui lui est reprochée, il sera difficile à la Défense de mener de réelles enquêtes avant l'ouverture du procès[69]. L'acte d'accusation n'est donc suffisamment précis que s'il expose les faits essentiels retenus par le Procureur d'une manière assez circonstanciée pour informer clairement la personne poursuivie des accusations portées contre elle afin qu'elle puisse préparer sa défense[70]. Tout acte d'accusation qui n'énonce pas dûment les faits essentiels fondant les accusations portées contre l'accusé est entaché de vice[71].

32. C'est la nature de la thèse du Procureur qui permet de savoir si tel ou tel fait est « essentiel ». La qualification que le Procureur donne à la conduite criminelle alléguée et la proximité que l'accusé entretient avec le crime jouent un rôle décisif dans la détermination du degré de précision avec lequel le Procureur doit articuler dans l'acte d'accusation les faits essentiels qu'il invoque pour en informer dûment l'accusé[72]. Par exemple, lorsqu'il reproche à l'accusé d'avoir personnellement commis les actes criminels considérés, le Procureur est tenu d'indiquer avec la plus grande précision l'identité de

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[65] *Le Procureur c. André Ntagerura*, affaire n°ICTR-96-10-I, Décision relative à l'exception soulevée par la Défense pour vices de forme de l'acte d'accusation, 28 novembre 1997 (« Décision relative à l'Acte d'accusation initial Ntagerura »), dispositif.
[66] Voir Jugement, par. 10.
[67] *Le Procureur c. André Ntagerura*, affaire n° ICTR-96-10-I, *Le Procureur c. Emmanuel Bagambiki, Samuel Imanishimwe et Yussuf Munyakazi*, affaire n°ICTR-97-36-I, Décision sur la Requête du Procureur en jonction d'instances, 11 octobre 1999 (« Décision aux fins de jonction »). Le recours formé contre cette décision a été rejeté pour cause de forclusion : *Le Procureur c. Emmanuel Bagambiki*, affaire n°ICTR-96-10-A et ICTR-97-36-A, Arrêt (relatif à l'appel interjeté de la décision rendue par la Chambre de première instance III le 11 octobre 1999), 13 avril 2000 ; *Le Procureur c. Emmanuel Bagambiki*, affaire n° ICTR-97-36-AR72, Arrêt (Requête aux fins de réouverture des débats), 7 septembre 2000. Yussuf Munyakazi, l'autre accusé, était toujours en fuite au moment du procès : Jugement, note de bas de page 13.
[68] Arrêt *Ntakirutimana*, par. 470. Voir également Arrêt *Kupreškić et consorts*, par. 88 ; Arrêt *Kvočka et consorts,* par. 27 ; Arrêt *Semanza*, par. 85 ; Arrêt *Naletilić et Martinović*, par. 23.
[69] Arrêt *Niyitegeka*, par. 194.
[70] Arrêt *Kupreškić et consorts*, par. 88 ; Arrêt *Ntakirutimana*, par. 470.
[71] Arrêt *Kupreškić et consorts*, par. 114 ; Arrêt *Niyitegeka*, par. 195 ; Arrêt *Kvočka et consorts*, par. 28.
[72] Arrêt *Kvočka et consorts*, par. 28.

la victime, le lieu et la date approximative des actes criminels allégués ainsi que leur mode d'exécution[73]. Toutefois, on peut accepter qu'il fournisse moins de détails si

> « l'ampleur même des crimes exclut que l'on puisse exiger un degré de précision élevé sur l'identité des victimes et la date des crimes »[74].

33. Dans les cas où le Procureur invoque la notion d'entreprise criminelle commune, il doit expressément mentionner cette forme de responsabilité dans l'acte d'accusation, faute de quoi l'acte d'accusation serait entaché d'un vice[75]. Bien que l'entreprise criminelle commune soit un moyen de « commettre » une infraction, il n'est pas suffisant de se borner à viser l'article 6 (1) du Statut sans autre précision[76]. Le Procureur doit également indiquer le but de l'entreprise, sa période, l'identité des personnes qui y ont participé et la nature de la participation de l'accusé[77]. En outre, pour permettre à la personne accusée de participation à une entreprise criminelle commune de comprendre pleinement les agissements dont le Procureur l'estime responsable, l'acte d'accusation devrait indiquer clairement la catégorie d'entreprise criminelle commune retenue[78].

34. Lorsqu'il est reproché à l'accusé d'avoir planifié, incité à commettre, ordonné ou aidé et encouragé à planifier, préparer ou exécuter les crimes allégués, le Procureur doit préciser les « agissements » ou la « ligne de conduite » de l'intéressé qui donnent lieu aux accusations portées contre lui[79].

35. Lorsque la responsabilité du supérieur hiérarchique prévue à l'article 6 (3) du Statut est invoquée, les faits essentiels qui doivent être énoncés dans l'acte d'accusation sont les suivants : (1) le fait que l'accusé était le supérieur hiérarchique de certaines personnes suffisamment identifiées sur lesquelles il exerçait un contrôle effectif – en ce sens qu'il avait la capacité matérielle d'empêcher ou de punir leur conduite criminelle – et dont les actes engageraient sa responsabilité[80] ; (2) les actes criminels commis par les personnes dont il aurait eu la responsabilité[81] ; (3) le comportement de l'accusé qui permet de conclure qu'il savait ou avait des raisons de savoir que ses subordonnés s'apprêtaient à commettre les crimes considérés ou les avaient commis[82] ; et (4) le comportement de

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[73] Arrêt *Kupreškić et consorts*, par. 89 ; Arrêt *Blaškić*, par. 213.

[74] Arrêt *Kupreškić et consorts*, par. 89. Selon la Chambre d'appel:
« The inability to identify victims is reconcilable with the right of the accused to know the material facts of the charges against him because, in such circumstances, the accused's ability to prepare an effective defence to the charges does not depend on knowing the identity of every single alleged victim. The Appeals Chamber recalls that the situation is different, however, when the Prosecution seeks to prove that the accused personally killed or harmed a particular individual. The Prosecution cannot simultaneously argue that the accused killed a named individual yet claim that the "sheer scale" of the crime made it impossible to identify that individual in the indictment. Quite the contrary: the Prosecution's obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual »: Arrêt Ntakirutimana, par. 73 et 74 (note de bas de page non reproduite, non disponible en langue française).

[75] Arrêt *Kvočka et consorts*, par. 42.

[76] Cf. Arrêt *Kvočka et consorts*, par. 42.

[77] Arrêt *Kvočka et consorts*, par. 28, se référant à : *Le Procureur c. Momčilo Krajišnik et Biljana Plavšić*, affaire nºIT-00-39&40-PT, Décision relative à la requête de l'Accusation aux fins d'autorisation de modifier l'acte d'accusation consolidé, 4 mars 2002, par. 13 ; *Le Procureur c. Mejakić et consorts,* affaire nºIT-02-65-PT, Décision relative à l'exception préjudicielle déposée par Dusko Kne`ević pour vice de forme de l'acte d'accusation, 4 avril 2003, p. 5 ; *Le Procureur c. Jovica Stanišić,* affaire nºIT-03-69-PT, Décision relative aux exceptions préjudicielles soulevées par la Défense, 14 novembre 2003, p. 4.

[78] Arrêt *Kvočka et consorts*, par. 28.

[79] Arrêt *Blaškić,* par. 213. Voir également *Le Procureur c. Milorad Krnojelac*, affaire nºIT-97-25-PT, Décision relative à l'exception préjudicielle de la Défense pour vices de forme de l'acte d'accusation, 24 février 1999, par. 13 ; *Le Procureur c. Milorad Krnojelac*, affaire nºIT-97-25-PT, Décision relative à l'exception préjudicielle pour vices de forme de l'acte d'accusation modifié, 11 février 2000, par. 18 ; *Le Procureur c. Radoslav Brđanin et Momir Talić*, affaire nºIT-99-36-PT, Décision relative à l'exception préjudicielle soulevée par Momir Talić pour vices de forme de l'acte d'accusation modifié, 20 février 2001, par. 20.

[80] Arrêt *Blaškić*, par. 218 (a).

[81] Arrêt Naletilić et Martinović, par. 67.

[82] Arrêt *Blaškić*, par. 218 (b). La Chambre d'appel relève que « les faits se rapportant aux actes commis par ces personnes dont l'accusé, en sa qualité de supérieur hiérarchique, est présumé responsable seront généralement exposés de façon moins

l'accusé qui permet de conclure qu'il n'a pas pris les mesures nécessaires et raisonnables pour empêcher que de tels actes ne soient commis ou en punir les auteurs[83].

36. L'acte d'accusation peut également s'avérer défectueux si les faits essentiels ne sont pas exposés avec suffisamment de précision, lorsqu'il situe, par exemple, ces faits dans de larges espaces de temps, n'indique les lieux que vaguement et ne donne l'identité des victimes qu'en termes généraux[84]. Il est certes possible que le Procureur ne puisse, faute de disposer des informations nécessaires, exposer dans l'acte d'accusation les faits essentiels avec le degré de précision exigé. À cet égard, la Chambre d'appel souligne que le Procureur devrait connaître son dossier avant de se présenter au procès et qu'il n'a pas le droit de s'appuyer sur les faiblesses de ses propres enquêtes pour forger sa thèse lors du procès en fonction de la façon dont se déroule la présentation des éléments de preuve[85]. D'autres vices de l'acte d'accusation peuvent se manifester à un stade ultérieur de la procédure parce que la présentation des éléments de preuve ne se déroule pas comme prévu. Dans ces circonstances, la Chambre de première instance se doit de rechercher s'il faut modifier l'acte d'accusation, suspendre les débats ou exclure les éléments de preuve qui n'entrent pas dans le cadre de l'acte d'accusation pour assurer l'équité du procès[86].

37. En rendant son jugement, une Chambre de première instance ne peut déclarer l'accusé coupable que des crimes exposés dans l'acte d'accusation[87]. Si elle juge l'acte d'accusation vicié parce qu'il est vague ou ambigu, elle doit rechercher si l'accusé a néanmoins bénéficié d'un procès équitable ou, en d'autres termes, si le vice constaté a porté préjudice à la Défense[88]. Dans certains cas, un acte d'accusation vicié peut être réputé « purgé » et une déclaration de culpabilité prononcée si le Procureur a fourni en temps voulu à l'accusé des informations claires et cohérentes présentant de façon détaillée les faits sur lesquels reposent les accusations portées contre lui[89]. Aucune déclaration de culpabilité ne peut être prononcée lorsque le manquement à l'obligation d'informer dûment la personne poursuivie des motifs de droit et de fait sur lesquels reposent les accusations dont elle est l'objet a porté atteinte à son droit à un procès équitable[90].

38. Lorsqu'un acte d'accusation est attaqué en appel, il n'est plus possible de le modifier. La question qui se pose alors est de savoir si l'erreur commise d'avoir jugé l'accusé sur la base d'un acte d'accusation vicié a « invalidé la décision » et autorise la Chambre d'appel à intervenir[91]. En tranchant la question, la Chambre d'appel n'exclut pas que, dans certains cas, l'effet néfaste d'un tel acte d'accusation puisse être dissipé si le Procureur fournit en temps voulu à l'accusé des informations claires et cohérentes concernant les faits sur lesquels reposent les accusations portées contre lui[92], remédiant par là même à son manquement à l'obligation d'informer pleinement l'accusé des accusations portées contre lui dans l'acte d'accusation[93].

39. Lorsqu'on se demande si le Procureur a purgé l'acte d'accusation d'un vice et si l'accusé subit encore le moindre préjudice, c'est, dans les deux cas, pour déterminer si le procès a été rendu

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précise (même si l'Accusation est toujours tenue de fournir toutes les informations dont elle dispose), parce que le détail de ces actes est souvent inconnu et parce que, souvent, les actes eux-mêmes ne sont pas véritablement contestés » : Arrêt *Blaškić*, par. 218 et références y relatives. Voir aussi Arrêt *Naletilić et Martinović*, par. 67.

[83] Arrêt *Blaškić*, par. 218 (c). Voir aussi Arrêt *Naletilić et Martinović*, par. 67.

[84] Arrêt *Kvočka et consorts*, par. 31.

[85] Arrêt *Niyitegeka*, par. 194 ; Arrêt *Kvočka et consorts*, par. 30. Voir aussi Arrêt *Kupreškić et consorts*, par. 92.

[86] Arrêt *Kupreškić et consorts*, par. 92 ; Arrêt *Niyitegeka*, par. 194 ; Arrêt *Kvočka et consorts*, par. 31.

[87] Arrêt Kvočka et consorts, par. 33 ; Arrêt Naletilić et Martinović, par. 33.

[88] Arrêt *Ntakirutimana*, par. 27 ; voir également l'Arrêt *Kvočka et consorts*, par. 33.

[89] Arrêt *Kupreškić et consorts*, par. 114 ; Arrêt Kvočka et consorts, par. 33.

[90] Arrêt Kvočka et consorts, par. 33 ; Arrêt Naletilić et Martinović, par. 26.

[91] Article 24 (1) (a) du Statut. Voir Arrêt *Niyitegeka*, par. 196.

[92] Arrêt *Niyitegeka*, par. 195 ; Arrêt *Ntakirutimana*, par. 27. Voir aussi Arrêt *Kupreškić et consorts*, par. 114.

[93] Arrêt *Kvočka et consorts*, par. 34.

inéquitable[94]. À cet égard, la Chambre d'appel réaffirme qu'un acte d'accusation vague ou ambigu qui n'est pas purgé de ses vices par la communication en temps voulu d'informations claires et cohérentes porte en soi préjudice à l'accusé[95]. Le vice dont il est entaché ne peut être jugé anodin que s'il est établi que celui-ci n'a pas sensiblement compromis la capacité de l'accusé de préparer sa défense[96].

40. C'est à l'appelant qui invoque un vice de l'acte d'accusation pour la première fois en appel qu'incombe la charge de démontrer que sa capacité de préparer sa défense a été sensiblement compromise[97]. Si l'accusé s'était en revanche déjà plaint en première instance de ne pas avoir reçu les informations nécessaires, c'est au Procureur que revient la charge de démontrer en appel que la capacité de l'accusé de préparer sa défense n'a pas été sensiblement compromise[98]. Il en est ainsi sous réserve du pouvoir propre dont la Chambre d'appel est investie pour rendre justice dans l'affaire considérée[99].

41. La Chambre d'appel souligne que la possibilité de purger un acte d'accusation n'est pas illimitée. Un acte d'accusation vague ou ambigu dans les accusations qu'il formule doit nécessairement être distingué de celui qui tait purement et simplement certaines accusations. Alors qu'il est possible de remédier aux imprécisions et ambiguïtés du premier par la communication en temps voulu à l'accusé d'informations claires et cohérentes concernant les faits sur lesquels reposent les accusations, il n'est possible de modifier le second aux fins d'introduire les accusations passées sous silence que par la procédure prévue à l'article 50 du Règlement.

C. REFUS DE LA CHAMBRE DE PREMIÈRE INSTANCE DE CONSIDÉRER L'ENTREPRISE CRIMINELLE COMMUNE (3ÈME MOTIF D'APPEL DU PROCUREUR)

42. Au paragraphe 34 du Jugement, la Chambre de première instance a considéré que :

> « le Procureur entend s'appuyer sur la théorie de l'entreprise criminelle commune pour retenir la responsabilité pénale de l'accusé comme auteur matériel des crimes principaux plutôt que comme complice, il doit le dire sans équivoque dans l'acte d'accusation et préciser la forme d'entreprise criminelle commune qu'il invoquera. Loin de se contenter d'alléguer que l'accusé a participé à une entreprise criminelle commune, il doit indiquer l'objet de cette entreprise, l'identité des autres parties et la nature de la participation de l'accusé. En conséquence, la Chambre ne retiendra pas les arguments du Procureur, qui n'ont été avancés pour la première fois que lors de la présentation de ses réquisitions, pour conclure à la responsabilité pénale des accusés sur le fondement de cette théorie ». [Notes de bas de page non reproduites].

43. Le Procureur soutient que la Chambre de première instance a commis une erreur sur un point de droit en refusant de lui permettre de s'appuyer sur la théorie de l'entreprise criminelle commune pour établir la responsabilité pénale individuelle des Accusés[100]. Dans son Acte d'appel et son Mémoire d'appel, le Procureur avançait plus précisément que la Chambre de première instance avait versé dans l'erreur en déclarant qu'il n'avait pas plaidé l'entreprise criminelle commune dans les Actes d'accusation[101]. Il soutenait en effet qu'il n'était pas obligé de plaider expressément ce mode de

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[94] Arrêt *Ntakirutimana*, par. 27 ; Arrêt *Kordić et Cerkez*, par. 143 ; Voir aussi Arrêt *Kupreškić et consorts*, par. 122.
[95] Arrêt *Ntakirutimana*, par. 58.
[96] Arrêt *Ntakirutimana*, par. 58 ; Voir aussi Arrêt *Kupreškić et consorts*, par. 122.
[97] Arrêt *Niyitegeka*, par. 200 ; Arrêt *Kvočka et consorts*, par. 35.
[98] Arrêt *Niyitegeka*, par. 200 ; Arrêt *Kvočka et consorts*, par. 35.
[99] Arrêt *Niyitegeka*, par. 200.
[100] Acte d'appel du Procureur, par. 15 ; Mémoire d'appel du Procureur, par. 40, 41 et 51. Tout en reconnaissant ne pas avoir explicitement plaidé la théorie de l'entreprise criminelle commune dans les Actes d'accusation, le Procureur affirmait que chacun des Accusés intimés avait été informé de son intention d'invoquer cette théorie par le truchement des Actes d'accusation, de son Mémoire préalable au procès, de sa Déclaration liminaire, de son Réquisitoire, des moyens de preuve présentés au procès, mais aussi de la Décision aux fins de jonction.
[101] Acte d'appel du Procureur, par. 15 ; Mémoire d'appel du Procureur, par. 40.

responsabilité dans les Actes d'accusation[102], ce s'appuyant sur la jurisprudence du Tribunal et du TPIY[103]. Lors des audiences en appel, le Procureur a indiqué abandonner ce moyen d'appel en raison de la décision récente prise par la Chambre d'appel TPIY dans l'affaire *Kvočka et consorts*[104]. S'il reconnaît désormais que les Actes d'accusation n'invoquaient pas la théorie de l'entreprise criminelle commune avec suffisamment de spécificité, le Procureur maintient néanmoins que les Actes d'accusation avaient été subséquemment purgés de leurs vices à cet égard. Il prétend en effet avoir fourni en temps voulu aux Accusés des informations claires et cohérentes les informant de son intention d'invoquer la théorie de l'entreprise criminelle commune[105].

44. Le Procureur concédant l'existence de vices entachant les Actes d'accusation pour ce qui est de l'accusation de participation à une entreprise criminelle commune, la Chambre d'appel va directement se pencher sur la question de savoir si les Accusés ont été informés en temps voulu et de manière claire et cohérente que ce mode de responsabilité était invoqué à leur encontre. La Chambre d'appel limitera son examen aux parties du dossier de première instance invoquées par le Procureur à l'appui de son argument, à savoir la Décision aux fins de jonction, le Mémoire préalable du Procureur, sa Déclaration liminaire et son Réquisitoire.

45. En premier lieu, le Procureur soutient que la Chambre de première instance a, dans sa Décision aux fins de jonction, reconnu qu'il avait fait connaître suffisamment à temps son intention d'invoquer la théorie de l'entreprise criminelle commune[106]. Le Procureur renvoie également à son intervention orale d'août 1999 sur la jonction d'instances selon laquelle

> « il y avait un génocide au Rwanda, *une entreprise criminelle*, et tous les Accusés faisaient partie de cette entreprise criminelle et … qu'ils devraient, sur cette base, être inculpés et jugés dans le cadre d'un procès unique »[107].

46. Ntagerura et Bagambiki répondent que l'intention du Procureur d'invoquer la théorie de l'entreprise criminelle commune n'était pas visée dans la Décision aux fins de jonction[108]. Bagambiki affirme aussi que la requête du Procureur en jonction d'instances ne pouvait l'informer de l'intention du Procureur parce qu'elle ne poursuivait pas le même but qu'un acte d'accusation[109].

47. La Décision aux fins de jonction se rapportait à la question de savoir si les Accusés étaient poursuivis pour des crimes « commis à l'occasion de la même opération », condition imposée par l'article 48 du Règlement pour autoriser une jonction d'instances. Le terme « opération » est défini à l'article 2 du Règlement comme « un certain nombre d'actes ou d'omissions survenant à l'occasion d'un seul événement ou de plusieurs événements, en un seul endroit ou en plusieurs endroits, et faisant partie d'un plan, d'une stratégie ou d'un dessein commun ». Les constatations faites par la Chambre de première instance dans cette décision se limitaient incontestablement au critère juridique énoncé à l'article 48 du Règlement[110]. Il serait donc incorrect de laisser entendre qu'à travers ces constatations la Chambre de première instance reconnaissait que le Procureur comptait invoquer l'entreprise

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[102] Mémoire d'appel du Procureur, par. 61, 64 et 65.
[103] Mémoire d'appel du Procureur, par. 45, 46 et 48.
[104] CRA(A) du 6 février 2006, p. 35, se référant à Arrêt *Kvočka et consorts*, par. 42.
[105] CRA(A) du 6 février 2006, p. 35, 36.
[106] Acte d'appel du Procureur, par. 15 (a) ; Mémoire d'appel du Procureur, par. 70 et 72, se référant à la Décision aux fins de jonction, par. 6, dans laquelle la Chambre de première instance a résumé comme suit les arguments du Procureur : les accusés auraient commis les crimes « séparément et conjointement, à l'occasion de la même série d'événements et dans le cadre d'un plan, d'une stratégie ou d'un dessein communs ». Au paragraphe 43 de ladite Décision, la Chambre de première instance s'est exprimée comme suit : « [P]our établir l'existence d'une entente […] il suffit d'établir que les accusés poursuivaient un objectif ou un dessein communs, qu'ils avaient fourni le projet de réaliser cet objectif ou ce dessein et qu'ils avaient exécuté ledit projet ».
[107] Mémoire d'appel du Procureur, par. 72, citant T. 11 août 1999, p. 113 (souligné dans l'original).
[108] Mémoire en réponse de Ntagerura, par. 51 à 55, se référant à la Décision aux fins de jonction, par. 31, 53 et 60 ; Mémoire en réponse de Bagambiki, par. 107 à 109.
[109] Mémoire en réponse de Bagambiki, par. 107, se référant à l'article 82 du Règlement et à l'article 20 (4) du Statut.
[110] Décision aux fins de jonction, par. 46.

criminelle commune comme forme de responsabilité. Ce faisant, la Décision aux fins de jonction n'a pas servi à informer les Accusés que ce mode de responsabilité allait être invoqué.

48. Il ressort de surcroît des arguments oraux développés par le Procureur lors du débat sur sa requête en jonction d'instances que lesdits arguments se rapportaient au critère de la « même opération », et ne visaient pas à clarifier les modes de responsabilité invoqués dans les Actes d'accusation. En tout état de cause, l'allusion de portée générale à « un seul génocide au Rwanda », conjuguée au fait que la nature de la participation des Accusés à cette « entreprise criminelle » n'était pas précisée, n'a pas fourni aux Accusés les informations suffisamment claires et cohérentes qui auraient pu pallier à l'équivoque des Actes d'accusation s'agissant de l'entreprise criminelle commune.

49. En deuxième lieu, le Procureur soutient avoir, dans son Mémoire préalable, informé les Accusés qu'il entendait invoquer la théorie de l'entreprise criminelle commune[111]. La Chambre d'appel convient avec le Procureur[112] que son Mémoire préalable contenait des allégations factuelles selon lesquelles les Accusés avaient participé au recrutement, à l'armement et à l'entraînement des *Interahamwe* et planifié le génocide dans la préfecture de Cyangugu[113]. Il y était également allégué qu'ils avaient participé à des réunions, été présents, ensemble, lors de massacres et avaient joué un rôle en rapport avec les massacres[114]. Toutefois, la Chambre d'appel considère que le Mémoire préalable du Procureur, en particulier dans les parties traitant de la responsabilité pénale individuelle des Accusés[115], ne faisait pas expressément mention d'une entreprise criminelle commune, d'un plan criminel commun ou d'un quelconque autre synonyme de cette forme de responsabilité pénale. Dès lors, il n'allait pas de soi que les allégations factuelles susvisées étaient destinées à fonder une accusation de participation à une entreprise criminelle commune.

50. Le Procureur affirme encore que

> « tout au long du procès, il a constamment invoqué la théorie de l'entreprise criminelle commune à l'encontre des trois accusés »[116].

Au soutien de son affirmation, il renvoie à sa Déclaration liminaire, selon laquelle les Accusés « ont agi de concert, pour la réalisation d'une seule et même entreprise criminelle »[117], et à son Réquisitoire qui mentionnait la doctrine du dessein commun – en d'autres termes la doctrine de l'entreprise criminelle commune – en relation avec l'article 6 (1) du Statut[118]. Il soutient aussi qu'ayant appelé 82 témoins pour réfuter la thèse du Procureur, les Accusés sont malvenus de prétendre que la préparation de leur défense a été compromise[119].

51. La Chambre d'appel relève que le Procureur n'a pas mentionné l'entreprise criminelle commune pour la première fois dans son Réquisitoire comme l'affirmait la Chambre de première instance[120] ; on trouve en effet une allusion à ce mode de responsabilité dans la Déclaration liminaire du Procureur, en ces termes :

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[111] Mémoire d'appel du Procureur, par. 77, 79 et 80 se référant au Mémoire préalable du Procureur, par. 2.16, 2.45, 2.47, 2.60, 2.64, 2.87, 2.88, 2.98, 2.99, 2.105 à 2.108, 2.110 à 2.112, 2.114 et 2.116.
[112] Mémoire d'appel du Procureur, par. 76 et 77, se référant au Mémoire préalable du Procureur, par. 2.4. Le Procureur alléguait que les intimés étaient présents ensemble à diverses occasions caractérisées par la distribution d'armes et les entraînements : *ibid*., par. 77, se référant au Mémoire préalable du Procureur, par. 2.8, 2.12 et 2.13.
[113] Mémoire préalable du Procureur, par. 2.8, 2.12, 2.13 et 2.16.
[114] Mémoire d'appel du Procureur, par. 78, se référant au Mémoire préalable du Procureur, par. 2.17 à 2.28, 2.33, 2.34, 2.36 à 2.38, 2.45, 2.64, 2.102, 2.105 à 2.110, 2.112 et 2.114.
[115] Mémoire préalable du Procureur, par. 3.1 à 3.37.
[116] Mémoire d'appel du Procureur, par. 82.
[117] Mémoire d'appel du Procureur, par. 83, citant CRA du 18 septembre 2000, p. 42, 43.
[118] Mémoire d'appel du Procureur, par. 83, se référant au Réquisitoire du Procureur, par. 57.
[119] Mémoire d'appel du Procureur, par. 68.
[120] Voir Jugement, par. 34. Voir aussi Mémoire d'appel du Procureur, par. 40.

« Qu'ils aient agi séparément ou conjointement, selon les circonstances, André Ntagerura, Emmanuel Bagambiki et Samuel Imanishimwe ont agi de concert, pour la réalisation d'une seule et même entreprise criminelle, en l'occurrence l'élimination de l'ethnie tutsi de la carte démographique du Rwanda, et singulièrement de la préfecture de Cyangugu, le tout en violation flagrante et délibérée de tous les devoirs que leur imposaient les lois rwandaises. Il apparaît ainsi que pour cette réalisation, chacun des accusés a apporté le concours actif, effectif et déterminant de son intelligence, de son expérience, de ses compétences professionnelles, de son autorité ou de son influence, chacun dans son rôle spécifique, et tous, dans une coordination et une complémentarité exemplaires. Le Procureur s'en ira précisément, de ce pas, vous présenter chacun des accusés, ainsi que son rôle dans l'exécution des massacres à Cyangugu ».[121]

52. Le Procureur a précisé son intention d'invoquer la théorie de l'entreprise criminelle commune dans la partie de son Réquisitoire traitant de la responsabilité pénale individuelle au titre de l'article 6 (1) du Statut[122].

53. La Chambre d'appel rappelle néanmoins que si la Défense se voit refuser la communication des faits essentiels relatifs à l'activité criminelle de l'accusé jusqu'au procès proprement dit, alors il sera difficile à celle-ci de mener de réelles enquêtes avant l'ouverture du procès[123]. Dans la présente affaire, le Procureur a attendu, pour faire allusion à son intention d'invoquer la théorie de l'entreprise criminelle commune, le premier jour du procès, à l'occasion de sa Déclaration liminaire. Il a attendu, pour développer ce mode de responsabilité en rapport direct avec la responsabilité pénale individuelle des Accusés, le moment de son Réquisitoire. Ni dans sa Déclaration liminaire, ni dans son Réquisitoire il n'a précisé la catégorie d'entreprise criminelle commune invoquée. L'argument du Procureur selon lequel les Accusés avaient cité 82 témoins durant le procès[124] n'est pas révélateur de l'aptitude des Accusés à préparer leur défense contre l'accusation particulière de participation à une entreprise criminelle commune. En conséquence, la Chambre d'appel conclut que les Accusés n'ont pas été informés en temps utile, de manière claire et cohérente, que leur responsabilité pénale individuelle serait invoquée en vertu de la théorie de l'entreprise criminelle commune.

54. C'est donc à juste titre que la Chambre de première instance s'est refusée à examiner la responsabilité pénale des Accusés sous l'angle de la théorie de l'entreprise criminelle commune. Partant, il n'est pas nécessaire pour la Chambre d'appel d'examiner l'argument du Procureur selon lequel les Accusés auraient

« agi dans le cadre d'une entreprise criminelle commune et auraient par conséquent dû être déclarés pénalement responsables à titre individuel en vertu de l'article 6 (1) du Statut »[125].

55. Le troisième motif d'appel du Procureur est donc rejeté.

D. Conclusions de la Chambre de première instance sur les Actes d'accusation (4ème motif d'appel du Procureur)

56. En son quatrième motif d'appel, le Procureur soutient, dans l'ordre suivant, que la Chambre de première instance a commis quatre erreurs de droit : (1) en refusant d'examiner si le Procureur avait, au moyen de ses écritures postérieures à la mise en accusation, remédié à tout vice entachant les Actes d'accusation[126] ; (2) en concluant, après la clôture des débats, que les Actes d'accusation étaient viciés, bien qu'ayant conclu auparavant qu'ils ne l'étaient pas[127] ; (3) en s'abstenant de lire les Actes

[121] CRA du 18 septembre 2000, p. 42, 43.
[122] Réquisitoire du Procureur, par. 52 à 57.
[123] Arrêt *Niyitegeka*, par. 194. Dans l'affaire *Kvočka et consorts*, cité par le Procureur (CRA(A) du 6 février 2006, p. 41), les accusés ont été informés bien avant la Déclaration liminaire, Arrêt *Kvočka et consorts*, par. 44 et 45.
[124] Mémoire d'appel du Procureur, par. 68.
[125] Mémoire d'appel du Procureur, par. 84 à 95.
[126] Acte d'appel du Procureur, par. 20, 22 et 24, renvoyant au Jugement, par. 64 à 70.
[127] Acte d'appel du Procureur, par. 26.

d'accusation ensemble, malgré leur jonction[128] ; et (4) en lisant les paragraphes des Actes d'accusation indépendamment les uns des autres, et sans tenir compte des chefs d'accusation[129]. Au dire du Procureur, ce motif d'appel a une incidence sur tous les verdicts prononcés à l'endroit des Accusés[130].

57. La Chambre d'appel rappelle que la Chambre de première instance a, dans son Jugement, déclaré vicié un certain nombre de paragraphes des deux Actes d'accusation, à savoir les paragraphes 9.1, 9.2, 9.3, 11, 12.1, 13, 14.1, 14.3 et 16 à 19 de l'Acte d'accusation Ntagerura[131] et les paragraphes 3.12 à 3.28, 3.30 et 3.31 de l'Acte d'accusation Bagambiki/Imanishimwe[132]. Elle note que la Chambre de première instance s'est néanmoins autorisée à dégager des conclusions factuelles des paragraphes 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 et 19 de l'Acte d'accusation Ntagerura et des paragraphes 3.16 à 3.28, 3.30 et 3.31 de l'Acte d'accusation Bagambiki/Imanishimwe[133].

58. La Chambre d'appel considère que la question de savoir si la Chambre de première instance pouvait, après la clôture des débats, conclure que les Actes d'accusation étaient entachés de vices, alors qu'elle avait auparavant conclu qu'ils ne l'étaient pas, est une question préliminaire.

1. Actes d'accusation jugés viciés après la clôture des débats

59. Le Procureur soutient que la Chambre de première instance a commis une erreur de droit en statuant, après la clôture des débats, que les Actes d'accusation étaient viciés alors qu'elle avait, dans une « décision antérieure », jugé qu'ils ne l'étaient pas[134]. À cet effet, il invoque l'Opinion du Juge Williams attaché à la Décision 98 *bis* pour souligner que les Actes d'accusation avaient été jugés réguliers aussi bien au stade de la confirmation qu'à celui des exceptions préjudicielles[135]. La Chambre d'appel note être saisie d'un appel contre le Jugement de première instance. Elle ne peut dès lors baser sa décision que sur le Jugement, pas sur une décision prise en vertu de l'article 98 *bis* ou sur une opinion séparée jointe à ladite décision qui n'ont jamais fait l'objet d'un appel. L'argument du Procureur ne peut en conséquence prospérer.

60. Dans sa Décision relative à l'Acte d'accusation initial Bagambiki/Imanishimwe, la Chambre de première instance déclarait qu'un lien avait été établi au paragraphe 3.22 de l'Acte d'accusation initial Bagambiki/Imanishimwe entre les faits qui y sont allégués et Imanishimwe, du fait de l'autorité que celui-ci exerçait sur les gendarmes[136]. Le paragraphe 3.22 est demeuré inchangé dans l'Acte d'accusation Bagambiki/Imanishimwe. Toutefois, dans le Jugement, la Chambre de première instance a conclu que l'acte d'accusation n'allèguait pas un lien entre les auteurs principaux des crimes et Bagambiki et Imanishimwe[137].

61. La Chambre de première instance se prononçait également sur le paragraphe 3.14 – lequel servait de base au chef d'accusation d'entente en vue de commettre le génocide (Chef 19) – pour affirmer qu'Imanishimwe avait participé à des réunions. La Chambre de première instance a estimé que le paragraphe 3.14 était vague et a ordonné au Procureur de :

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[128] Acte d'appel du Procureur, par. 29, renvoyant au Jugement, par. 41 à 48, 51 à 70, 82 et 202 ; Décision aux fins de jonction, 11 octobre 1999.
[129] Acte d'appel du Procureur, par. 36 et 38, renvoyant au Jugement, par. 41 à 48, 50 à 56, et 62 à 70.
[130] Acte d'appel du Procureur, par. 19, 25, 27 et 28.
[131] Jugement, par. 40 à 48.
[132] Jugement, par. 49 à 63.
[133] Jugement, par. 69.
[134] Mémoire d'appel du Procureur, par. 169.
[135] Mémoire d'appel du Procureur, par. 169, se référant à : *Le Procureur c. Ntagerura et consorts*, affaire n°ICTR-99-46-T, Separate and Concurring Decision of Judge Williams on Imanishimwe's Defence Motion for Judgement of Acquittal on Count of Conspiracy to Commit Genocide Pursuant to Rule 98 bis, 13 mars 2002.
[136] Décision relative à l'Acte d'accusation initial Bagambiki/Imanishimwe, par. 10.
[137] Jugement, par. 56 (non souligné dans l'original).

préciser […] les réunions visées dans ce paragraphe, [en particulier] les dates approximatives, lieux et objet de ces réunions, autant que faire se peut, et préciser si les personnes accusées et d'autres personnes nommément désignées dans l'acte d'accusation étaient les seules personnes présentes à ces réunions ou si d'autres personnes, non nommément désignées dans l'acte d'accusation, y assistaient également.[138]

Le 10 août 1999, le Procureur a déposé le Paragraphe 3.14 modifié qui, avec l'Acte d'accusation initial Bagambiki/Imanishimwe, contenait la version définitive des accusations retenues contre Bagambiki et Imanishimwe[139]. Dans le Jugement, la Chambre de première instance a estimé que le Paragraphe 3.14 modifié :

ne relate pas de faits susceptibles de constituer des éléments essentiels du crime d'entente […] Qui plus est, ce paragraphe ne précise pas la nature de la participation de Bagambiki et Imanishimwe aux réunions évoquées.[140]

La question se pose alors de savoir pourquoi la Chambre de première instance n'a pas ordonné au Procureur de clarifier le paragraphe 3.14 aussi au regard des faits essentiels du crime étayé par ce paragraphe.

62. Par voie d'exception préjudicielle, Ntagerura a fait valoir que l'acte d'accusation initial établi contre lui était trop vague à certains égards[141]. Statuant sur cette exception préjudicielle dans sa Décision relative à l'Acte d'accusation initial Ntagerura, la Chambre de première instance a ordonné au Procureur d'apporter certaines précisions à l'acte d'accusation, par exemple en ce qui concerne les délais mentionnés dans les paragraphes 9 à 16, rejetant la requête de Ntagerura sur tous les autres points[142]. Par la suite, elle a confirmé que les modifications déposées par le Procureur étaient conformes à son ordonnance[143].

63. Dans le Jugement, cependant, l'imprécision des périodes retenues a été mentionnée parmi les vices affectant l'Acte d'accusation Ntagerura[144]. Au demeurant, bien qu'elle ait rejeté l'exception préjudicielle soulevée par Ntagerura quant à la précision des indications concernant les lieux et la description des faits incriminés, sa participation personnelle à ces faits ainsi que l'identité de ses subordonnés et l'intention qui l'animait au sens de l'article 6 (3) du Statut, la Chambre de première instance a néanmoins estimé dans le Jugement que l'Acte d'accusation Ntagerura était vicié à ces égards[145].

64. Au vu de ce qui précède, il apparaît clairement que la Chambre de première instance a, dans son Jugement, reconsidéré certaines des décisions préalables au procès qu'elle avait prises sur la forme des Actes d'accusation. Cela ne constitue pas en soi une erreur puisqu'il est loisible à une Chambre de première instance de reconsidérer chacune de ses décisions au titre de son pouvoir discrétionnaire[146] si

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[138] Décision relative à l'Acte d'accusation initial Bagambiki/Imanishimwe, par. 11 (traduction non officielle) ; Voir aussi dispositif.
[139] Jugement, par. 15.
[140] Jugement, par. 51.
[141] *Le Procureur c. André Ntagerura*, affaire n°ICTR-96-10A-I, Exceptions préjudicielles (vices de l'acte d'accusation), 21 avril 1997 (« Exceptions relatives à la forme de l'Acte d'accusation initial Ntagerura »), par. 54 à 98.
[142] *Le Procureur c. André Ntagerura*, affaire n°ICTR-96-10-I, Décision relative à l'exception soulevée par la Défense pour vices de forme de l'acte d'accusation, 1er décembre 1997, dispositif.
[143] *Le Procureur c. André Ntagerura*, affaire n°ICTR-96-10 A-I, Décision relative à la requête de la Défense aux fins que soit déclaré non-conforme au jugement de la Chambre de première instance du 28 novembre 1997 l'acte d'accusation modifié déposé le 29 janvier 1988, 17 juin 1999, p. 3.
[144] Jugement, par. 41, 43, 45 et 46.
[145] Jugement, par. 41, 43 et 45 (lieux où se sont produits les faits) ; *ibid*., par. 41, 42, 45 et 47 (description des faits) ; *ibid*., par. 41, 43, 44 et 46 (participation directe de Ntagerura) ; *ibid*., par. 42 et 47 (responsabilité de Ntagerura au sens de l'article 6 (3) du Statut, en particulier relativement au sixième chef d'accusation).
[146] *Le Procureur c. Stanislav Galic*, Affaire n°IT-98-29-AR73, Décision relative à la demande de l'Accusation aux fins d'autorisation d'interjeter appel, 14 décembre 2001 (« Décision *Galić* du 14 décembre 2001 »), par. 13.

une erreur manifeste de raisonnement a été mise en évidence ou si la décision reconsidérée a donné lieu à une injustice[147]. La Chambre d'appel précise néanmoins que lorsqu'une Chambre décide de modifier l'une de ses décisions, elle

> « doit examiner très attentivement chaque point soulevé, et faire face aux conséquences que cette révision peut avoir eu sur la procédure qui se sera entre-temps déroulée conformément à la décision initiale »[148].

Dans le cas d'espèce, la Chambre d'appel considère que, dès lors que la Chambre de première instance avait décidé de reconsidérer ses décisions préalables au procès sur le degré de précision des Actes d'accusation au stade du délibéré, elle aurait dû interrompre le cours de ses délibérations et procéder à la réouverture des débats. À un stade aussi avancé du procès, après que tous les moyens de preuve aient été présentés et les conclusions finales des parties entendues, le Procureur ne pouvait proposer une modification des Actes d'accusation. La réouverture des débats lui aurait en revanche permis de tenter de convaincre la Chambre de première instance de la justesse de ses premières décisions relatives à la forme de l'acte d'Accusation, ou, le cas échéant, de ce que les vices en question avaient été purgés. La Chambre d'appel considère que la Chambre de première instance a versé dans l'erreur en ne disant mot jusqu'au rendu du Jugement de sa décision de juger les parties susmentionnées des Actes d'accusation viciées.

65. La question de savoir si cette erreur est de nature à invalider le verdict sera examinée plus loin au vu des conclusions de la Chambre d'appel sur les autres erreurs alléguées par le Procureur au titre de ce motif d'appel. La Chambre d'appel examinera tout d'abord la question de la lecture combinée des Actes d'accusation.

2. Défaut de considération des Actes d'accusation comme un tout

66. Le Procureur soutient que la Chambre de première instance a versé dans l'erreur faute d'avoir considéré les deux Actes d'accusation ensemble car, au terme de la Décision aux fins de jonction, « juridiquement, les actes d'accusation joints [étaient] devenus un acte d'accusation unique »[149]. Dans cette décision, ajoute-t-il, la Chambre de première instance

> « a expressément accepté des arguments présentés à l'appui d'une lecture des deux actes d'accusation comme s'il s'agissait d'un document unique »[150].

Le Procureur soutient de manière générale que les Actes d'accusation s'étayaient mutuellement pour ce qui est des chefs d'entente en vue de commettre le génocide, mais limite ses arguments détaillés aux conclusions de la Chambre de première instance concernant l'Acte d'accusation Ntagerura[151].

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[147] Arrêt *Kajelijeli*, par. 203 et 204.
[148] Décision *Galić* du 14 décembre 2001, par. 13.
[149] Mémoire d'appel du Procureur, par. 173 et 174.
[150] Mémoire d'appel du Procureur, par. 173, citant la Décision aux fins de jonction, par. 30, dans laquelle la Chambre de première instance cite l'Opinion individuelle et concordante des Juges Tieya et Nieto-Navia dans l'affaire *Kanyabashi* : « une autorisation de mise en accusation conjointe sous l'empire de (l'article 48 du Règlement) ne signifie pas nécessairement qu'il faille substituer un nouvel acte d'accusation aux actes d'accusation existants ; car ajouter des noms à l'un desdits actes fondés sur les mêmes faits ou entreprises conférerait sans doute à la cause le caractère de procès conjoint de plusieurs accusés au titre de différents chefs d'accusation portés dans un seul acte d'accusation, sous réserve, bien entendu, de toute requête en modification » : *Le Procureur c. Kanyabashi*, affaire n°ICTR-96-15-A, Arrêt relatif à la requête de la Défense déposée aux fins d'appel interlocutoire sur la compétence de la Chambre I, 3 juin 1999, Opinion individuelle et concordante conjointe des Juges Wang Tieya et Rafael Nieto-Navia, par. 6.
[151] Il fait valoir à cet égard que les paragraphes suivants auraient dû être lus ensemble : (i) le paragraphe 13 de l'Acte d'accusation Ntagerura avec le paragraphe 3.16 de l'Acte d'accusation Bagambiki/Imanishimwe ; (ii) le paragraphe 16 de l'Acte d'accusation Ntagerura avec le paragraphe 3.29 de l'Acte d'accusation Bagambiki/Imanishimwe ; et (iii) les paragraphes 17, 18 et 19 de l'Acte d'accusation Ntagerura avec les paragraphes 3.16 et 3.23 de l'Acte d'accusation Bagambiki/Imanishimwe : Mémoire d'appel du Procureur, par. 176 à 178.

67. Imanishimwe répond que la jonction des instances des Accusés n'emportait pas pour autant la jonction des chefs d'accusation[152]. Bagambiki répond quant à lui que la Chambre de première instance n'a pas reconnu dans sa Décision aux fins de jonction qu'il était possible de retenir à l'encontre de l'un quelconque des accusés des charges portées dans l'un quelconque des Actes d'accusation et que cette décision n'emportait pas modification des références aux conclusions factuelles étayant les charges retenues dans les Actes d'accusation[153]. Il fait valoir que ce serait méconnaître le droit de l'accusé d'être informé des charges portées contre lui que de tenir compte de faits l'impliquant contenus dans un acte d'accusation autre que le sien[154]. Ntagerura soutient que la Chambre de première instance, pas plus que l'accusé, ne devrait être dans l'obligation de s'en référer à un deuxième acte d'accusation pour donner un sens aux allégations du premier[155].

68. En réplique, le Procureur avance ne pas vouloir opérer une confusion des « charges retenues contre l'accusé A avec celles retenues contre l'accusé B ». Il prétend plutôt vouloir dénoncer l'erreur commise par la Chambre de première instance consistant à écarter les précisions relatives aux accusations portées contre l'accusé A figurant dans l'acte d'accusation dressé contre l'accusé B[156].

69. Le Procureur énumère dans les Actes d'accusation le ou les paragraphes qui étayent chaque chef d'accusation. De la sorte, il informait les Accusés des allégations fondant chaque chef d'accusation. La Chambre d'appel relève que le Procureur s'est cependant abstenu de faire des références croisées à chacun des Actes d'accusation. Ainsi, les allégations factuelles avancées dans chacun des Actes d'accusation restaient, de l'avis de la Chambre d'appel, strictement cantonnées à leurs chefs respectifs. Le simple fait que les instances des Accusés aient été jointes « aux fins d'un procès commun »[157] (et non d'une jonction des charges) ne visait pas à informer les Accusés de ce que les allégations factuelles étayant les chefs d'accusation portés dans un acte d'accusation étaieraient également les chefs retenus dans un autre. Bien que son nom soit cité dans l'Acte d'accusation Bagambiki/Imanishimwe, la Chambre d'appel ne peut conclure que Ntagerura ait été informé du fait que les allégations avancées dans l'Acte d'accusation Bagambiki/Imanishimwe viendraient étayer les chefs retenus dans l'acte d'accusation dressé contre lui.

70. Au surplus, le Procureur fait valoir que le fait de considérer les Actes d'accusation indépendamment les uns des autres au regard des allégations factuelles allait à « l'encontre de la raison d'être de la jonction d'instances »[158]. Cet argument ne saurait prospérer. En effet, il ne va pas de soi que des actes d'accusation distincts doivent être considérés ensemble en cas de jonction d'instance. Dans ce cas de figure, il n'en demeure pas moins que chaque accusé conserve les mêmes droits que s'il était jugé séparément[159]. Le Procureur est toujours tenu d'articuler, dans l'acte d'accusation dressé contre chaque accusé, les faits essentiels fondant les accusations retenues contre lui[160]. L'argument du Procureur selon lequel les Actes d'accusation « sont devenus, en droit, un seul acte d'accusation » est rejeté. Il appartenait au Procureur de déposer un nouvel acte d'accusation joint et unique contre les trois Accusés.

71. La Chambre d'appel considère en conséquence que l'argument du Procureur selon lequel les Actes d'accusation auraient dû être lus ensemble comme un document unique est mal fondé. Dans la

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[152] Mémoire en réponse d'Imanishimwe, par. 70, 74 et 75.
[153] Mémoire en réponse de Bagambiki, par. 159 et 161.
[154] Mémoire en réponse de Bagambiki, par. 160.
[155] Mémoire en réponse de Ntagerura, par. 115.
[156] Mémoire en réplique du Procureur, par. 24 et 31.
[157] Décision aux fins de jonction, par. 60. La référence à l'Opinion individuelle et concordante des Juges Tieya et Nieto-Navia dans l'affaire *Kanyabashi*, mentionnée par le Procureur, a été faite par la Chambre de première instance à l'appui de sa conclusion selon laquelle « des personnes accusées peuvent être jugées ensemble, même lorsqu'elles ne sont pas accusées conjointement » : Décision aux fins de jonction, par. 30.
[158] Mémoire en réplique du Procureur, par. 24.
[159] Article 82 (A) du Règlement.
[160] Cf. Arrêt Ntakirutimana, par. 470 ; Arrêt Kupreškić et consorts, par. 88.

mesure où la Chambre d'appel conclut que la Chambre de première instance n'a pas commis d'erreur en refusant de lire les Actes d'accusation comme un tout, il n'est alors pas nécessaire de se pencher sur l'effet qu'aurait pu avoir une lecture combinée des deux Actes d'accusation.

72. Se tournant vers les autres moyens d'appel du Procureur, la Chambre d'appel concède que la logique voudrait que soit examinée à présent la question de savoir si la Chambre de première instance a versé dans l'erreur en concluant que les Actes d'accusation étaient entachés de vices. Afin d'éviter d'analyser chacun des paragraphes litigieux à deux reprises – au stade de la détermination de l'existence des vices et, le cas échéant, au stade de l'examen de la question de savoir si les vices en question ont pu être purgés – la Chambre d'appel examinera tout d'abord dans l'abstrait si la Chambre de première instance a versé dans l'erreur en omettant de rechercher si les Actes d'accusation avaient été purgés des vices identifiés[161]. Ce n'est qu'à l'issue de cette analyse que la Chambre d'appel entreprendra alors d'examiner, paragraphe par paragraphe, si les Actes d'accusation étaient effectivement viciés et, le cas échéant, si les vices ont été purgés.

3. La purge des vices identifiés

La Chambre de première instance a-t-elle versé dans l'erreur en omettant d'examiner si les vices avaient été purgés ?

73. La Chambre de première instance a tenu les conclusions suivantes :

> « la Chambre conclut que les paragraphes étayant les accusations contre Ntagerura, Bagambiki et Imanishimwe, ainsi que les accusations elles-mêmes, sont inacceptablement vagues. De plus, la Chambre ne relève aucune raison valable fondant le Procureur à exposer les allégations ou les accusations d'une manière aussi générale »[162].

Elle a pris acte de l'Arrêt de la Chambre d'appel du TPIY en l'affaire *Kupreškić et consorts* et du fait que, dans un nombre limité d'affaires, un acte d'accusation vicié pouvait être purgé de ses vices[163]. Elle a poursuivi en ces termes :

> les pièces produites à l'appui de l'acte d'accusation Ntagerura et de celui de Bagambiki et Imanishimwe, les autres pièces communiquées avant le procès et le mémoire préalable au procès fournissent des informations complémentaires permettant de connaître les éléments de preuve susceptibles d'être produits lors du procès et la thèse du Procureur. Cependant, les conclusions et les pièces communiquées avant le procès ne peuvent pas valablement remplacer un acte d'accusation bien formulé, celui-ci étant le seul instrument de mise en accusation mentionné dans le Statut et le Règlement. L'acte d'accusation doit exposer tous les faits essentiels. La Chambre de première instance et l'accusé ne devraient pas avoir à examiner minutieusement des montagnes d'informations, de déclarations de témoins et de conclusions écrites ou verbales pour déterminer les faits qui pourraient fonder les crimes reprochés à l'accusé, et ce d'autant plus si certaines de ces informations et pièces ne sont communiquées qu'à la veille du procès[164].

74. La Chambre d'appel rappelle qu'il est de jurisprudence constante aussi bien devant le Tribunal de céans que devant le TPIY que, dans un nombre limité d'affaires, un acte d'accusation vicié peut être purgé de ses vices si le Procureur fournit en temps voulu à l'accusé des informations claires et cohérentes, concernant les faits sur lesquels reposent les accusations portées contre lui[165]. En l'espèce,

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[161] Acte d'appel du Procureur, par. 20 ; Mémoire d'appel du Procureur, par. 107 à 111.
[162] Jugement, par. 64. La Chambre de première instance a souligné que les paragraphes 9.1, 9.2, 9.3, 11, 12.1, 13, 14.1, 14.3, 16, 17, 18 et 19 de l'Acte d'accusation Ntagerura et les paragraphes 3.12 à 3.28, 3.30 et 3.31 de l'Acte d'accusation Bagambiki/Imanishimwe étaient viciés d'une façon ou d'une autre.
[163] Jugement, par. 65.
[164] Jugement, par. 66 (notes de bas de page non reproduites).
[165] Voir *supra*, par. 28.

il ressort du Jugement que la Chambre de première instance ne s'est pas demandée si les Actes d'accusation avaient été purgés de leurs vices. La Chambre d'appel rappelle que, si un acte d'accusation est jugé vicié pour cause d'imprécision ou d'ambiguïté, la Chambre de première instance doit déterminer si l'accusé a néanmoins bénéficié d'un procès équitable[166]. Au vu de la déclaration de la Chambre de première instance selon laquelle certaines des pièces communiquées par le Procureur après la mise en accusation avaient fourni

> « des informations complémentaires permettant de connaître les éléments de preuve susceptibles d'être produits lors du procès et la thèse du Procureur »[167],

la Chambre d'appel estime que la Chambre de première instance, pour s'acquitter de l'obligation qui lui est faite de déterminer si le procès a été équitable, aurait dû chercher à savoir si les vices avaient été corrigés. Elle a commis une erreur de droit faute de l'avoir fait. Il s'agira alors pour la Chambre d'appel d'examiner l'affirmation du Procureur selon laquelle les Actes d'accusation ont été purgés de leurs vices.

Le « passage relatif aux preuves solides » de l'Arrêt *Kupreškić et consorts*

75. Ayant conclu que les Actes d'accusation étaient viciés et omis de déterminer si les vices avaient été corrigés, la Chambre de première instance a conclu comme suit :

> dans l'affaire *Kupreškic*, la Chambre d'appel a déclaré qu'elle « pourrait, on le conçoit, hésiter à laisser un vice de forme de l'acte d'accusation modifié décider de l'issue d'une affaire dans laquelle tout porte à croire à la culpabilité des accusés ». La Chambre dès lors examinera les éléments de preuve à charge contre Ntagerura, Bagambiki et Imanishimwe pour voir s'il existe de tels éléments de preuve portant à croire à la culpabilité de l'accusé.[168]

76. La Chambre d'appel estime que la déclaration de la Chambre d'appel du TPIY dans l'affaire *Kupreškić et consorts* selon laquelle elle

> « pourrait, on le conçoit, hésiter à laisser un vice de forme de l'acte d'accusation modifié décider de l'issue d'une affaire dans laquelle tout porte à croire à la culpabilité des accusés »

n'autorise nullement la Chambre de première instance à prendre en considération des faits essentiels dont l'accusé n'a pas été suffisamment informé. La question du « passage relatif aux preuves solides » s'est posée s'agissant de savoir si, le bien-fondé des objections formulées par les appelants quant à la précision de l'acte d'accusation ayant été reconnu, il convenait de renvoyer l'affaire en vue d'un nouveau procès[169]. En première instance, cette question ne se pose pas. La Chambre d'appel insiste sur le fait que si l'acte d'accusation est jugé défectueux en première instance, la Chambre de première instance doit examiner si l'accusé a néanmoins bénéficié d'un procès équitable. Aucune déclaration de culpabilité ne peut être prononcée lorsque le manquement à l'obligation d'informer dûment la personne poursuivie des motifs de droit et de fait sur lesquels reposent les accusations dont elle est l'objet a porté atteinte à son droit à un procès équitable[170].

4. Lecture des paragraphes des Actes d'accusation de façon isolée et conclusions de la Chambre de première instance sur les vices entachant certains paragraphes des Actes d'accusation

77. La Chambre d'appel note que l'argument du Procureur selon lequel la Chambre de première instance aurait versé dans l'erreur en ne lisant les paragraphes de chaque acte d'accusation que de façon isolée se rapporte principalement au fait que la Chambre ait conclu que plusieurs des

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[166] Arrêt *Kvočka et consorts*, par. 33.
[167] Jugement, par. 66.
[168] Jugement, par. 68.
[169] Arrêt Kupreškić et consorts, par. 125.
[170] Arrêt *Kvočka et consorts*, par. 33. Voir *supra*, par. 30.

paragraphes des Actes d'accusation s'abstenaient d'exposer la conduite criminelle reprochée aux Accusés[171]. Le Procureur prétend avoir remédié aux insuffisances des Actes d'accusation s'agissant des dates, lieux et circonstances des événements allégués dénoncées par la Chambre de première instance par la communication d'informations déposées avant l'ouverture du procès[172]. Aux fins de faciliter l'analyse, la Chambre d'appel examinera ensemble ces deux arguments.

78. La Chambre d'appel note encore que la Chambre de première s'est crue autorisée à dégager des conclusions factuelles de paragraphes des Actes d'accusation qu'elle avait pourtant jugés viciés[173]. En conséquence, les conclusions de la Chambre de première instance sur la validité des Actes d'accusation n'ont, pour un certain nombre d'allégations, pas pesé sur sa décision finale : ces allégations n'ont en effet pas été rejetées pour des motifs liés à la forme des Actes d'accusation mais en raison des faits de la cause. Si le Procureur semble soutenir qu'il n'est pas satisfait des conclusions factuelles que la Chambre de première instance a formées s'agissant des paragraphes qu'elle a jugé viciés, il n'apporte pas d'éléments sur ce point. Partant, considérant que les erreurs invoquées par le Procureur dans son quatrième motif d'appel ne peuvent prospérer s'agissant des paragraphes des Actes d'accusation qui ont fait l'objet d'une analyse factuelle de la Chambre de première instance, la Chambre d'appel limitera son analyse à l'examen du bien fondé des arguments du Procureur relatifs aux paragraphes qui n'ont pas fait l'objet de conclusions factuelles, à savoir les paragraphes 11, 12.1, 13 et 16 de l'Acte d'accusation Ntagerura et les paragraphes 3.12 à 3.15 de l'Acte d'accusation Bagambiki/Imanishimwe. Elle examinera également le paragraphe 3.28 de l'Acte d'accusation Bagambiki/Imanishimwe qui n'a fait l'objet que d'une analyse partielle.

Acte d'accusation Ntagerura

79. La Chambre d'appel rappelle que la Chambre de première instance a dégagé des conclusions factuelles relatives aux paragraphes 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 et 19 de l'Acte d'accusation Ntagerura, et que, par conséquent, seules les erreurs concernant les paragraphes 11, 12.1, 13 et 16 seront examinées.

(i) Paragraphe 11

80. Le paragraphe 11 de l'Acte d'accusation Ntagerura est formulé comme suit :

> Du 1er janvier 1994 au 31 juillet 1994 et notamment en février, mars et avril 1994, André Ntagerura a permis et/ou autorisé l'utilisation des véhicules de l'État, notamment des autocars, pour le transport des miliciens, d'*Interahamwe* armés, des civils y compris des membres de la population tutsie, ainsi que d'armes et de munitions vers et à travers toute la préfecture de Cyangugu, notamment à travers les communes de Karengera, Bugarama, Nyakabuye et autres, ainsi que dans les préfectures de Butare, Ruhengeri et Kibuye et ailleurs.

81. La Chambre de première instance a constaté que ce paragraphe ne donnait aucun exemple précis de cas où Ntagerura aurait permis ou autorisé l'utilisation de véhicules de l'État ni des circonstances dans lesquelles ces véhicules auraient été utilisés. Elle a constaté également que dès lors que ce paragraphe ne précisait pas le but dans lequel étaient effectués ces transports ni la mesure dans laquelle Ntagerura avait connaissance de ce but, il n'énonçait pas les éléments constitutifs d'un acte criminel. Le Procureur entendait surtout se servir de ce paragraphe pour établir la responsabilité pénale de Ntagerura au titre de l'article 6 (3) tel qu'allégué au chef 6[174]. La Chambre de première instance a

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[171] Mémoire d'appel du Procureur, par. 179 à 181.
[172] Acte d'appel du Procureur, par. 20 ; Mémoire d'appel du Procureur, par. 107 à 111. Voir aussi Acte d'appel du Procureur, par. 22 ; Mémoire d'appel du Procureur, par. 126.
[173] A savoir les paragraphes 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 et 19 de l'Acte d'accusation Ntagerura et les paragraphes 3.16 à 3.31 de l'Acte d'accusation Bagambiki/Imanishimwe. Voir Jugement, par. 69.
[174] Acte d'accusation Ntagerura, chef 6.

constaté à cet égard que le paragraphe 11, comme l'Acte d'accusation Ntagerura dans son ensemble, n'identifiait pas les subordonnés de Ntagerura qui auraient réellement approuvé l'utilisation des autocars, ni les autres faits essentiels caractérisant une allégation de responsabilité du supérieur hiérarchique[175].

82. Le Procureur soutient que le résumé de la déposition attendue du Témoin MF comprenait des détails relatifs à l'autorisation donnée par Ntagerura, à plusieurs reprises, pour l'utilisation des véhicules de l'État, notamment dans le but de convoyer des armes, des munitions et des *Interahamwe* de même que des détails sur les véhicules utilisés, tels que les autocars de l'Onatracom (« Office national des transports en commun »), ainsi que sur les personnes auxquelles cette autorisation avait été donnée[176].

83. Le résumé de la déposition attendue du Témoin MF évoquait un incident en particulier où Ntagerura aurait ordonné l'utilisation d'un véhicule de l'État, numéro d'immatriculation A-7058, véhicule qu'il avait ordonné de remettre au sous-préfet de Busengo en mars 1994. Toutefois, le résumé ne fournissait aucune information concernant le dessein criminel aux fins desquelles ce véhicule aurait été utilisé ultérieurement ni la connaissance qu'aurait eu Ntagerura d'un tel dessein. De même, ce résumé n'informait pas Ntagerura des faits essentiels de la responsabilité qui lui était imputée en vertu de l'article 6 (3) du Statut[177].

(ii) Paragraphes 12.1, 13 et 16

84. Le Procureur soutient que la Chambre de première instance a versé dans l'erreur dans ses conclusions relatives aux paragraphes 12.1, 13, 14.1, 14.3 et 16 de l'Acte d'accusation Ntagerura[178]. Bien que la Chambre de première instance a dégagé des conclusions factuelles sur la base des paragraphes 14.1 et 14.3, la Chambre d'appel estime devoir examiner les arguments relatifs à ces paragraphes également pour permettre une analyse des paragraphes 12.1, 14.1 et 14.3 dans leur contexte.

85. Les paragraphes 12.1, 13, 14.1, 14.3 et 16 de l'Acte d'accusation Ntagerura sont formulés comme suit :

> 12.1. Du 1er janvier 1994 au 31 juillet 1994 et même depuis 1991, André Ntagerura a encouragé et participé à la formation des miliciens *Interahamwe* dans la commune de Karengera et dans d'autres communes sur le territoire de la préfecture de Cyangugu.
>
> 13. Du 1er janvier 1994 au 31 juillet 1994 et même depuis janvier 1993, des armes, des munitions et des uniformes étaient fréquemment distribués dans la préfecture de Cyangugu. Ces armes étaient parfois entreposées chez Yussuf Munyakazi, dans la commune de Bugarama et ailleurs. Elles étaient par la suite distribuées aux *Interahamwe* dans la préfecture de Cyangugu.
>
> 14.1. Du 1er janvier 1994 au 31 juillet 1994, André Ntagerura a souvent été vu en compagnie de Yussuf Munyakazi et des *Interahamwe* dans la préfecture de Cyangugu et plus précisément dans la commune de Bugarama [et il leur a publiquement exprimé son soutien].

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[175] Jugement, par. 42.
[176] Mémoire d'appel du Procureur, par. 133, renvoyant à l'Annexe 4 au Mémoire préalable du Procureur, Annexe 4 : Résumé des dépositions des témoins prévus par le Procureur, déposé le 3 juillet 2000, (« Annexe 4 »), p. 7, n°17 (Témoin MF).
[177] Voir Annexe 4, p. 7, n°17 (Témoin MF) :
Le témoin déclarera qu'il connaissait NTAGERURA, et affirme que NTAGERURA avait l'habitude de mettre des véhicules du gouvernement à la disposition des *Interahamwe*, par exemple le véhicule A-7058 que NTAGERURA avait ordonné au témoin de donner au sous-préfet de Busengo en mars 1994 ; que NTAGERURA l'a fait à plusieurs reprises ; que le témoin a également vu des bus de l'ONATRACOM transporter des armes, des munitions et des *Interahamwe* ; que le témoin a rapporté ces incidents à son chef et à NTAGERURA, mais qu'il n'y a pas eu de réaction.
[178] Mémoire d'appel du Procureur, par. 184.

14.3 Du 1er janvier 1994 au 31 juillet 1994, André Ntagerura sillonnait la préfecture de Cyangugu, souvent accompagné par le préfet Emmanuel Bagambiki et Yussuf Munyakazi, pour superviser les activités des *Interahamwe* et vérifier si les ordres de tuer tous les Tutsis et tous les opposants politiques ont été exécutés.

16. Du 1er janvier 1994 au 31 juillet 1994, Yussuf Munyakazi était un membre influent et un responsable des *Interahamwe* en préfecture de Cyangugu. Il était l'une des personnalités chargées de l'exécution des ordres du MRND. Un grand nombre de ces ordres provenaient André Ntagerura.

86. La Chambre de première instance a jugé que les paragraphes 12.1, 13 et 16, étaient non seulement vagues, mais ne faisaient état d'aucun comportement criminel identifiable de la part de Ntagerura[179]. Elle a également jugé que les paragraphes 14.1 et 14.3 n'exposaient pas de façon suffisamment précise la nature de la participation criminelle de Ntagerura[180].

87. Le Procureur soutient que la Chambre de première instance a versé dans l'erreur dans ses conclusions et soutient que « les faits figurant dans ces paragraphes sont reliés les uns aux autres d'une manière qui contribue à étayer les allégations de chacun d'entre eux. L'association [de Ntagerura] aux *Interahamwe* et le rôle de ces derniers dans le génocide constituent le fil conducteur qui relie ces paragraphes »[181]. Il prétend que : (i) le sous-paragraphe 12.1 relie Ntagerura à l'entraînement des *Interahamwe* ; (ii) le paragraphe 13 le relie à la fourniture d'armes et d'uniformes aux *Interahamwe* par l'intermédiaire de Munyakazi ; et (iii) les sous-paragraphes 14.1 et 14.3 et le paragraphe 16 le relient aux activités de Munyakazi et de Bagambiki se rapportant aux *Interahamwe*, ainsi qu'à ces derniers directement, et aux activités des *Interahamwe* concernant le meurtre de Tutsis et d'opposants politiques[182].

88. La Chambre d'appel relève que les paragraphes 12.1, 13, 14.1, 14.3 et 16 faisaient état d'un certain lien entre Ntagerura, Yussuf Munyakazi et les *Interahamwe* et indiquaient que ces derniers avaient perpétré des actes criminels. Toutefois, une allégation aussi générale ne suffisait pas à informer Ntagerura des faits essentiels de sa conduite criminelle. La Chambre d'appel relève qu'il n'était pas évident que ceux des membres des *Interahamwe* visés au paragraphe 14.3 qui auraient perpétré des actes de tuerie étaient les mêmes que ceux visés au paragraphe 12.1 qui auraient suivi un entraînement. En fait, il n'était même pas indiqué que l'entraînement avait été effectué en vue de la perpétration de tels actes. Le paragraphe 14.3 n'indiquait pas davantage qui aurait donné et/ou executé « les ordres de tuer tous les Tutsis et les opposants politiques ». Au demeurant, les allégations selon lesquelles Ntagerura « a souvent été vu en compagnie de, et a publiquement exprimé son soutien envers Yussuf Munyakazi et les *Interahamwe* » au paragraphe 14.1 ; a « supervis[é] les activités » des *Interahamwe,* au paragraphe 14.3 ; ou selon lesquelles les ordres du MRND provenaient de Ntagerura, tel qu'il est indiqué au paragraphe 16, ne décrivaient pas suffisamment son rôle, le cas échéant, dans la distribution d'armes alléguée au paragraphe 13.

89. Rien ne permettait davantage de dire clairement si les ordres du MRND, dont il est allégué qu'ils provenaient de Ntagerura, concernaient les faits mentionnés aux paragraphes 12.1, 13, 14.1 ou 14.3. En outre, la Chambre d'appel relève que le nom de Ntagerura n'est pas mentionné du tout au paragraphe 13. Un lecteur objectif ne peut pas comprendre en quoi le fait que des armes ont été entreposées et distribuées dans la préfecture de Cyangugu soit lié à la personne de Ntagerura. Pour les mêmes motifs, les paragraphes 12.1, 13 ou 16 n'ont apporté aucune précision quant à la participation présumée de Ntagerura aux faits allégués aux paragraphes 14.1 et 14.3. En conséquence, la Chambre

[179] Jugement, par. 69.
[180] Jugement, par. 45.
[181] Mémoire d'appel du Procureur, par. 184.
[182] Mémoire d'appel du Procureur, par. 185.

de première instance n'a pas commis d'erreur en jugeant que les paragraphes 12.1, 13, 14.1, 14.3 et 16 n'exposaient pas suffisamment la conduite criminelle de Ntagerura.

90. La Chambre d'appel relève que les résumés des dépositions attendues des Témoins LAB, MF, LAI, LAP et LAR, que le Procureur invoque à l'appui de l'argument selon lequel les paragraphes 12.1, 13, 14.1, 14.3 et 16 avaient été purgés des vices les affectant[183], n'ont pas remédié à l'imprécision de ces paragraphes en ce qui concerne la conduite criminelle de Ntagerura.

91. Le résumé de la déposition attendue du Témoin LAB allègue que Ntagerura s'était adressé à une foule dans le secteur de Nyamuhunga en avril 1994, mais n'établit aucun lien entre les propos qu'il aurait tenus à cette occasion et un quelconque crime sous-jacent à lui imputé[184]. Bien que ce même résumé allègue que, le 18 mai 1994, Ntagerura avait livré des armes à l'usine de Shagasha, il n'indique pas si ces armes auraient servi pour un crime quelconque ou pour l'entraînement à l'usine. Qui plus est, cet entraînement aurait eu lieu entre janvier et avril 1994, c'est-à-dire avant le 18 mai 1994[185]. L'allégation avancée dans le résumé de la déposition attendue du Témoin LAP comme quoi, le 28 janvier 1994, Ntagerura serait arrivé à Bigogwe avec des bottes et des uniformes qui ont été distribués aux *Interahamwe* ne faisait pas état non plus d'un quelconque crime pour lequel ces effets auraient été utilisés[186]. Il en est de même de l'allégation contenue dans le résumé de la déposition attendue du Témoin LAR affirmant que, le 28 janvier 1994, Ntagerura aurait annoncé à une foule rassemblée à Bugarama avoir livré des bottes et des uniformes[187]. Si le résumé de la déposition attendue du Témoin MF allègue que Ntagerura aurait ordonné que le véhicule de l'État immatriculé A-7058 soit remis au sous-préfet de Busengo en mars 1994, il ne donne aucune indication permettant de relier l'utilisation de ce véhicule à un éventuel dessein criminel ni ne permet d'établir la connaissance qu'avait Ntagerura d'un tel dessein[188]. Enfin, bien que le résumé de la déposition attendue du Témoin LAI indique qu'« après le 7 avril » Ntagerura aurait envoyé un fax intimant l'ordre à Munyakazi d'éliminer les intellectuels tutsis, il n'indique pas si cet ordre aurait été exécuté, ni à quel moment précis entre le 7 avril et le 31 juillet 1994[189] il l'aurait donné[190]. Dès lors que le Procureur imputait à Ntagerura la responsabilité d'avoir donné cet ordre, la période visée n'était pas suffisamment précise.

92. Les paragraphes 12.1, 13, 14.1, 14.3 et 16 n'ayant pas été purgés des vices les entachant s'agissant de la conduite criminelle alléguée, point n'est alors besoin pour la Chambre d'appel d'examiner si ces derniers avaient été purgés des autres vices les affectant.

(iii) Modes de responsabilité

93. Au paragraphe 48 du Jugement, la Chambre de première instance a jugé que :

> [L]es chefs de l'acte d'accusation de Ntagerura sont formulés de manière inintelligible. Le membre de phrase « [e]n raison des actes commis … dans le cadre des événements décrits dans les paragraphes 9 à 19 », qui est repris pour chaque chef d'accusation vise les « causes » et les « événements » et non pas le comportement criminel de Ntagerura. En outre, les chefs d'accusation ne précisent ni la qualité en laquelle Ntagerura est poursuivi (auteur principal ou complice), ni la forme de complicité retenue.

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[183] Mémoire d'appel du Procureur, par. 136, note de bas de page 181.
[184] Annexe 4, p. 15 et 16, n°32 (Témoin LAB).
[185] Annexe 4, p. 15 et 16, n°32 (Témoin LAB). En outre, la Chambre d'appel a déjà constaté que le résumé de la déposition attendue du Témoin LAB n'indiquait pas si Ntagerura avait participé à l'entraînement à l'usine de Shagasha.
[186] Annexe 4, p. 7, n°22 (Témoin LAP).
[187] Annexe 4, p. 9, n°26 (Témoin LAR).
[188] Annexe 4, p. 5, n°17 (Témoin MF).
[189] Les paragraphes 14.1, 14.2, et 16 de l'Acte d'accusation Ntagerura portaient sur la période allant du 1er janvier au 31 juillet 1994.
[190] Annexe 4, p. 6, n°21 (Témoin LAI).

94. Le Procureur fait valoir que cette conclusion

> « est erronée au regard des détails fournis lors des communications préalables au procès et qui décrivent la nature de l'implication de Ntagerura dans les crimes dont il est accusé ainsi que ses relations avec les autres auteurs »[191].

95. La Chambre d'appel note que le Procureur n'explique pas comment les communications préalables au procès ont permis d'informer Ntagerura du mode de responsabilité sur la base duquel il était poursuivi. La Chambre d'appel a déjà conclu que certaines communications préalables au procès invoquées par le Procureur n'aidaient en rien à clarifier les défauts de l'Acte d'accusation s'agissant de la prétendue responsabilité de supérieur hiérarchique de Ntagerura[192]. Pour démontrer que les vices de l'acte d'accusation avaient été purgés, le Procureur se réfère de surcroît à la communication avant le procès des déclarations des Témoins LAB, LAI, LAR et LAP[193]. Ayant examiné lesdites déclarations, la Chambre d'appel considère qu'elles n'ont pas permis de fournir à Ntagerura des informations claires et cohérentes concernant le mode de responsabilité retenu contre lui.

(iv) Conclusion sur l'Acte d'accusation Ntagerura

96. Au vu de ce qui précède, la Chambre d'appel conclut que le Procureur n'est pas parvenu à démontrer que la Chambre de première instance avait versé dans l'erreur en jugeant vicié les paragraphes 11, 12.1, 13 et 16 de l'Acte d'accusation Ntagerura et en en concluant que les modes de responsabilité retenus contre l'accusé n'étaient pas précisés, pas plus qu'il n'est parvenu à démontrer que les vices identifiés avaient été corrigés. Les arguments du Procureur relatifs à l'Acte d'accusation Ntagerura sont par conséquent rejetés.

Acte d'accusation Bagambiki/Imanishimwe

97. Le Procureur fait valoir que la Chambre de première instance a versé dans l'erreur en lisant indépendamment les uns des autres (i) les paragraphes 3.12, 3.13 et 3.14 ; (ii) les paragraphes 3.15, 3.16, 3.17 et 3.18 ; et (iii) les paragraphes 3.19, 3.20, 3.24 et 3.25[194]. Il ajoute que ces paragraphes, de même que les paragraphes 3.21, 3.22, 3.23, 3.26, 3.27, 3.28, 3.30 et 3.31, ont été purgés des vices les affectant[195]. La Chambre de première instance ayant dégagé des conclusions factuelles des allégations contenues aux paragraphes 3.16 à 3.31, la Chambre d'appel considère que ces paragraphes ne méritent pas examen. À l'exception d'une erreur relative au paragraphe 3.28, aucune des erreurs alléguées ici par le Procureur n'est susceptible d'avoir pesé sur le verdict. La Chambre d'appel limitera par conséquent son examen aux paragraphes 3.12 à 3.15 qui n'ont pas fait l'objet d'analyse factuelle et au paragraphe 3.28 qui n'a fait l'objet que d'une analyse partielle.

(i) Paragraphes 3.12, 3.13 et 3.14

98. Les paragraphes 3.12, 3.13 et 3.14 de l'Acte d'accusation Bagambiki/Imanishimwe sont formulés comme suit :

> 3.12 Lors des événements auxquels se réfère le présent acte d'accusation, le préfet Emmanuel Bagambiki a présidé plusieurs réunions du « conseil restreint de sécurité » de la préfecture de Cyangugu, organisme responsable de la sécurité de la population civile de la préfecture, auxquelles a participé le lieutenant Samuel Imanishimwe, en sa qualité de

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[191] Mémoire d'appel du Procureur, par. 149.
[192] Voir section (ii) *supra*, par. 81 et 82.
[193] Mémoire d'appel du Procureur, par. 128 et 140.
[194] Mémoire d'appel du Procureur, par. 188 à 191.
[195] Mémoire d'appel du Procureur, par. 150 à 166.

commandant du camp militaire de Cyangugu, de même que le commandant de la Gendarmerie, les sous-préfets et d'autres personnes. Une de ces réunions a été tenue le ou vers le 9 avril 1994.

3.13 De plus, le préfet Emmanuel Bagambiki a présidé au moins à deux occasions, le ou vers le 11 avril 1994 et le ou vers le 18 avril 1994, des réunions de la « conférence préfectorale » de Cyangugu, où il fut discuté des problèmes de sécurité de la population civile de la préfecture. Ont pris part à ces réunions, les membres du « conseil restreint de sécurité », notamment le préfet Emmanuel Bagambiki et le lieutenant Samuel Imanishimwe, en plus de tous les bourgmestres et des représentants des partis politiques et des différentes églises.

3.14 Avant et lors des événements visés par le présent acte d'accusation,

Emmanuel Bagambiki, préfet de Cyangugu ;

André Ntagerura, Ministre des transports et des communications ;

Yussuf Munyakazi, leader *Interahamwe* ;

Christophe Nyandwi, fonctionnaire du Ministère du plan ;

Michel Busunyu, président du MRND pour la commune de Karengera ; et

Édouard Bandeste, leader *Interahamwe* ;

tous des personnalités importantes du MRND à Cyangugu, ont tenu de nombreuses réunions, entre eux ou avec d'autres, pour encourager, préparer et organiser le génocide.

Ces réunions ont eu lieu aussi bien dans la ville de Cyangugu que dans les diverses sous-préfectures et communes de cette préfecture, dans des lieux publics comme le stade Kamarampaka, et aussi dans des lieux [à accès] plus restreint, tels que des bars et [des résidences privées], et notamment :

a) vers la fin de 1993, dans la commune de Kirambo, avec des membres du MRND ;

b) vers la fin de 1993 et au début [de] 1994 à Karangiro, dans le cabaret de Miruho Augustin, avec en outre la participation des nommés Baligira Félicien, ex-député du CND, Nteziryayo Siméon, directeur de la SONARWA, Kayijamahe, directeur de la STIR, et d'autres personnes ;

c) courant février 1994, au domicile de Ntagerura André, dans la commune de Karengera, avec la participation de Yussuf Munyakazi, dirigeant *Interahamwe*, Christophe Nyandwi, un fonctionnaire au Ministère du plan, Édouard Bandeste, dirigeant *Interahamwe*, et d'autres membres du MRND ;

d) le 7 février 1994, au marché de Bushenge, avec la participation de Ntagerura André, Mbangura Daniel, Busunyu Michel, Nsabimana Callixte, Baligira Félicien et d'autres participants, membres du MRND et de la CDR ;

e) courant juin 1994 au siège du MRND, à Cyangugu, sous la présidence de Théodore Sindikubwabo, Président de la République, et en présence, notamment, des Ministres André Ntagerura, Daniel Mabngura, et d'autres [personnalités] civiles et religieuses ;

f) pendant l'année 1993 et au début de 1994, dans la commune de Gatare, en présence d'André Ntagerura, Yussuf Munyakazi et Emmanuel Bagambiki ;

g) le ou vers le 28 janvier 1994, à Bugarama, avec la participation d'André Ntagerura et Yussuf Munyakazi ; et

h) à la fin de juin 1994, à Gisuma, avec la participation d'Emmanuel Bagambiki et Samuel Imanishimwe.

99. La Chambre de première instance a constaté que les paragraphes 3.12, 3.13 et 3.14

> « ne relat[aient] pas des faits susceptibles de constituer les éléments essentiels du crime d'entente qui, selon le Procureur, [était] la seule accusation étayée par ces paragraphes »[196].

Elle a constaté en particulier que l'élément matériel de l'entente, « à savoir que deux personnes ou plus se sont entendues en vue de commettre le crime de génocide », n'avait pas été allégué[197]. Ayant souligné que les paragraphes 3.12 et 3.13 ne faisaient état ni du but criminel visé par les réunions évoquées ni du moindre lien que celles-ci auraient eu avec les crimes principaux, la Chambre de première instance a conclu que le Procureur ne reprochait dès lors dans ces paragraphes aucun acte de participation criminelle à Bagambiki ou Imanishimwe. Elle a également constaté que les indications de temps données aux paragraphes 3.12 et 3.13 étaient vagues, sauf en ce qui concerne les dates des 9, 11 et 18 avril 1994[198]. Enfin, elle a constaté que le paragraphe 3.14 ne précisait pas la nature de la participation de Bagambiki et Imanishimwe aux réunions évoquées[199].

100. Le Procureur fait valoir que la Chambre de première instance a versé dans l'erreur en lisant ces paragraphes indépendamment les uns des autres et sans tenir compte du contexte du chef d'accusation sous-jacent d'entente[200]. Il ajoute que la conclusion de la Chambre de première instance selon laquelle les paragraphes 3.12, 3.13 et 3.14 n'alléguaient aucun fait qui constituerait les éléments constitutifs de l'entente est

> « sans fondement, dans la mesure où ces [paragraphes] démontrent que [Bagambiki et Imanishimwe] ont entrepris des actions coordonnées et agissaient dans un cadre unifié comme cela ressort des nombreuses réunions auxquelles ils ont assisté ensemble. Ces réunions ont fourni le cadre dans lequel l'entente impliquant [Bagambiki et Imanishimwe] s'est déroulée »[201].

Le Procureur se fonde à cet égard sur la conclusion dégagée par la Chambre de première instance en l'affaire *Nahimana et consorts* selon laquelle

> « l'entente en vue de commettre le génocide peut être déduite des actions coordonnées des individus qui tendent vers un dessein commun et agissent dans un cadre unifié »[202].

101. Tout d'abord, la Chambre d'appel estime qu'à tout le moins l'entente en vue de commettre le génocide est une résolution d'agir sur laquelle au moins deux personnes se sont accordées, en vue de commettre un génocide[203]. L'existence d'un tel accord entre Bagambiki, Imanishimwe et, éventuellement, d'autres personnes, aurait dû être alléguée dans l'Acte d'accusation Bagambiki/Imanishimwe comme un fait essentiel. Le fait que les paragraphes 3.12, 3.13 et 3.14, ainsi que le soutient le Procureur, visaient à décrire le « cadre dans lequel l'entente impliquant [Bagambiki et Imanishimwe] s'est déroulée » ou que ces paragraphes étaient invoqués à l'appui du chef d'accusation d'entente, ne libérait pas le Procureur de l'obligation de faire état de ce fait essentiel[204]. Ce dernier demeurait en effet dans l'obligation d'énoncer les faits essentiels fondant les accusations portées dans l'Acte d'accusation Bagambiki/Imanishimwe, de sorte que les deux accusés soient en mesure de préparer leur défense.

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[196] Jugement, par. 50 et 51.
[197] Jugement, par. 70.
[198] Jugement, par. 50.
[199] Jugement, par. 51.
[200] Mémoire d'appel du Procureur, par. 188.
[201] Mémoire d'appel du Procureur, par. 189.
[202] Mémoire d'appel du Procureur, par. 189, citant le Jugement *Nahimana et consorts*, par. 1047.
[203] Jugement *Musema*, par. 191 ; Jugement *Ntakirutimana*, par. 798 et 799. La Chambre d'appel rappelle de surcroît que, relativement à la notion d'entente en général, la Chambre d'appel du TPIY a conclu que « pour établir l'existence de l'association de malfaiteurs, il faut démontrer que plusieurs individus se sont entendus pour commettre un crime ou une série de crimes » : Décision *Ojdanić* sur la compétence, par. 23.
[204] Ainsi que le fait remarquer le Procureur lui-même, « les faits essentiels traduisent les éléments abstraits du crime en une réalité spécifique, en établissant qui a fait quoi au préjudice de qui, où, quand, comment et avec quelle intention » : Mémoire d'appel du Procureur, par. 221.

102. En l'absence de toute allégation de dessein criminel ou de participation criminelle de la part de Bagambiki ou d'Imanishimwe, les simples allégations formulées aux paragraphes 3.12 et 3.13 tendant à démontrer qu'ils avaient participé à des réunions ne faisaient pas état de l'élément essentiel en l'espèce, c'est-à-dire l'accord en vue de commettre le génocide[205].

103. La Chambre d'appel reconnaît que, même si le paragraphe 3.14 ne contient pas expressément les termes « entente en vue de commettre le génocide », l'allégation selon laquelle Bagambiki, Ntagerura et Imanishimwe (ainsi que d'autres personnalités importantes du MRND à Cyangugu) auraient tenu de nombreuses réunions entre eux ou avec d'autres pour « encourager, préparer, organiser le génocide »[206] pourrait être lue comme impliquant la finalité propre à l'entente en vue de commettre le génocide. La Chambre d'appel relève toutefois que la Chambre de première instance a refusé d'examiner les allégations contenues dans le paragraphe 3.14 au motif que ledit paragraphe « ne précis[ait] pas la nature de la participation de Bagambiki et Imanishimwe aux réunions invoquées »[207]. S'il semble reconnaître le vice dont souffre le paragraphe 3.14, le Procureur soutient néanmoins y avoir remédié en fournissant aux Accusés lors de la phase préalable au procès les informations nécessaires relatives aux réunions et à leur participation à ces dernières[208].

104. La Chambre d'appel considère avec la Chambre de première instance que le paragraphe 3.14 est inacceptablement vague dans la mesure où il ne fournit aucun détail sur la participation des deux accusés aux réunions. Au dire du paragraphe 3.14, Bagambiki n'aurait pas participé à plus de deux réunions tandis qu'Imanishimwe n'aurait assisté qu'à l'une d'entre elles. Aucune des réunions ne se serait déroulée en présence des trois Accusés. Quant à l'objet de ces réunions, le Procureur se contente de la formule générique selon laquelle elles étaient destinées à « encourager, préparer et organiser le génocide », sans préciser d'aucune manière le rôle que les Accusés ont pu y jouer.

105. Selon le Procureur, l'ambiguïté du paragraphe 3.14 a été corrigée par les dépositions attendues des Témoins LAI, LAP, LAG, LAR et LAN[209]. La Chambre d'appel relève que les résumés des dépositions attendues des Témoins LAI, LAP et LAG allèguent que Bagambiki et/ou Imanishimwe avaient participé à des réunions en 1993 et que le résumé de la déposition attendue du Témoin LAR affirme qu'ils avaient rencontré Ntagerura à Bugarama le 28 janvier 1994 sans donner de précisions sur leur participation aux réunions[210]. Le résumé de la déposition attendue du Témoin LAN alléguait que Ntagerura, Bagambiki, Munyakazi et d'autres dignitaires du parti « avaient présidé » une réunion du MRND au centre de Bushenge le 7 février 1993 à laquelle les *Interahamwe* « chantaient des chansons d'incitation à la purification ethnique applaudies par Ntagerura, Bagambiki et les autres », mais n'a fait état d'aucun accord conclu à cette occasion en vue de commettre le génocide[211]. En outre, cette réunion n'a pas été mentionnée au paragraphe 3.14, qui, s'agissant des réunions tenues en 1993, ne parlait que de réunions tenues « vers fin 1993 » et « entre 1993 et début 1994 dans la commune de Gatare »[212]. La Chambre d'appel relève également que Bushenge n'est pas situé dans la commune de Gatare. En conclusion, la Chambre d'appel estime que les dépositions

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[205] En fait, le seul objet déclaré de ces réunions était « l'examen des problèmes relatifs à la sécurité de la population civile de la préfecture », qui, ainsi que l'a fait observer la Chambre de première instance, s'avère en contradiction avec l'accusation d'entente en vue de commettre le génocide : Acte d'accusation Bagambiki/Imanishimwe, par. 3.13 ; Jugement, par. 50.

[206] La Chambre d'appel remarque que ce passage de la version anglaise du Paragraphe 3.14 modifié se lit « *to incite, prepare, organise and commit genocide* ». Ayant déposé les versions anglaise et française du paragraphe 3.14 modifié le même jour dans un seul et même document, le Procureur ne précise pas quelle version doit faire foi. La Chambre d'appel relève que l'Acte d'accusation initial Bagambiki/Imanishimwe avait initialement été déposé en français, dont la version fait donc foi.

[207] Jugement, par. 51. Voir aussi par. 69.

[208] Mémoire d'appel du Procureur, par. 151.

[209] Mémoire d'appel du Procureur, par. 151, note de bas de page 193.

[210] Annexe 4, p. 9, n°21 (Témoin LAI) ; *ibid*., p. 9 à 11, n°22 (Témoin LAP) ; *ibid*., p. 12, n°25 (Témoin LAG) ; *ibid*., p. 12 et 13, n°26 (Témoin LAR).

[211] Annexe 4, p. 12, n°24.

[212] Acte d'accusation Bagambiki/Imanishimwe, par. 3.14 (a), (b), (f).

attendues des Témoins LAI, LAP, LAG, LAR et LAN ne fournissaient pas d'informations claires et cohérentes sur la nature de la participation de Bagambiki ou d'Imanishimwe aux réunions ni sur un quelconque accord entre eux en vue de commettre le génocide.

(ii) Paragraphe 3.15

106. Pour mener à bien son analyse, la Chambre d'appel estime nécessaire de replacer le paragraphe 3.15 dans son contexte et, partant, l'examinera à la lumière des paragraphes 3.16, 3.17 et 3.18. Les paragraphes 3.15, 3.16, 3.17 et 3.18 sont formulés comme suit :

> 3.15 De plus, durant cette même période, André Ntagerura, Yussuf Munyakazi et Emmanuel Bagambiki ont publiquement exprimé des sentiments anti-tutsis.
>
> 3.16 Avant et durant les événements auxquels se réfère le présent acte d'accusation, le Ministre André Ntagerura, le préfet Emmanuel Bagambiki, Yussuf Munyakazi, Christophe Nyandwi, tous des personnalités influentes du MRND à Cyangugu ont participé, directement ou indirectement, à la formation, l'entraînement et la distribution des armes à des miliciens du MRND, les *Interahamwe*, qui ont par la suite commis des massacres de la population civile Tutsi.
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> 3.17 Lors des événements auxquels se réfère le présent acte d'accusation, le lieutenant Samuel Imanishimwe, en sa qualité de commandant du camp militaire de Cyangugu, a participé avec le préfet Emmanuel Bagambiki et d'autres personnes, à la confection de listes de personnes à éliminer, majoritairement des Tutsis et certains Hutus de l'opposition.
>
> 3.18 Ces listes furent données à des militaires et à des miliciens avec ordre d'arrêter et de tuer ces personnes. Des militaires et des *Interahamwe* ont alors exécuté ces ordres.

107. La Chambre de première instance a constaté qu'aucun de ces paragraphes n'exposait en des termes suffisamment précis les dates et lieux des activités alléguées[213]. Elle a constaté également que le paragraphe 3.15 ne précisait pas du tout la nature et la teneur approximative des propos tenus, et le lien entre ces déclarations et un crime principal[214]. Elle a ajouté que le paragraphe 3.16 n'indiquait pas le rôle précis que Bagambiki avait joué dans l'entraînement et la distribution des armes ni ne visait aucun massacre auquel avaient participé les personnes qui auraient reçu la formation en cause[215]. Enfin, elle a constaté que les paragraphes 3.17 et 3.18 ne nommaient pas les personnes figurant sur les listes et n'indiquaient pas non plus le rôle de Bagambiki ou d'Imanishimwe dans le lancement ou l'exécution des ordres qui auraient été donnés ni la connaissance qu'ils en avaient[216].

108. En premier lieu, le Procureur fait valoir que la manière dont la Chambre de première instance a examiné les paragraphes 3.15 à 3.18 et sa conclusion selon laquelle ils manquaient de précision sont déraisonnables compte tenu de l'allégation principale retenue, en l'occurrence l'entente en vue de commettre le génocide. En outre, le Procureur soutient que les paragraphes 3,15, 3,16, 3,17 et 3.18 ont été purgés de leurs vices[217].

109. La Chambre d'appel a constaté que les paragraphes 3.12 et 3.13 n'exposaient pas l'un des faits essentiels, à savoir que Bagambiki, Imanishimwe et d'autres s'étaient entendus en vue de commettre le génocide, et que le paragraphe 3.14 était trop vague, ne précisant pas la nature de la participation de Bagambiki et Imanishimwe aux réunions évoquées. Pour ce qui est de l'entente, il importe donc peu que les paragraphes 3.15, 3.16, 3.17 et 3.18 aient fourni des informations sur le

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[213] Jugement, par. 52, 53 et 54.
[214] Jugement, par. 52.
[215] Jugement, par. 53.
[216] Jugement, par. 54.
[217] Mémoire d'appel du Procureur, par. 152 à 155.

contexte et la nature continue des agissements ayant débouché sur la commission du génocide. C'est à bon droit que la Chambre de première instance a conclu que les allégations étayant le chef d'accusation d'entente en vue de commettre le génocide (Chef 19) « ne pourraient constituer les éléments essentiels » de l'entente[218].

110. En outre, le Procureur soutient que les résumés des dépositions attendues des Témoins LAI, LAP, LAG, LAR et LAN ont fourni des précisions sur les sentiments anti-Tutsis exprimés par Bagambiki et Imanishimwe tel qu'il est allégué au paragraphe 3.15[219].

111. La Chambre d'appel note qu'il est allégué dans le résumé de la déposition attendue du Témoin LAI que « Bagambiki aussi a incité la population à tuer les Tutsis », mais sans que soient précisés la date, le lieu ou le rapport qu'il y aurait entre cette déclaration et un quelconque crime principal[220]. Le résumé de la déposition attendue du Témoin LAP fait état de ce que Bagambiki a participé en 1993 à un rassemblement au stade Kamarampaka à l'occasion duquel on avait « incité la population contre les Tutsis » ; ce que le résumé ne dit pas, en revanche, c'est si Bagambiki a fait une quelconque déclaration allant dans ce sens[221]. Cette observation est également valable pour la réunion alléguée dans le résumé de la déposition attendue du Témoin LAG[222]. Le résumé de la déposition attendue du Témoin LAR ne contient aucune information selon laquelle Bagambiki aurait publiquement exprimé une quelconque hostilité à l'égard des Tutsis[223]. Le résumé de la déposition attendue du Témoin LAN allègue que Ntagerura, Bagambiki et d'autres ont « présidé » une réunion au centre de Bushenge le 7 février 1993, réunion au cours de laquelle « les *Interahamwe* chantaient des chansons incitant au nettoyage ethnique et applaudies par Ntagerura, Bagambiki et d'autres »[224]. Toutefois, il n'est fait état d'aucun accord auquel seraient parvenus les participants à cette réunion en vue de commettre le génocide, fait essentiel qui fait défaut au paragraphe 3.15.

(iii) Paragraphe 3.28

112. Le paragraphe 3.28 est libellé comme suit :

> 3.28. À l'époque des événements auxquels se réfère le présent acte d'accusation, le préfet Emmanuel Bagambiki avait le devoir d'assurer la protection et la sécurité des populations civiles de sa préfecture. À plusieurs occasions en avril 1994, le préfet Bagambiki a négligé ou refusé d'aider les personnes menacées de mort qui lui demandaient assistance, notamment dans la commune de Gatare où ces personnes d'ethnie tutsie furent massacrées.

113. La Chambre de première instance a constaté que le paragraphe 3.28 n'identifiait aucune circonstance par une date et un nom de lieu précis et n'indiquait ni quand ni où précisément Bagambiki avait négligé ou refusé d'aider des personnes menacées de mort[225].

114. Le Procureur fait état du résumé de la déposition attendue du Témoin LQ, selon lequel, en dépit des multiples mises en garde relatives à l'imminence d'une attaque dirigée contre les personnes réfugiées à la paroisse de Hanika en avril 1994 et malgré ses promesses répétées d'intervenir, Bagambiki n'a rien fait, et quelque 2000 réfugiés ont été tués lors de l'attaque. Il fait état également du résumé de la déposition attendue du Témoin MP, selon lequel Bagambiki s'est abstenu d'arrêter

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[218] Jugement, par. 70.
[219] Mémoire d'appel du Procureur, par. 152.
[220] Annexe 4, p. 9, n°21 (Témoin LAI).
[221] Annexe 4, p. 9 à 11, n°22 (Témoin LAP).
[222] Annexe 4, p. 12, nº 25 (Témoin LAG).
[223] Annexe 4, p. 12, 13, n°26 (Témoin LAR).
[224] Annexe 4, p. 12, n°24 (Témoin LAN).
[225] Jugement, par. 61.

l'assaut lancé par les *Interahamwe* contre des milliers de réfugiés à la paroisse de Mbilizi entre le 12 et le 30 avril 1994[226].

115. Si la Chambre de première instance a tiré un certain nombre de conclusions factuelles concernant les attaques menées dans la commune de Gatare mentionnées au paragraphe 3.28[227], elle s'est cependant abstenue de mentionner dans le Jugement l'attaque menée à la paroisse de Hanika dont le Témoin LQ avait fait récit.

116. Les parties pertinentes du résumé de la déposition attendue du Témoin LQ précisent :

> À 9 heures du matin, le 11 avril 1994, des assaillants *Interahamwe* ont encerclé la paroisse de [Hanika] ; le témoin a téléphoné à Bagambiki pour solliciter son intervention afin de parer à l'attaque et Bagambiki a promis de dépêcher le bourgmestre de Gatare avec des gendarmes ; les attaques ont commencé d'abord avec des machettes, puis avec des grenades ; vers midi, le témoin a appelé à nouveau Bagambiki, qui lui a dit de patienter, pendant ce temps, l'assaut continuait ; le bourgmestre est arrivé vers 16h30 avec un seul gendarme et deux policiers communaux ; […] environ 2000 réfugiés ont été tués ce jour-là.[228]

117. Le résumé ne dit pas que Bagambiki, dont l'assistance a été sollicitée par le Témoin LQ, a refusé d'empêcher l'attaque. On y lit textuellement que Bagambiki a dit au Témoin LQ « de patienter » et que la protection promise par Bagambiki, toute faible qu'elle était, est arrivée dans l'après-midi. La Chambre d'appel conclut que le résumé de la déposition attendue du Témoin LQ n'allègue pas clairement que Bagambiki a négligé ou refusé de venir en aide aux personnes qui étaient attaquées à la paroisse de Hanika le 11 avril 1994 et qu'en conséquence, il est malaisé de savoir si ce résumé venait vraiment à l'appui des allégations figurant au paragraphe 3.28.

(iv) Chefs d'accusation de l'Acte d'accusation Bagambiki/Imanishimwe

118. La Chambre de première instance a estimé que la manière dont les chefs d'accusation avaient été formulés dans l'Acte d'accusation Bagambiki/Imanishimwe « pos[ait] problème » car ils n'indiquaient pas clairement si Bagambiki et Imanishimwe étaient poursuivis en qualité d'auteurs principaux ou de complices et ne précisaient pas non plus la forme de complicité retenue[229]. Le Procureur soutient que ses arguments relatifs à la manière dont l'Acte d'accusation Bagambiki/Imanishimwe a été purgé de ses vices éclairent la « nature de la participation de Bagambiki et d'Imanishimwe dans les crimes dont ils sont accusés ainsi que leur relation avec les autres auteurs »[230].

119. Le Procureur ne démontre pas en quoi la remarque de la Chambre de première instance relative à la manière dont les chefs d'accusation avaient été formulés dans l'Acte d'accusation Bagambiki/Imanishimwe a pesé dans le Jugement. Dans la section précédente, la Chambre d'appel a conclu que les griefs du Procureur relatifs aux conclusions de la Chambre de première instance étaient, pour ce qui est de leur incidence sur le Jugement, sans fondement. La Chambre d'appel décline par conséquent de considérer plus avant les arguments avancés par le Procureur sur ce point.

(v) Conclusion sur l'Acte d'accusation Bagambiki/Imanishimwe

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[226] Mémoire d'appel du Procureur, par. 165.
[227] Jugement, par. 528 à 540.
[228] Annexe 4, p. 5, n°10 (Témoin LQ).
[229] Jugement, par. 63.
[230] Mémoire d'appel du Procureur, par. 167.

120. La Chambre d'appel conclut que le Procureur n'est pas parvenu à démontrer que la Chambre de première instance avait versé dans l'erreur en jugeant vicié les paragraphes 3.12, 3.13, 3.14, 3.15 et 3.28 de l'Acte d'accusation Bagambiki/Imanishimwe, pas plus qu'il n'est parvenu à démontrer que les vices identifiés avaient été corrigés. Les arguments du Procureur relatifs à l'Acte d'accusation Bagambiki/Imanishimwe sont par conséquent également rejetés.

5. Conclusions

121. La Chambre d'appel conclut que les arguments du Procureur s'agissant des paragraphes des Actes d'accusation qui n'ont pas fait l'objet d'une analyse factuelle par la Chambre de première instance (ou seulement d'une analyse partielle pour le paragraphe 3.28 de l'Acte d'accusation Bagambiki/Imanishimwe) sont infondés. Le Procureur n'est en effet pas parvenu à démontrer que ces paragraphes n'étaient pas viciés ou avaient été purgés.

122. Plus haut, la Chambre d'appel est parvenue à la conclusion que la Chambre de première instance avait versé dans l'erreur en reconsidérant son jugement sur la forme des Actes d'accusation après la clôture des débats sans donner aux parties l'opportunité d'être entendues[231]. Elle a également conclu que la Chambre de première instance avait versé dans l'erreur en omettant d'examiner si les vices identifiés dans les Actes d'accusation avaient été purgés[232]. À la lumière de ses conclusions sur les autres moyens d'appel, la Chambre considère cependant que ces deux erreurs n'invalident pas les décisions de la Chambre de première instance. Le quatrième motif d'appel du Procureur est par conséquent rejeté dans son intégralité.

123. La Chambre d'appel doit se montrer préoccupée par la démarche du Procureur dans la présente affaire. Elle ne saurait trop rappeler que l'acte d'accusation, seul instrument de mise en accusation, doit exposer la thèse du Procureur de manière circonstanciée. Si, dans certains cas, un acte d'accusation vicié peut être réputé « purgé », la Chambre d'appel réitère qu'il ne peut exister qu'un nombre limité d'affaires qui entrent dans cette catégorie[233]. Dans le cas d'espèce, la Chambre d'appel est troublée par l'ampleur avec laquelle le Procureur cherche à recourir à cette exception. Même si les arguments du Procureur selon lesquels les Actes d'accusation avaient été purgés de leurs vices s'étaient révélés prospères dans chacun des cas, il aurait malgré tout été du devoir de la Chambre d'appel de considérer si l'ampleur des vices identifiés n'aurait pas rendu le procès inéquitable en soi.

E. CONDAMNATION POUR DES FAITS NON VISÉS DANS L'ACTE D'ACCUSATION (1ER MOTIF D'APPEL DE SAMUEL IMANISHIMWE)

124. Dans son premier motif d'appel, Imanishimwe reproche à la Chambre de première instance de l'avoir condamné pour des faits non visés dans l'acte d'accusation et, par là même, d'avoir excédé le cadre de sa saisine[234]. Il soutient que la Chambre de première instance a versé dans l'erreur en le condamnant au titre des chefs d'accusation 7, 10 et 13 pour des faits perpétrés au terrain de football de Gashirabwoba, faits dont l'Acte d'accusation Bagambiki/Imanishimwe ne dit mot[235].

1. L'acte d'accusation était-il entaché de vices ?

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[231] Voir *supra*, par. 55 et 56.
[232] Voir *supra*, par. 65.
[233] Arrêt *Kupreškić et consorts*, par. 114. Voir aussi Arrêt *Ntakirutimana*, par. 125 ; Arrêt *Kvočka et consorts*, par. 33.
[234] Acte d'appel d'Imanishimwe, par. 7 à 12.
[235] Mémoire d'appel d'Imanishimwe, par. 8 à 12.

125. Au soutien de son grief, Imanishimwe rappelle avoir dénoncé dans plusieurs requêtes le caractère vague de l'acte d'accusation[236]. Il prétend que les paragraphes 3.25 et 3.30 de l'Acte d'accusation Bagambiki/Imanishimwe ne l'informaient pas des charges relatives au terrain de football de Gashirabwoba en ce que ni les véritables auteurs, ni le lieu ou la date de perpétration du massacre allégué, ni la nature de son éventuelle implication ou de ses subordonnés n'y sont précisés[237]. S'il concède que le Procureur n'a pas toujours à préciser la date et le lieu de la survenance de certains événements, il soutient que la gravité particulière du massacre survenu à Gashirabwoba exigeait du Procureur ce genre de précision en vertu des articles 17 (4), 19 (3) et 20 (4) (a) du Statut et 47 (B) et (C) du Règlement[238].

126. Le Procureur reconnaît que les charges exposées aux paragraphes 3.25 et 3.30 de l'Acte d'accusation Bagambiki/Imanishimwe ne le sont que dans les grandes lignes et que l'acte d'accusation reste silencieux sur les faits survenus à Gashirabwoba[239]. Il admet même que

> « si le procès ne devait procéder que sur cette base, l'accusé n'aurait rien lui permettant de préparer une bonne défense »[240].

127. La Chambre de première instance a reconnu Imanishimwe coupable des chefs d'accusation de génocide (Chef 7), d'extermination constitutive de crime contre l'humanité (Chef 10) et de violations graves de l'article 3 commun aux Conventions de Genève du 12 août 1949 et du Protocole additionnel II (Chef 13) pour sa responsabilité dans le massacre de réfugiés civils perpétré au terrain de football de Gashirabwoba le 12 avril 1994, ce sur la base des paragraphes 3.25 et 3.30 de l'Acte d'accusation Bagambiki/Imanishimwe[241]. Elle s'est déclarée convaincue au-delà de tout doute raisonnable que, bien qu'il n'ait pas été établi qu'il ait ordonné l'attaque ou y ait été présent, Imanishimwe voyait sa responsabilité pénale engagée au regard de l'article 6 (3) du Statut pour ne pas avoir empêché ses subordonnés d'attaquer les réfugiés[242].

128. Les paragraphes 3.25 et 3.30 se lisent comme suit :

> 3.25 Entre les mois d'avril à juillet 1994, des Tutsis et des Hutus modérés furent arrêtés et amenés au camp militaire de Cyangugu pour y être torturés et exécutés. De plus, durant cette période, des militaires ont participé à plusieurs reprises avec des miliciens du MRND, les *Interahamwe*, à des massacres de la population civile tutsie.
>
> 3.30 À l'époque des événements auxquels se réfère le présent acte d'accusation, les miliciens, les *Interahamwe*, aidés souvent par des militaires, ont participé aux massacres de la population civile tutsie et des opposants politiques hutus de la préfecture de Cyangugu.

129. Dans son Jugement, la Chambre de première instance s'est livrée à un examen minutieux des questions préjudicielles relatives aux actes d'accusation. Dans ce cadre, elle a examiné avec soin les paragraphes 3.25 et 3.30 pour souligner que :

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[236] Mémoire d'appel d'Imanishimwe, par. 15 à 20. Imanishimwe fait référence à : « Exceptions préjudicielles », introduite le 28 janvier 1998 ; « Requête aux fins de requalification des faits – Art. 17 (4) des Statuts et 47 (A) et (B) du Règlement », introduite le 10 février 1998 (et non le 24 septembre 1998 comme indiqué par Imanishimwe).
[237] Mémoire d'appel d'Imanishimwe, par. 24 et 25.
[238] Mémoire d'appel d'Imanishimwe, par. 23 et 30 à 33, se référant aussi au Jugement *Kupreškić et consorts*, par. 725.
[239] Mémoire en réponse du Procureur, par. 37 et 52.
[240] Mémoire en réponse du Procureur, par. 37.
[241] *Cf.* Jugement, par. 688, 689, 744 et 791.
[242] Jugement, par. 694, 749, 750 et 802. La Chambre d'appel remarque que la Chambre de première instance fait aussi référence, aux paragraphes 691, 744 et 794 du Jugement, au fait « qu'Imanishimwe n'a puni aucun militaire pour cette attaque ». La Chambre d'appel considère que cette précision est incidente dans la mesure où, dans ses conclusions juridiques, la Chambre de première instance a décidé de ne tenir Imanishimwe responsable que pour ne pas avoir empêché ses soldats de commettre les crimes.

> Le paragraphe 3.25 ne mentionne aucun fait précis au cours duquel des soldats ont participé avec des miliciens et des *Interahamwe* à des massacres de la population civile tutsie ni aucun autre fait essentiel qui démontrerait la responsabilité d'Imanishimwe pour ces crimes.[243]
>
> … les paragraphes 3.30 et 3.31 ne précisent ni les infractions principales ni le rôle propre que l'accusé aurait joué dans les massacres.[244]

avant de conclure que :

> Pour les raisons qui précèdent, la Chambre conclut que les paragraphes étayant les accusations contre Ntagerura, Bagambiki et Imanishimwe, ainsi que les accusations elles-mêmes, sont inacceptablement vagues. De plus, la Chambre ne relève aucune raison valable fondant le Procureur à exposer les allégations ou les accusations d'une manière aussi générale.[245]

130. La Chambre d'appel réaffirme que le Procureur doit non seulement informer l'accusé de la nature et des motifs des accusations portées contre lui dans l'acte d'accusation mais aussi exposer de façon circonstanciée les faits essentiels qui fondent lesdites accusations. La Chambre d'appel a déjà été amenée à rappeler plus haut les faits essentiels qui doivent être plaidés quand la responsabilité de l'accusé est engagée en vertu de l'article 6 (3) du Statut[246].

131. La Chambre d'appel ne peut que constater que les paragraphes 3.25 et 3.30 de l'Acte d'accusation Bagambiki/Imanishimwe souffrent d'une imprécision manifeste. En formulant des accusations aussi vagues, l'Acte d'accusation Bagambiki/Imanishimwe ne remplit pas la fonction fondamentale qui lui est assignée, celle de fournir à l'accusé une description circonstanciée des accusations portées contre lui afin qu'il puisse préparer sa défense. La Chambre d'appel considère que l'Acte d'accusation Bagambiki/Imanishimwe était entaché de vices pour ce qui est des allégations relatives au terrain de football de Gashirabwoba.

2. Les vices de l'acte d'accusation pouvaient-ils être purgés ?

132. Imanishimwe soutient que l'acte d'accusation étant le seul instrument de saisine du Tribunal, il ne peut être suppléé, complété ou corrigé par la déclaration liminaire ou le mémoire préalable du Procureur, par des déclarations de témoins ou par tout autre document divulgué avant ou pendant le déroulement du procès[247]. Tout en invoquant un certain nombre de décisions du Tribunal et du TPIY[248], ainsi que l'Opinion individuelle et dissidente du Juge Dolenc, Imanishimwe fait valoir qu'un accusé ne peut être condamné pour des accusations non portées dans l'acte d'accusation car cela consisterait pour la Chambre de première instance à excéder les limites de sa saisine, limites fixées par l'acte d'accusation[249]. Il conteste de ce fait le standard juridique énoncé aux paragraphes 67 et 68 du Jugement. Il avance que même s'il existait une possibilité juridique de purger un acte d'accusation de ses vices, le degré d'imprécision affectant l'Acte d'accusation Bagambiki/Imanishimwe pour ce qui est des charges relatives à Gashirabwoba excédait à tel point les limites de l'acceptable que rien n'aurait pu remédier à l'omission du Procureur[250].

133. Le Procureur concède qu'un accusé ne peut se voir reprocher des faits qui n'entrent pas dans le champ des chefs articulés dans l'acte d'accusation. Bien qu'il reconnaisse que les charges exposées aux paragraphes 3.25 et 3.30 de l'Acte d'accusation Bagambiki/Imanishimwe ne sont exposées que

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[243] Jugement, par. 58.
[244] Jugement, par. 62.
[245] Jugement, par. 64 (note de bas de page non reproduite).
[246] Voir *supra*, par. 26.
[247] Mémoire d'appel d'Imanishimwe, par. 35 et 36.
[248] Notamment, Arrêt *Kupreskić et consorts*, par. 92 ; Jugement *Semanza*, par. 61 ; Jugement *Krnojelac,* par. 86 ; *Le Procureur c. Radoslav Brđanin,* affaire n°IT-99-36-T, Décision relative à la requête aux fins d'acquittement introduite en vertu de l'article 98 *bis* du Règlement, 28 novembre 2003, par. 88 ; Jugement *Stakić*, par. 772.
[249] Mémoire d'appel d'Imanishimwe, par. 41 à 44.
[250] Mémoire d'appel d'Imanishimwe, par. 48 à 57.

« dans leurs grandes lignes », le Procureur soutient qu'Imanishimwe défend une interprétation trop rigide des principes applicables à l'articulation des charges[251] et souligne que pour avancer la thèse selon laquelle un acte d'accusation vicié ne peut en aucun cas être purgé après avoir été confirmé, le Juge Dolenc s'écarte, de son propre aveu, du droit applicable[252].

134. Dans son Mémoire en réplique, Imanishimwe soutient qu'en vertu du principe de légalité, et de son corollaire le principe de l'interprétation stricte de la loi pénale, la Chambre de première instance ne pouvait s'affranchir des dispositions qui régissent l'acte d'accusation – à savoir les articles 17, 18, 19 et 20 du Statut du Tribunal et 47 et 50 du Règlement –, lesquelles interdisent à une Chambre de dépasser le cadre de sa saisine[253]. Concernant la jurisprudence *Niyitegeka*, *Ntakirutimana* et *Kvocka et consorts* à laquelle le Procureur se réfère, Imanishimwe soutient qu'elle ne peut être considérée comme une source de droit au terme du principe de légalité puisqu'elle est postérieure au Jugement[254].

135. La Chambre d'appel réitère qu'aucune accusation nouvelle ne peut être introduite en dehors de l'acte d'accusation, seul instrument de saisine du Tribunal. La Chambre de première instance ne dit d'ailleurs pas autre chose aux paragraphes 29, 30 et 66 du Jugement. Pour autant, la Chambre d'appel ne considère pas que l'acte d'accusation ne puisse en aucun cas « être suppléé, complété ou corrigé ». Il est en effet de jurisprudence constante qu'un acte d'accusation vicié en raison de son ambiguïté ou de son imprécision peut, dans certaines circonstances, être purgé si le Procureur fournit en temps voulu à l'accusé des informations claires et cohérentes concernant les faits sur lesquels reposent les accusations portées contre lui[255].

136. Contrairement à ce que soutient Imanishimwe, la Chambre d'appel ne considère pas que le principe selon lequel un acte d'accusation par trop vague ou imprécis puisse être purgé de ses vices déroge aux dispositions statutaires et réglementaires régissant l'acte d'accusation. C'est en procédant à l'interprétation desdites dispositions que la Chambre d'appel du TPIY a pu, pour la première fois dans ces termes, énoncer ce principe. La Chambre d'appel rappelle que le principe de légalité, ou principe *nullum crimen sine lege*, n'empêche pas un tribunal de trancher une question à travers un processus d'interprétation et de clarification du droit applicable ; il ne l'empêche pas non plus de s'appuyer sur certaines décisions antérieures qui renferment une interprétation du sens à donner de certaines dispositions[256]. La Chambre d'appel affirme clairement que lorsqu'elle interprète certains articles du Statut ou du Règlement, elle se borne à préciser l'interprétation correcte à associer à ces dispositions, même si elle n'avait pas été exprimée auparavant dans ces termes. L'argument d'Imanishimwe selon lequel le principe de légalité interdit de considérer la jurisprudence élaborée après le rendu du Jugement de première instance ne peut par conséquent davantage prospérer.

137. La Chambre d'appel ayant dégagé le standard juridique applicable aux actes d'accusation viciés, elle doit à présent reconnaître l'erreur commise par la Chambre de première instance dans l'énoncé de ses propres standards. Si la Chambre de première instance souligne à bon droit qu'il lui était

> « loisible, dans certaines circonstances, de tenir compte des éléments de preuve étayant un paragraphe même si celui-ci est vicié »[257],

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[251] Mémoire en réponse du Procureur, par. 27 et 32.
[252] Mémoire en réponse du Procureur, par. 33 à 36 et par. 38 à 41, se référant à : Arrêt *Niyitegeka*, par. 197 ; Arrêt *Ntakirutimana*, par. 27 ; Arrêt *Kvocka et consorts*, par. 27 à 35. Voir aussi Mémoire en réponse du Procureur, par. 43, invitant à se référer aux paragraphes 115 et suivants de l'Arrêt *Kupreskić et consorts*.
[253] Mémoire en réplique d'Imanishimwe, par. 10 à 29.
[254] Mémoire en réplique d'Imanishimwe, par. 29 à 31, 35 à 37, 65 et 66.
[255] Voir *supra*, par. 29.
[256] *Cf.* Arrêt *Aleksovski*, par. 126 et 127.
[257] Jugement, par. 67, se référant à l'Arrêt *Kupreskić et consorts,* par. 114.

son raisonnement procède d'une lecture erronée de la jurisprudence *Kupreskić* quand, au paragraphe 68, elle conclut qu'elle pourra prendre en considération les éléments de preuve à charge présentés pour voir s'il existe des preuves solides de culpabilité[258]. La Chambre d'appel renvoie à l'analyse qu'elle a pu développer sur ce point lors de l'examen du quatrième motif d'appel du Procureur[259]. La Chambre d'appel concourt avec Imanishimwe quand il affirme que la Chambre de première instance s'est affranchie des dispositions régissant l'acte d'accusation en concluant comme elle l'a fait.

138. En revanche, la Chambre d'appel ne peut souscrire aux conclusions d'Imanishimwe quand ce dernier soutient que, dans les circonstances de l'espèce, il ne pouvait être remédié à l'imprécision de l'acte d'accusation. Les arguments d'Imanishimwe procèdent d'une certaine confusion entre les éléments que doit contenir l'acte d'accusation, c'est à dire accusations proprement dites et faits essentiels qui les fondent. La Chambre de première instance n'a pas conclu que les paragraphes 3.25 et 3.30 de l'Acte d'accusation Bagambiki/Imanishimwe ne formulaient pas d'accusations proprement dites, mais que les accusations contenues dans ces paragraphes étaient « inacceptablement vagues »[260]. Il convient en effet de relever que l'accusation principale, les « massacres de la population civile tutsie », est formulée dans les deux paragraphes en question. Imanishimwe ne démontre pas en quoi la Chambre de première instance aurait commis une erreur en concluant de la sorte. Les événements survenus à Gashirabwoba entrent sans conteste dans le champ de cette accusation, même si cette dernière est formulée en des termes très généraux. La Chambre d'appel remarque par ailleurs que le Procureur précise dans l'acte d'accusation se fonder sur les paragraphes 3.25 et 3.30 pour ce qui est des chefs d'accusation 7, 10 et 13[261]. La Chambre d'appel réaffirme la conclusion de la Chambre de première instance selon laquelle Imanishimwe n'était non pas tenu dans l'ignorance des accusations portées contre lui, mais insuffisamment informé par l'Acte d'accusation Bagambiki/Imanishimwe.

139. Partant, rien en droit ne s'opposait à ce que la Chambre de première instance examine les éléments de preuve étayant cette accusation imprécise, dès lors que le Procureur avait fourni en temps voulu à Imanishimwe des informations claires et cohérentes concernant les faits sur lesquels reposait l'accusation permettant à Imanishimwe de préparer sa défense. La Chambre d'appel a déjà eu l'occasion d'indiquer que ces informations pouvaient, entre autres, et selon les circonstances, être fournies dans le mémoire préalable au procès du Procureur ou dans sa déclaration liminaire[262]. La Chambre d'appel considère qu'il importe avant tout que le procès n'ait pas été rendu inéquitable. Cette condition, la plus capitale de toutes, reste le préalable à toute déclaration de culpabilité. La Chambre va à présent examiner si Imanishimwe avait bien reçu en temps voulu les informations claires et cohérentes concernant les faits sur lesquels reposaient les accusations portées contre lui.

3. Les vices de l'acte d'accusation ont-ils été purgés ?

140. Imanishimwe prétend que la Chambre de première instance a très clairement outrepassé sa saisine en le condamnant pour les crimes perpétrés au terrain de football de Gashirabwoba[263]. Si la Chambre de première instance a souligné qu'il était possible, dans certaines circonstances, de tenir compte d'éléments de preuve étayant un paragraphe vicié de l'acte d'accusation, Imanishimwe allègue que cette dernière n'a pas précisé les circonstances en question dans le Jugement[264] et que cette absence de motivation traduit la partialité de la Chambre de première instance et son intention de le

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[258] Voir *supra*, par. 66 et 67.
[259] Voir *supra*, par. 67.
[260] Voir Jugement, par. 64 lu avec le par. 69.
[261] Acte d'accusation Bagambiki/Imanishimwe, par. 4, p. 9, 10.
[262] Voir, entre autres, Arrêt *Kupreskic et consorts*, par. 117 ; Arrêt *Ntakirutimana*, par. 36 ; Arrêt *Niyitegeka*, par. 219 ; Arrêt *Kordic and Cerkez*, par. 169.
[263] Mémoire d'appel d'Imanishimwe, par. 47.
[264] Mémoire d'appel d'Imanishimwe, par. 53 et 54.

« condamner à tout prix »[265]. Il soutient aussi que, lus dans leur contexte, les passages de l'arrêt *Kupreskić et consorts* cités par la Chambre de première instance[266] mettent en évidence l'erreur commise par cette dernière de retenir sa responsabilité sur le fondement d'allégations non visées dans l'acte d'accusation mais versées de façon imprécise par le Témoin LAC, lequel a comparu trois semaines après le début du procès, soit plus de trois ans après la confirmation de l'Acte d'accusation initial Bagambiki/Imanishimwe[267]. Imanishimwe se plaint aussi de ce que ni l'acte d'accusation, ni le Mémoire préalable du Procureur, ne l'informait de l'intention du Procureur de le poursuivre sur la base de l'article 6 (3) du Statut. Il affirme que le Procureur avait clairement limité le cadre de sa poursuite et, avec lui le cadre de saisine de la Chambre, à l'article 6 (1) du Statut[268]. Après avoir rappelé certains arguments développés par le Juge Dolenc dans son opinion individuelle et dissidente[269], Imanishimwe conclut que l'erreur de la Chambre de première instance lui a causé un grave préjudice qui ne saurait être réparé que par la réformation du Jugement[270].

141. Le Procureur prétend qu'il a été remédié aux omissions de l'acte d'accusation sur les faits survenus à Gashirabwoba par la communication en temps voulu d'informations claires et cohérentes[271]. Le Procureur fait valoir que les détails relatifs aux événements de Gashirabwoba ont été fournis à Imanishimwe dès le 26 novembre 1999 par la communication des déclarations caviardées des Témoins LAC, LAB et LAH[272]. Il soutient avoir également clairement manifesté son intention de prouver l'implication d'Imanishimwe dans le massacre du terrain de football de Gashirabwoba aux paragraphes 2.29 à 2.40 et aux annexes 3 et 5[273] du Mémoire préalable du Procureur, lequel a été déposé deux mois et demi avant le début du procès[274]. Il souligne que lesdits paragraphes informaient très distinctement Imanishimwe du détail des allégations pesant contre lui quant au massacre de Gashirabwoba[275], à savoir : (1) des auteurs des crimes[276] ; (2) du rôle joué par Imanishimwe[277] ; (3) des dates et heures des faits[278] ; (4) du lieu où se sont produits les faits[279] ; (5) de l'identité des militaires[280] ; (6) des actes perpétrés[281] ; (7) de la connaissance qu'Imanishimwe avait des faits[282] ; et (8) du manquement d'Imanishimwe à son obligation d'empêcher ou punir les crimes commis par les

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[265] Mémoire d'appel d'Imanishimwe, par. 56.
[266] Arrêt *Kupreškić et consorts,* par. 122 à 125.
[267] Mémoire d'appel d'Imanishimwe, par. 57 à 61.
[268] Mémoire d'appel d'Imanishimwe, par. 162 et 163, se référant aux paragraphes 2.33 et 2.35 du Mémoire préalable du Procureur. Voir aussi Mémoire d'appel d'Imanishimwe, par. 102.
[269] Voir Opinion du Juge Dolenc, par. 5, 6 et 10.
[270] Mémoire d'appel d'Imanishimwe, par. 61 à 68.
[271] Mémoire en réponse du Procureur, par. 52.
[272] Mémoire en réponse du Procureur, par. 47. Le Procureur précise que les versions non caviardées des déclarations ont été communiquées à Imanishimwe le 31 août 2000.
[273] Le Procureur se réfère plus particulièrement aux résumés des dépositions des Témoins LAC, LAB et LAH contenus dans l'annexe 5 au Mémoire préalable du Procureur, p. 1412, 1413.
[274] Mémoire en réponse du Procureur, par. 43 et 44.
[275] Mémoire en réponse du Procureur, par. 50. Le Procureur ajoute au paragraphe 51 que l'Annexe 5 audit mémoire préalable qui contenait les résumés des témoignages attendus des témoins LAC, LAB et LAH détaillait aussi les allégations en question.
[276] « Des militaires et des *Interahamwe* », Mémoire en réponse du Procureur, par. 50 (a). Le Procureur a précisé lors des audiences d'appel que le paragraphe 2.39 de son Mémoire préalable indiquait en particulier que « les militaires agissaient sous le contrôle d'Imanishimwe. » Voir AT. 7 février 2006, p. 21 (la version française des compte rendus d'audience indiquant les mauvaises références).
[277] A savoir le fait qu'il ait « incité au massacre de civils, en grande majorité des Tutsis », qu'il ait « verbalement encouragé les *Interahamwe* à attaquer et à exterminer les Tutsis », qu'il ait emmené un homme « que l'on n'a plus revu depuis », qu'il soit arrivé à Gashirabwoba avec « un groupe qui comprenait des militaires armés », qu'il ait « ordonné aux Hutus de se séparer des Tutsis », qu'il ait « ordonné aux militaires et aux *Interahamwe* d'encercler le terrain de football », qu'il ait « donné un ordre direct aux militaires d'ouvrir le feu sur la foule », Mémoire en réponse du Procureur, par. 50 (b).
[278] Lundi 11 avril et matinée du mardi 12 avril 1994, Mémoire en réponse du Procureur, par. 50 (c).
[279] Terrain de football de Gashirabwoba, Commune de Gisuma, Mémoire en réponse du Procureur, par. 50 (d).
[280] Ceux sous sa « supervision directe », Mémoire en réponse du Procureur, par. 50 (e).
[281] Mémoire en réponse du Procureur, par. 50 (f).
[282] Mémoire en réponse du Procureur, par. 50 (g), arguant du fait qu'Imanishimwe a reconnu qu'il était au courant du massacre de Gashirabwoba (Samuel Imanishimwe, CRA du 22 janvier 2003, p. 41).

militaires et les *Interahamwe*[283]. Le Procureur conclut qu'il ressort de la façon dont Imanishimwe a abordé et mené le procès que ce dernier avait connaissance de la nature exacte des allégations portées contre lui pour les actes perpétrés au terrain de football de Gashirabwoba en temps voulu et que ce dernier n'a par conséquent pas subi de préjudice dans la préparation de sa défense[284].

142. En réplique, Imanishimwe fait valoir que la défaillance du Procureur n'a pas été corrigée par le Mémoire préalable du Procureur, ni même par la communication des déclarations des Témoins LAB, LAC et LAH. Il affirme que rien dans le Mémoire préalable du Procureur n'indiquait que le Procureur entendait le poursuivre en sa qualité de supérieur hiérarchique pour des faits commis à Gashirabwoba par ses subordonnées. Il soutient à ce titre que les paragraphes 1.36 à 1.40 auxquels se réfère le Procureur font état de son implication personnelle directe dans le massacre, sans indication aucune du fait qu'il aurait à répondre des actes commis par ses subordonnés en sa qualité de supérieur hiérarchique. Les déclarations des Témoins LAB, LAC et LAH sont – prétend-il – tout aussi silencieuses sur ce point[285]. Imanishimwe argue qu'il ne s'est en conséquence défendu que des allégations concernant son implication personnelle dans le massacre au sens de l'article 6 (1) du Statut[286]. En réponse à l'argument du Procureur sur son absence d'objection, il précise s'être élevé contre les vices de l'acte d'accusation aux moments appropriés, à savoir « *in limine litis* » par le dépôt de deux requêtes datées des 28 janvier et 17 février 1998[287] et « à la fin du procès » dans ses conclusions écrites et plaidoiries orales[288]. Enfin, Imanishimwe relève que les versions non caviardées des déclarations des Témoins LAB, LAC et LAH ne lui ont été communiquées que le 31 août 2000, deux semaines seulement avant le procès[289]. Il réaffirme alors ne pas avoir été

> « dans les conditions de préparer sa défense par rapport aux agissements qu'auraient eus, le 12 avril 1994, les militaires qui étaient sous sa responsabilité »[290].

143. Dans le chapitre du Jugement consacré aux questions préjudicielles relatives aux actes d'accusation, la Chambre de première instance énonce les principes qu'elle considère applicables aux actes d'accusation[291]. La Chambre d'appel a déjà conclu que la Chambre de première instance avait commis un certain nombre d'erreurs dans son énoncé juridique. La Chambre d'appel remarque que, par voie de conséquence, la Chambre de première instance a également versé dans l'erreur dans son application du droit aux faits. En effet, bien que la Chambre de première instance ait conclu à l'imprécision de l'acte d'accusation pour ce qui est des allégations relatives à Gashirabwoba, elle s'est autorisée à tirer des conclusions factuelles des éléments de preuve devant elle sans s'assurer au préalable qu'Imanishimwe avait bien reçu en temps voulu les informations claires et cohérentes concernant les faits sur lesquels reposaient les allégations en question. La Chambre de première instance ne montre à aucun moment qu'elle s'inquiète de ce que l'accusé ait bien été informé des faits essentiels pour pouvoir se défendre des accusations portées contre lui pour les faits perpétrés à Gashirabwoba, alors même qu'elle s'était engagée à examiner « dans quelle mesure l'absence de notification et l'ambiguïté ont affecté les preuves »[292]. Elle parvient au terme de son analyse et tire conclusions factuelles et juridiques pour ces événements sans s'acquitter de son obligation de vérifier que le procès n'ait pas été rendu inéquitable par l'imprécision et l'ambiguïté « inacceptables » de

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[283] Mémoire en réponse du Procureur, par. 50 (h).
[284] Mémoire en réponse du Procureur, par. 53 et 60 à 62.
[285] Mémoire en réplique d'Imanishimwe, par. 51 à 59, 65 et 66.
[286] Mémoire en réplique d'Imanishimwe, par. 60.
[287] Imanishimwe fait référence à : « Exceptions préjudicielles », introduite le 28 janvier 1998 ; «Requête aux fins de requalification des faits – Art. 17 (4) des Statuts et 47 (A) et (B) du Règlement », introduite le 10 février 1998 (et non le 24 septembre 1998 comme indiqué par Imanishimwe).
[288] Mémoire en réplique d'Imanishimwe, par. 60 et 61.
[289] Mémoire en réplique d'Imanishimwe, par. 64.
[290] Mémoire en réplique d'Imanishimwe, par. 67.
[291] Voir Jugement, par. 29 à 39 et 65 à 68.
[292] Jugement, par. 68.

l'acte d'accusation[293]. La Chambre d'appel considère qu'il s'agit d'une erreur de droit qui découle directement de l'application de critères juridiques erronés.

144. S'agissant de l'accusation de partialité de la Chambre de première instance, la Chambre d'appel rappelle qu'elle ne saurait se contenter d'allégations générales ou abstraites, non étayées ni approfondies, pour réfuter la présomption d'impartialité dont bénéficient les juges du Tribunal[294]. En l'espèce, la Chambre d'appel relève qu'Imanishimwe se contente de formuler son grief sans l'étayer d'aucune façon. Le simple défaut de motivation allégué par Imanishimwe ne saurait ici emporter démonstration de la partialité des juges composant la Chambre de première instance.

145. Afin de déterminer si l'erreur de la Chambre de première instance invalide sa décision de condamner Imanishimwe pour les crimes perpétrés au terrain de football de Gashirabwoba, la Chambre d'appel va devoir se demander si l'Acte d'accusation Bagambiki/Imanishimwe a été purgé de ses vices. En d'autres termes, après avoir corrigé l'erreur de droit en énonçant les critères qui conviennent, la Chambre d'appel va à présent appliquer ces critères juridiques aux circonstances d'espèce et déterminer si le procès n'a pas été rendu inéquitable.

146. La Chambre d'appel ne peut confirmer les déclarations de culpabilité prononcées à l'encontre d'Imanishimwe pour le massacre de Gashirabwoba sur la base des paragraphes 3.25 et 3.30 de l'Acte d'accusation Bagambiki/Imanishimwe que si elle est convaincue que le Procureur a fourni en temps voulu à Imanishimwe des informations claires et cohérentes concernant les faits sur lesquels reposent l'accusation, permettant de ce fait à Imanishimwe de préparer sa défense.

Charge de la preuve

147. Avant tout autre considération, il est nécessaire pour la Chambre d'appel de déterminer à qui incombe la charge de la preuve. La Chambre d'appel rappelle que lorsqu'il s'avère que l'acte d'accusation est défectueux, il incombe à l'accusé qui n'a soulevé aucune exception à cet égard en première instance de prouver en appel que sa capacité à préparer sa défense en a sensiblement pâti. En revanche, lorsque l'accusé a soulevé une exception en première instance, il incombe au Procureur de prouver en appel que sa capacité à préparer sa défense n'a pas été sensiblement compromise[295]. En l'espèce, la Chambre d'appel note que, lors de la phase préalable au procès, Imanishimwe a déposé, en vertu de l'article 72 (A) (ii) du Règlement, deux requêtes distinctes en exceptions préjudicielles fondées sur les vices de forme de l'Acte d'accusation initial Bagambiki/Imanishimwe. Dans la requête déposée le 29 janvier 1998, Imanishimwe dénonçait l'absence « d'éléments de preuve suffisants permettant d'asseoir l'accusation » et l'absence de « relation concise des faits qui sont reprochés à l'accusé »[296]. Dans celle déposée le 24 mars 1998, Imanishimwe demandait le retrait de l'acte d'accusation au motif qu'il ne l'informait pas de la nature exacte et des motifs de l'accusation portée contre lui[297]. Imanishimwe réitérait ses griefs contre l'imprécision de l'acte d'accusation dans ses Dernières conclusions écrites et ses plaidoiries orales finales, et ce dénonçant spécifiquement l'introduction des charges relatives à Gashirabwoba[298]. La Chambre d'appel constate donc qu'Imanishimwe n'excipe pas de l'existence de vices entachant l'acte d'accusation pour la première fois en appel. C'est par conséquent au Procureur qu'incombe la charge de prouver que la capacité

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[293] Voir aussi *supra*, par. 65.
[294] Voir Arrêt *Rutaganda*, par. 43, se référant à l'Arrêt *Akayesu*, par. 92 et 100.
[295] Voir *supra*, par. 31.
[296] *Le Procureur c. Emmanuel Bagambiki, Samuel Imanishimwe et Yussuf Munyakazi*, affaire n°ICTR-97-36-I, Exceptions préjudicielles, 29 janvier 1998, p. 4.
[297] *Le Procureur c. Emmanuel Bagambiki, Samuel Imanishimwe et Yussuf Munyakazi*, affaire n°ICTR-97-36-I, Requête aux fins de requalification des faits, 17 février 1998, p. 5.
[298] Dernières conclusions écrites d'Imanishimwe, p. 66 à 69 pour ce qui est des paragraphes 3.25 et 3.30 de l'Acte d'accusation Bagambiki/Imanishimwe. Voir aussi, Dernières conclusions orales d'Imanishimwe, CRA du 15 août 2003, p. 13, 57, 58, sur Gashirabwoba spécifiquement.

d'Imanishimwe à préparer sa défense concernant les allégations relatives à Gashirabwoba n'a pas été sensiblement compromise par le manque d'information. Autrement dit, il incombe au Procureur de prouver que le procès n'a pas été rendu inéquitable.

Communication des faits essentiels : lieu, date, identité des auteurs du massacre

148. Dans ses écritures, le Procureur prétend avoir communiqué à Imanishimwe le détail des faits essentiels étayant l'accusation formulée aux paragraphes 3.25 et 3.30 dès le 26 novembre 1999. À cette date, le Procureur déposait les déclarations caviardées des Témoins LAC, LAB et LAH, déclarations qui, selon le Procureur, constituent « les sources des précisions relatives aux faits survenus à Gashirabwoba ». La Chambre d'appel ne considère pas que la simple communication de la copie des déclarations de témoins que le Procureur entendait appeler à la barre, imposée par l'article 66 (A) (ii) du Règlement, suffisait à procurer à Imanishimwe les informations de nature à purger les vices de l'acte d'accusation[299].

149. La Chambre d'appel reconnaît néanmoins que le Procureur faisait formellement état de son intention de poursuivre Imanishimwe pour des faits perpétrés au terrain de football de Gashirabwoba dans son mémoire préalable au procès préliminaire déposé le 24 mai 2000[300]. Cette intention est confirmée dans le Mémoire préalable du Procureur déposé quelques mois plus tard. Dans ce dernier, le Procureur indique clairement mettre en cause la participation d'Imanishimwe dans la tuerie perpétrée au terrain de football de Gashirabwoba le, ou vers le, mardi 12 avril 1994[301]. Le Procureur donne corps à son accusation formulée aux paragraphes 3.25 et 3.30 en spécifiant date et lieu précis d'un des massacres de civils tutsis invoqués. Les informations relatives aux exactions commises, comme celles relatives aux auteurs directs, sont détaillées aux paragraphes 2.33 à 2.40 du Mémoire préalable. Il y est également précisé au paragraphe 2.39 que des militaires dépendant du commandement direct d'Imanishimwe ont pris part aux exactions.

150. Il ressort de ces éléments que le Procureur a bien fourni à Imanishimwe des informations claires et cohérentes sur les lieux et dates du massacre de réfugiés tutsis, ainsi que sur l'identité de ses auteurs directs. La Chambre d'appel réserve néanmoins à un stade ultérieur de l'analyse ses conclusions sur la question de savoir si la communication a été faite en temps voulu.

Comportement criminel imputé à Samuel Imanishimwe

151. S'agissant du rôle joué par Imanishimwe dans la commission des crimes, la Chambre d'appel constate que les paragraphes 2.31 à 2.40 du Mémoire préalable du Procureur détaillent avec clarté l'implication personnelle directe d'Imanishimwe dans la tuerie perpétrée le 12 avril 1994 au terrain de football de Gashirabwoba[302]. Le Procureur allègue de la part d'Imanishimwe tant des actes concrets d'incitation, d'encouragement et d'assistance que la formulation d'ordres criminels.

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[299] Voir Arrêt *Ntakirutimana*, par. 27, citant *Le Procureur c. Radoslav Brđanin et Momir Talić*, affaire n°IT-99-36-PT, Décision relative à la forme du nouvel acte d'accusation modifié à la requête de l'Accusation aux fins de modification dudit acte, 26 juin 2001, par. 62.

[300] *The Prosecutor's Preliminary Pre-Trial Brief*, déposé le 24 mai 2000, par. 1.29 à 1.40.

[301] Mémoire préalable du Procureur, par. 2.29.

[302] Les passages pertinents du Mémoire préalable du Procureur se lisent comme suit :

2.31. Imanishimwe encouraged with words the interahamwe to attack and exterminate the Tutsi causing them and others to flee to the football field.

2.33. It is alleged that immediately prior to the attack, Emmanuel Bagambiki and Samuel Imanishimwe brought grenades by vehicle to Gisuma commune, which were passed to Ananie Kanyamuhanda for distribution to the *interahamwe*.

2.36. On or around 12 April 1994, early in the morning, the interahamwe attacked the refugees who again successfully resisted. Later that same morning, Emmanuel Bagambiki and Samuel Imanishimwe came to the football field with others, including a group of armed soldiers.

152. Imanishimwe relève toutefois qu'il n'a non pas été condamné au titre de sa responsabilité pénale individuelle directe en vertu de l'article 6 (1) du Statut, mais au titre de sa responsabilité de supérieur hiérarchique au sens de l'article 6 (3) du Statut pour ne pas avoir empêché ses subordonnés d'attaquer les réfugiés. La Chambre d'appel note en effet que la Chambre de première instance a conclu qu'il n'était pas établi qu'Imanishimwe ait ordonné l'attaque, ni qu'il y ait été présent[303].

Forme de responsabilité retenue à charge de Samuel Imanishimwe

153. Sans qu'il soit besoin d'examiner plus avant la question de savoir si les informations fournies à Imanishimwe en dehors de l'acte d'accusation étaient de nature à combler la défaillance du Procureur, la Chambre d'appel est d'avis que le motif d'appel d'Imanishimwe peut être accueilli à ce stade. À la lecture des informations contradictoires contenues dans le Mémoire préalable du Procureur, mais aussi dans son Réquisitoire écrit, la Chambre d'appel considère que le Procureur n'a pas soutenu l'accusation selon laquelle Imanishimwe engageait sa responsabilité de supérieur hiérarchique sur la base de l'article 6 (3) pour les crimes décrits aux paragraphes 3.25 et 3.30 de l'Acte d'accusation Bagambiki/Imanishimwe, responsabilité au titre de laquelle il a été déclaré coupable.

154. Le Procureur expose son intention de plaider la responsabilité d'Imanishimwe pour les chefs 7, 10 et 13 sous l'angle de l'article 6 (3) du Statut dans l'Acte d'accusation Bagambiki/Imanishimwe[304]. Pour autant, une lecture attentive des écritures postérieures du Procureur révèle un certain nombre de contradictions et d'incohérences quant à la mise en cause de la responsabilité d'Imanishimwe en sa qualité de supérieur hiérarchique pour lesdits chefs.

155. Les premières de ces incohérences sont contenues dans le Mémoire préalable du Procureur : alors que dans les titres des paragraphes 3.33 et 3.35 consacrés aux chefs 7 et 10 portés contre Imanishimwe le Procureur réitère son intention d'invoquer les articles 6 (1) et 6 (3) du Statut – ce qui correspond à l'accusation telle que portée dans l'acte d'accusation –, le Procureur précise sans aucune ambiguïté dans le corps des paragraphes que la responsabilité de l'accusé est envisagée sous l'angle du seul article 6 (1) :

> 3.33 Genocide 6 (1) and 6 (3)
>
> The accused is charged in count seven of the indictment with genocide pursuant to Article 2 (3) (a) of the Statute of the Tribunal by virtue of his responsibility pursuant to Article 6 (1) of the Statute, for killing, causing of serious bodily or mental harm and deliberate infliction of conditions calculated to bring about the destruction of Tutsis in whole or in part, that occurred in the area of Cyangugu prefecture, Rwanda in April, May and June 1994, and outlined in the indictment. […][305]
>
> 3.35 Crimes against Humanity (Murder, Extermination, Imprisonment and Torture), 6 (1) and 6 (3)

2.38. Samuel Imanishimwe then ordered the Hutus on the field to separate from the Tutsis and that the Hutus should leave the field, which many did; he then ordered the soldiers and the *interahamwe* to encircle the field.
2.39. Soldiers under the direct command of Samuel Imanishimwe began firing at the crowd. It is alleged that an automatic firing weapon, positioned on the football field, was able to spray the crowd with bullets. It is alleged that the soldiers and interahamwe threw grenades into the crowd at the same time.
2.40 After the shooting stopped, many people lay dead or fatally wounded. The *Interahamwe* finished off any survivors by stabbing with knives, hacking with machetes or bludgeoning to death with clubs. The *interahamwe* and soldiers looted the belongings of the dead.

[303] Voir Jugement, par. 653 et 691.
[304] Acte d'accusation Bagambiki/Imanishimwe, par. 4, p. 7 et chefs d'accusation 7, 10 et 13.
[305] Mémoire préalable du Procureur, par. 3.33 (non souligné dans l'original). Voir aussi *The Prosecutor's Preliminary Pre-Trial Brief*, déposé le 24 mai 2000, par. 2.33 (versions françaises non disponibles).

> At counts nine, ten, eleven and twelve of the indictment, Samuel Imanishimwe is charged with crimes against humanity, of murdering, extermination and imprisoning of civilians, by virtue of his responsibility pursuant to Article 6 (1) of the Statute in and around Cyangugu *préfecture* in April, May and June 1994 as outlined in the indictment.
>
> In support of the said charge the Prosecutor will prove beyond reasonable doubt that:
>
> a. The accused instigated, ordered committed, aided and abetted in the extermination of thousands of Tutsi civilians in Cyangugu *préfecture* in April, May and June 1994 as outlined in the indictment. […][306]

Le Procureur ne précise pas dans son Mémoire préalable le mode de responsabilité allégué pour le chef de violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II (Chef 13)[307].

156. S'agissant plus précisément des allégations relatives à Gashirabwoba, la Chambre d'appel constate que, pour seule indication d'une éventuelle mise en cause de la responsabilité d'Imanishimwe en sa qualité de supérieur hiérarchique, le Procureur indique la participation de « *soldiers under the direct command of Samuel Imanishimwe* »[308]. Cette information est néanmoins communiquée au milieu d'éléments factuels désignant la participation directe d'Imanishimwe au massacre[309]. La Chambre d'appel considère par ailleurs que l'information selon laquelle des militaires sous le commandement d'Imanishimwe auraient participé au massacre n'est pas, en soi, contradictoire avec la thèse d'une participation directe qui semble, ici, être celle du Procureur[310].

157. Les mêmes contradictions sont présentes dans le Réquisitoire écrit du Procureur[311]. Alors qu'il y indique à plusieurs reprises que Samuel Imanishimwe est poursuivi pour les chefs 7, 10 et 13 sur la base des articles 6 (1) et 6 (3) du Statut[312], le Procureur fait systématiquement référence à la participation directe d'Imanishimwe dans la commission des crimes quand il en vient aux faits matériels étayant ces trois chefs d'accusations[313]. Les faits susceptibles de fonder une condamnation sous 6 (3) sont systématiquement passés sous silence.

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[306] Mémoire préalable du Procureur, par. 3.35 (non souligné dans l'original). Voir aussi *The Prosecutor's Preliminary Pre-Trial Brief*, déposé le 24 mai 2000, par. 2.35 (versions françaises non disponibles).
[307] Mémoire préalable du Procureur, par. 3.36.
[308] Mémoire préalable du Procureur, par. 2.39.
[309] Voir Mémoire préalable du Procureur, par. 2.31 à 2.40.
[310] La Chambre d'appel rappelle à cet égard que l'engagement de la responsabilité d'un accusé pour « avoir ordonné » les crimes exige la preuve d'un certain lien d'autorité entre les auteurs directs et l'accusé. Voir Arrêt *Semanza*, par. 361.
[311] La Chambre d'appel constate que le réquisitoire orale du Procureur n'évoque pas la question du mode de responsabilité sur la base duquel Imanishimwe est poursuivi pour Gashirabwoba.
[312] Réquisitoire du Procureur, par. 39, 1132, 1302, 1596 et 1741.
[313] *The Prosecutor's Closing Brief Filed under Rule 86 (B) and (C) of the Rules of Procedure and Evidence*, 26 Juin 2003, par. 1146 à 1151. Les passages les plus pertinents se lisent comme suit (non souligné dans l'original :
1146. Genocide (counts 1 and 7)
1147. Evidentiary basis establishing the Crime of Genocide:
1148. […] Specifically, the following supporting evidence establishes that [Bagambiki and Imanishimwe] committed genocide by directly participating in massacres and attacks with the specific intent to destroy, in whole or in part, ethnic Tutsi.
1149. Direct Participation in Massacres and Attacks: […]
1151. […] The Accused Emmanuel Bagambiki and Samuel Imanishimwe participated directly in these mass killings, gave orders to others to kill Tutsis, provided ammunition to people to be used to kill Tutsis, and otherwise encouraged and facilitated the massacres and attacks against Tutsis in Cyangugu préfecture.
La Chambre décide ici de citer les paragraphes dans leur langue originale, la traduction offerte en français ne reflétant pas avec la justesse nécessaire la version anglaise. Voir aussi, par. 1313 et 1316. Pour le massacre de Gashirabwoba spécifiquement, voir Réquisitoire du Procureur, par. 1172. Pour le chef 10, voir Réquisitoire du Procureur, par. 1604. Pour le chef 13, voir Réquisitoire du Procureur, par. 1758, 1769, 1770 et 1772.

158. Au vu de ces éléments, la Chambre d'appel considère que le Procureur n'a pas, pour la tuerie de Gashirabwoba, soutenu ses poursuites en vertu de l'article 6 (3) du Statut, se concentrant uniquement sur une responsabilité pénale fondée sur l'article 6 (1) du Statut.

159. La Chambre d'appel est d'avis que les raisons qui précèdent suffisent à considérer que la Chambre de première instance ne pouvait prononcer de déclaration de culpabilité sur la base de l'article 6 (3) du Statut pour les chefs 7, 10 et 13. Sur cette seule base, la Chambre d'appel considère pouvoir accueillir le motif d'appel et annuler les déclarations de culpabilité prononcées contre Imanishimwe sur la base de l'article 6 (3) du Statut pour les événements de Gashirabwoba.

160. En tout état de cause, la Chambre d'appel tient à préciser que, ayant examiné la question de savoir si Imanishimwe avait correctement été informé des faits essentiels fondant une accusation portée sur la base de l'article 6 (3) pour le massacre de Gashirabwoba, elle considère que tel n'est pas le cas. L'analyse ci-dessous est offerte à cet effet.

(ii) Communication des faits essentiels fondant une accusation portée sous l'article 6 (3)

161. Si le Procureur plaide la responsabilité de Samuel Imanishimwe sur le fondement de l'article 6 (3) dans l'acte d'accusation, il y omet la plupart des faits essentiels liés à ce mode de responsabilité, et ce d'autant plus pour Gashirabwoba qui est tout simplement passé sous silence. La Chambre d'appel rappelle que les faits essentiels suivants doivent être exposés dans l'acte d'accusation lorsqu'un accusé est mis en cause sur la base de l'article 6 (3) du Statut : (1) le fait que l'accusé était le supérieur hiérarchique de certaines personnes suffisamment identifiées sur lesquelles il exerçait un contrôle effectif – en ce sens qu'il avait la capacité matérielle d'empêcher ou de punir leur conduite criminelle – et dont les actes engageraient sa responsabilité ; (2) les actes criminels commis par les personnes dont il aurait eu la responsabilité ; (3) le comportement de l'accusé qui permet de conclure qu'il savait ou avait des raisons de savoir que ses subordonnés s'apprêtaient à commettre les crimes considérés ou les avaient commis ; et (4) le comportement de l'accusé qui permet de conclure qu'il n'a pas pris les mesures nécessaires et raisonnables pour empêcher que de tels actes ne soient commis ou en punir les auteurs[314].

162. S'agissant tout d'abord de l'exercice par Imanishimwe d'un contrôle effectif sur des subordonnés, Imanishimwe ne pouvait ignorer que le Procureur entendait prouver qu'il exerçait l'autorité de fait et de droit sur les militaires du camp militaire de Cyangugu en sa qualité de Commandant[315]. En ce qui concerne plus précisément le massacre de Gashirabwoba, la mention au paragraphe 2.39 du Mémoire préalable du Procureur de militaires « *under the direct command of Samuel Imanishimwe* » achève de convaincre la Chambre d'appel qu'Imanishimwe était informé de ce fait essentiel. Il en va de même pour ce qui est de la connaissance des actes criminels prétendumment commis par ses subordonnées[316].

163. S'agissant ensuite du comportement de l'accusé qui permet de conclure qu'il savait ou avait des raisons de savoir que ses subordonnés s'apprêtaient à commettre des crimes[317], la Chambre d'appel note que, dans son Mémoire préalable, le Procureur passe sous silence ce fait essentiel. Cette omission s'explique aisément par le fait que le Procureur fait état de la présence physique et de la contribution substantielle directe de l'accusé le jour de la tuerie : la connaissance de l'accusé se déduit

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[314] Voir *supra*, par. 26.
[315] Voir Acte d'accusation Bagambiki/Imanishimwe, par. 3.10. Voir aussi Mémoire préalable du Procureur, par. 2.3.
[316] Voir Mémoire préalable du Procureur, par. 2.39.
[317] La Chambre d'appel décide ici de ne pas rechercher si Imanishimwe avait bien été informé du fait que le Procureur chercherait à prouver qu'il savait ou avait des raisons de savoir que ses subordonnés avaient commis des crimes puisque Imanishimwe a été déclaré coupable de ne pas avoir empêché les crimes, ce qui exige une connaissance antérieure à la commission des crimes.

implicitement mais nécessairement du comportement criminel qu'il lui est reproché. À aucun moment n'est envisagée l'hypothèse de l'absence de Samuel Imanishimwe sur les lieux de la tuerie. Les résumés de dépositions des Témoins LAH, LAB et LAC annexés au Mémoire préalable du Procureur ne sont pas plus instructifs à cet égard : le résumé relatif au Témoin LAB fait état de la présence d'Imanishimwe lors de l'attaque sans plus de détail[318], tandis que celui relatif au Témoin LAC est silencieux sur la connaissance qu'Imanishimwe aurait pu avoir de l'attaque[319]. Le résumé de la déposition du Témoin LAH évoque quant à lui le fait que le témoin faisait « un rapport quotidien à Bagambiki et Imanishimwe sur l'état d'avancement des tueries »[320]. Cette indication, non spécifique à l'attaque de Gashirabwoba pour laquelle LAH mentionne la présence d'Imanishimwe, pèse cependant peu de poids face à l'abondance des informations données par le Procureur quant au fait qu'il tenterait de prouver qu'Imanishimwe était présent sur les lieux, allant jusqu'à ordonner la tuerie.

164. La Chambre d'appel ne peut conclure que le Procureur ait donné une information claire et cohérente à Imanishimwe en la matière. Il est d'ailleurs intéressant de noter que, dans son Mémoire en réponse, le Procureur se contente d'alléguer qu'Imanishimwe avait connaissance des faits en s'appuyant sur la concession faite par l'accusé lui-même le 22 janvier 2003 à la Chambre de première instance[321], alors que rien dans le passage du compte rendu d'audience pertinent ne porte à croire qu'Imanishimwe ait été informé du comportement par lequel le Procureur entendait prouver qu'il savait ou avait des raisons de savoir que ses subordonnés s'apprêtaient à attaquer les personnes réfugiées à Gashirabwoba[322]. Imanishimwe se contente de préciser qu'il savait que des massacres avaient eu lieu au terrain de football de Gashirabwoba. La Chambre d'appel note que l'accusé admet avoir su qu'un massacre avait été perpétré, pas avoir su qu'un massacre allait être perpétré, et qu'il n'est à aucun moment question de l'implication de ses subordonnés.

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[318] Annexe 4, p. 1393-1392 (pagination du Greffe) :
[Le témoin LAB déclarera que] en janvier 1994, Imanishimwe et Bagambiki sont venus à l'usine à thé de Shagasha et y ont recruté une trentaine de jeunes gens pour un entraînement militaire, qui a duré jusqu'en avril 1994 […] ; que pendant une semaine Imanishimwe leur a fait faire des exercices de tirs dans la forêt en utilisant des balles réelles tandis que Bagambiki surveillait l'entraînement et informait les recrues qu'elles étaient formées pour combattre les envahisseurs tutsis et leurs complices ; que le 7 avril, Imanishimwe et Bagambiki ont apporté 150 gourdins et 300 machettes qui ont été distribués aux *Interahamwe* ; que quelques jours plus tard, les *Interahamwe* ont lancé une attaque contre les réfugiés à Gashirabwoba, que l'attaque a été repoussée à l'aide de pierres et de briques ; que plus tard dans la journée Imanishimwe et Bagambiki sont arrivés avec un renfort de militaires pour l'assaut final sur Gashirabwoba […]
[319] Annexe 4, p. 1393 (pagination du Greffe) :
[Le témoin LAC déclarera qu'il] avait fui vers le terrain de football de Gashirabwoba où il est arrivé vers 13 heures en même temps que d'autres réfugiés tutsis; qu'environ une heure plus tard, Imanishimwe et Bagambiki sont arrivés avec une liste et que Bagambiki a donné lecture de deux noms […] ; que le 12 avril, les réfugiés ont été attaqués par les *Interahamwe* vers 8 heures, mais qu'ils ont repoussé cette attaque et également une autre 2 heures plus tard ; que Bagambiki est venu 30 minutes environ après la deuxième attaque et a dit qu'il allait envoyer des militaires pour les garder ; qu'environ 30 minutes après, des militaires sont venus avec des *Interahamwe* et ont commencé à tirer sur la foule avec des fusils et à lancer des grenades ; que lorsque la fusillade s'est arrêtée, après plusieurs morts et blessés, les *Interahamwe* sont intervenus pour achever les blessés à la machette et dépouiller les morts de leurs objets de valeur […]
[320] Annexe 4, p. 1394 (pagination du Greffe) :
[Le témoin LAH déclarera que le matin du 7 avril 1994] Bagambiki et Imanishimwe ont distribué des grenades qui ont été utilisées contre les Tutsis lors de l'attaque à Gashirabwoba ; que Imanishimwe est venu à Gashirabwoba avec un renfort d'environ 30 militaires et des fusils qui ont été distribués aux *Interahamwe* avant le début de l'assaut ; que le témoin a également lancé des attaques quotidiennes contre les Tutsis et a fait un rapport quotidien à Bagambiki et Imanishimwe sur l'état d'avancement des tueries.
[321] Mémoire en réponse du Procureur, par. 50 (g), se référant à CRA du 22 janvier 2003, p. 41, lignes 4 à 9.
[322] Samuel Imanishimwe, CRA du 22 janvier 2003, p. 41:
M. LE PRESIDENT : Monsieur Imanishimwe, avant que je n'oublie, parce que je prends des notes, et avant que je n'oublie, peut-être que vous pourriez m'aider avec quelque chose. Je ne sais pas si je prononce bien les mots, mais si je me trompe, excusez-moi. Gashirabobwa… le terrain de football de Gashirabobwa, étiez-vous au courant qu'il y a eu des massacres à cet endroit ?
R. Oui, j'ai appris qu'il y a eu des massacres.
M. LE PRESIDENT : Très bien. Merci.

165. S'agissant enfin du comportement de l'accusé qui permettrait de conclure qu'il n'a pas pris les mesures nécessaires et raisonnables pour empêcher que le massacre ne soit commis[323], la Chambre d'appel remarque que le Mémoire préalable du Procureur n'en dit mot. Le Procureur n'attire l'attention de la Chambre sur aucun élément particulier – passage de son Mémoire préalable, de sa Déclaration liminaire, résumés de déclarations de témoins – susceptible de démontrer qu'il avait fourni à Imanishimwe une information claire et cohérente sur ce fait essentiel. Au paragraphe 50 (h) de son Mémoire en réponse, le Procureur ne fait que détailler des exactions commises par « les militaires et les *interahamwe* »[324], telles qu'énumérées dans le Mémoire préalable, sans montrer en quoi ces éléments auraient pu informer Imanishimwe des raisons pour lesquelles il était accusé d'avoir failli à son obligation d'empêcher les crimes commis le 12 avril 1994 au terrain de football de Gashirabwoba. La Chambre d'appel rappelle que c'est au Procureur qu'incombait la charge de prouver que l'acte d'accusation avait été purgé de ses vices, en ce qu'Imanishimwe avait été informé des détails nécessaires fondant les accusations portées contre lui[325].

166. La Chambre d'appel constate qu'un certain nombre d'informations claires et cohérentes sur l'accusation relative au massacre de Gashirabwoba ont été fournies par le Procureur à Imanishimwe dans son Mémoire préalable, document déposé deux mois avant le début du procès. La Chambre d'appel estime cependant qu'il ne lui est pas nécessaire de se prononcer sur la question de savoir si lesdites informations ont été communiquées en temps voulu – c'est-à-dire suffisamment tôt pour qu'Imanishimwe soit à même de préparer sa défense – puisqu'elle est d'avis que toutes les informations nécessaires n'ont pas été communiquées[326]. Le comportement criminel d'Imanishimwe décrit de façon suffisamment circonstanciée par le Procureur dans son Mémoire préliminaire se limite à la participation directe d'Imanishimwe dans le massacre. Les références faites à l'article 6 (3) de façon générale et au fait que certaines personnes « *under his direct command* » étaient impliquées dans les crimes ne pourraient suffire, pour considérer qu'Imanishimwe était informé de façon claire et cohérente des poursuites engagées contre lui au titre de l'article 6 (3) du Statut pour les actes commis par ses subordonnés à Gashirabwoba.

167. La Chambre d'appel reconnaît qu'avant la présentation de l'ensemble des moyens de preuve, le Procureur ne peut déterminer avec certitude laquelle des accusations portées contre l'accusé sera prouvée. Le cumul de qualifications est de ce fait autorisé[327]. Le Procureur ne peut cependant pas se soustraire à son obligation d'étayer chacune des accusations s'il entend effectivement plaider plusieurs modes de responsabilité, à la fois ou alternativement. Dans cette affaire, le Procureur se contente d'une simple référence à l'article 6 (3) du Statut sans jamais se contraindre à préciser à l'attention de l'accusé tous les faits essentiels susceptibles de fonder l'accusation sur la base de cet article. La simple mention de l'article 6 (3) semble constituer pour le Procureur un sésame suffisant pour autoriser une condamnation en vertu de cet article. La Chambre d'appel ne peut que dénoncer cette posture. Elle réaffirme que s'il souhaite invoquer la responsabilité pénale individuelle d'un supérieur hiérarchique en vertu de l'article 6 (3) du Statut, le Procureur a l'obligation de plaider les faits essentiels fondant

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[323] La Chambre d'appel considère qu'il n'est pas nécessaire de déterminer qu'Imanishimwe ait été informé du comportement qui aurait selon le Procureur permis de conclure qu'il n'avait pas pris les mesures nécessaires et raisonnables pour punir les auteurs des crimes puisqu'il a été déclaré coupable de ne pas avoir empêché les crimes, pas de ne pas les avoir puni.

[324] Mémoire en réponse du Procureur, par. 50 (h) :
« **Le refus de l'Appelant d'agir :** Outre le rôle actif qu'il a joué, tel qu'exposé aux alinéas (b) et (f) ci-dessus, l'Appelant, bien qu'il l'ait su, n'a pas empêché les militaires et les *Interahamwe* de commettre ces actes ou ne les en a pas punis : ils ont incendié des maisons et tué des gens sur les collines aux alentours de Gashirabwoba (Mémoire liminaire, par. 2.30) ; les militaires et les *Interahamwe* ont lancé des grenades dans la foule à Gashirabwoba le 12 avril 1994 (Mémoire liminaire, par. 2.39) ; les *Interahamwe* ont achevé les survivants à coups de couteau, de machette et de gourdin (Mémoire liminaire, par. 2.40) ; les *Interahamwe* et les militaires ont pillé les biens des morts (Mémoire liminaire, par. 2.40) ».

[325] Voir *supra*, par. 138.

[326] La Chambre d'appel n'estime pas nécessaire de se prononcer sur la question de savoir si les faits essentiels qui devaient être plaidés pour entrer en voie de condamnation contre Samuel Imanishimwe pour Gashirabwoba sur la base de l'article 6 (1) du Statut ont été communiqués en temps voulu au vu de ses conclusions sur le 10ème motif d'appel du Procureur. Voir *infra*, chapitre III. G, par. 353 à 377.

[327] Arrêt *Čelebići,* par. 400.

l'accusation dans l'acte d'accusation et que le manquement à cette obligation ne peut être corrigé que si les faits omis sont plaidés en temps voulu avec clarté et cohérence.

Iniquité du procès

168. Le Procureur soutient nonobstant que le procès n'a pas été rendu inéquitable car il peut être déduit du dossier qu'Imanishimwe

> « avait bien compris la thèse du Procureur concernant les accusations relatives à Gashirabwoba et qu'il était prêt à y répondre au procès »[328].

169. Au soutien de son affirmation, le Procureur relève qu'Imanishimwe n'a pas soulevé d'objection précise contre l'introduction de moyens de preuve sur le massacre de Gashirabwoba[329] et n'a pas demandé un temps supplémentaire pour contre-interroger les témoins ou mener des enquêtes supplémentaires[330]. La Chambre d'appel considère que cela ne démontre pas qu'Imanishimwe était informé du fait que le Procureur entendait, pour ces faits, mettre en cause sa responsabilité de supérieur hiérarchique. La Chambre d'appel a conclu plus haut qu'Imanishimwe avait été informé d'un certain nombre de faits essentiels ayant trait à l'accusation relative à Gashirabwoba. Il était donc normal qu'il s'en défende au procès. La Chambre d'appel remarque qu'aucun des moyens de preuve introduits par le Procureur pour les événements de Gashirabwoba ne concernait la seule responsabilité d'Imanishimwe en sa qualité de supérieur hiérarchique, nécessitant de ce dernier une objection ou la demande de temps de préparation supplémentaire.

170. Le Procureur soutient que l'attitude d'Imanishimwe durant le procès démontre qu'il s'était pleinement préparé à répondre des allégations sur Gashirabwoba. Tout d'abord, il fait état du fait que la Défense d'Imanishimwe ait contre interrogé avec précision les Témoins LAC, LAB et LAH sur les événements de Gashirabwoba[331]. À la lecture des passages des comptes rendus d'audience identifiés par le Procureur, la Chambre d'appel ne peut considérer que la façon dont la Défense d'Imanishimwe a mené les contre-interrogatoires des Témoins LAC et LAH[332] conforte la thèse du Procureur : il n'y est jamais question des éléments relatifs au mode de responsabilité pénale dont Imanishimwe a été trouvé coupable.

171. Le Procureur met ensuite en exergue le fait qu'Imanishimwe ait déposé des moyens de preuve additionnels sur Gashirabwoba[333]. Pour seul exemple de preuve additionnelle, le Procureur cite la pièce à conviction D-IS 2 présentée le 10 octobre 2002. De l'avis de la Chambre d'appel, l'introduction de cette pièce à conviction – un dessin rudimentaire du terrain de football de Gashirabwoba et des ses environs immédiats – ne démontre absolument pas qu'Imanishimwe savait qu'il avait à répondre d'une accusation portée sur la base de l'article 6 (3) du Statut. Le Procureur relève aussi que les témoins à décharge PBA et PKA ont déposé pour tenter de fournir un alibi à Imanishimwe pour la journée du 12 avril 1994[334]. La présentation de ces deux témoins et la stratégie

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[328] Mémoire en réponse du Procureur, par. 53 à 62. Lors des audiences d'appel, le Procureur étoffe son argumentation juridique en précisant qu'il est dit au paragraphe 53 de l'Arrêt *Kvocka et consorts* « qu'une notification adéquate peut être déduite, suite à la compréhension de l'Accusé en ce qui concerne la nature de l'affaire du Procureur » : CRA(A) du 7 février 2006, p. 27. Voir Mémoire en réplique d'Imanishimwe, par. 57 à 62 et 67.

[329] Mémoire en réponse du Procureur, par. 55 à 59. Voir Mémoire en réplique d'Imanishimwe, par. 61.

[330] CRA(A) du 7 février 2006, p. 27.

[331] Mémoire en réponse du Procureur, par. 60. Le Procureur se réfère aux passages suivants : Témoin LAC, CRA du 10 octobre 2000, p. 47 à 55 (huis clos) ; Témoin LAH, CRA du 11 octobre 2000, p. 87 à 114 ; Témoin LAB, CRA du 29 janvier 2001, p. 30 à 94. Voir aussi CRA(A) du 7 février 2006, p. 28. Voir Mémoire en réplique d'Imanishimwe, par. 57 à 60 et 62.

[332] La Chambre d'appel considère que les passages du contre-interrogatoire du Témoin LAH cités par le Procureur ne sont pas pertinents en l'espèce dans la mesure où le contre-interrogatoire en question était mené par la Défense d'Emmanuel Bagambiki.

[333] Mémoire en réponse du Procureur, par. 60. Le Procureur se réfère à la pièce à conviction D-IS 02, introduite le 10 octobre 2002.

[334] Mémoire en réponse du Procureur, par. 60. Le Procureur se réfère aux passages suivants : Témoin PBA, CRA du 5 novembre 2002, p. 146 à 149, et CRA du 6 novembre 2002, p. 7, 8 ; Témoin PKA, CRA du 15 octobre 2002, p. 4 à 14.

choisie par la Défense d'Imanishimwe lors de leur audition renforce la conviction de la Chambre d'appel selon laquelle Imanishimwe croyait devoir se défendre non pas de la mise en cause de sa responsabilité de supérieur hiérarchique, mais de sa responsabilité pour participation directe aux crimes. Enfin, le Procureur fait référence au fait qu'Imanishimwe lui-même ait déposé sur le massacre perpétré à Gashirabwoba, « déclarant qu'il était au courant, mais niant simplement d'y avoir participé »[335]. Encore une fois, la Chambre d'appel considère que cet élément, insuffisant s'il en est pour conclure qu'Imanishimwe était informé de tous les faits essentiels fondant une accusation sous l'article 6 (3) du Statut, semble prouver qu'Imanishimwe répondait à une accusation de participation directe à la tuerie de Gashirabwoba.

172. Pour derniers arguments, le Procureur avance enfin (1) qu'Imanishimwe a spécifiquement fait référence aux crimes perpétrés à Gashirabwoba dans sa Déclaration liminaire non pour dénoncer l'introduction des accusations relatives à Gashirabwoba mais pour s'en défendre[336] ; et (2) que les témoignages des Témoins LAB, LAC et LAH sont analysés de façon extensive dans ses Dernières conclusions écrites[337]. La Chambre d'appel estime que ces derniers arguments ne parviennent pas davantage à conforter la thèse du Procureur. Contrairement au but recherché, ils achèvent de convaincre la Chambre d'appel qu'Imanishimwe ne savait pas qu'il devait se défendre d'une mise en cause de sa responsabilité pénale pour ne pas avoir empêché le massacre en sa qualité de supérieur hiérarchique. Il est en effet éclairant de constater que toute la stratégie mise en œuvre par Imanishimwe pour Gashirabwoba se limite essentiellement à prouver qu'il n'était pas sur les lieux le 12 avril 1994.

4. Conclusion

173. La Chambre d'appel considère que la capacité d'Imanishimwe à préparer sa défense s'agissant des allégations relatives à Gashirabwoba a été sensiblement compromise. Outre le fait qu'Imanishimwe n'ait pas été informé en temps voulu de façon claire et cohérente des faits essentiels sur lesquels le Procureur entendait se fonder pour les accusations portées au titre de l'article 6 (3) du Statut, la Chambre d'appel conclut qu'Imanishimwe était en droit de comprendre des écritures postérieures à l'acte d'accusation que, pour Gashirabwoba, le Procureur avait décidé de ne pas soutenir ses poursuites sous l'article 6 (3) du Statut. De l'avis de la Chambre d'appel, Imanishimwe n'était pas informé du fait qu'il aurait à répondre de la mise en cause de sa responsabilité de supérieur hiérarchique pour le massacre de Gashirabwoba. Le procès a dès lors été rendu inéquitable. En conséquence, la Chambre d'appel conclut que la Chambre de première instance ne pouvait prononcer de déclaration de culpabilité sur la base de l'article 6 (3) du Statut pour les faits commis au terrain de football de Gashirabwoba.

174. La Chambre d'appel fait droit au motif d'appel et annule les déclarations de culpabilité prononcées contre Imanishimwe sur la base de l'article 6 (3) du Statut pour les faits survenus au terrain de football de Gashirabwoba, à savoir celles prononcées pour génocide (Chef 7 de l'Acte d'accusation Bagambiki/Imanishimwe), pour extermination constitutive de crime contre l'humanité (Chef 10 de l'Acte d'accusation Bagambiki/Imanishimwe) et pour violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II (Chef 13 de l'Acte d'accusation Bagambiki/Imanishimwe). L'incidence éventuelle de ces annulations sur la peine sera examinée plus loin dans le chapitre consacré à la peine.

III. L'Appel du procureur

[335] Mémoire en réponse du Procureur, par. 60.
[336] Mémoire en réponse du Procureur, par. 61, se référant à la déclaration liminaire d'Imanishimwe, CRA du 2 octobre 2002, p. 126 à 157.
[337] Mémoire en réponse du Procureur, par. 62, se référant à Dernières conclusions écrites d'Imanishimwe, par. 769 à 865. Voir Mémoire en réplique d'Imanishimwe, par. 61.

A. PRINCIPES RELATIFS À LA PREUVE (5ÈME MOTIF D'APPEL)

1. Application des principes relatifs à la preuve

175. Le Procureur fait valoir, en son cinquième motif d'appel, que la Chambre de première instance a commis une erreur sur un point de droit relative au principe d'établissement de la preuve au-delà de tout doute raisonnable. Le Procureur soutient que

> « [au] lieu d'en réserver l'application à la détermination des questions fondamentales de l'innocence ou de la culpabilité des accusés, la Chambre de première instance l'a utilisé dans le cadre de l'appréciation d'éléments de preuve individuels présentés lors du procès, considérés de manière isolée »[338].

Le Procureur affirme qu'il n'avait pas l'obligation de prouver au-delà de tout doute raisonnable chacun des faits allégués à l'encontre de l'accusé, mais que la Chambre de première instance aurait dû examiner l'ensemble des éléments de preuve produits au titre de chacun des chefs d'accusation[339]. Invoquant la jurisprudence du TPIY, le Procureur admet que pour établir la culpabilité de l'accusé il doit prouver les faits essentiels au-delà de tout doute raisonnable mais soutient qu'il n'en va pas de même des faits généraux dont la preuve n'est pas essentielle. En l'espèce, le Procureur reproche à la Chambre de première instance de s'être considérée comme tenue d'établir ces faits généraux au-delà de tout doute raisonnable[340]. De l'avis du Procureur, le

> « principe du doute raisonnable, […] ne devrait être utilisé que dans le cadre de la phase du verdict et non pas lors de la phase antérieure d'établissement des faits »[341].

Selon le Procureur, ce motif d'appel vise tous les verdicts rendus à l'encontre de Ntagerura, de Bagambiki, et d'Imanishimwe[342].

176. Bagambiki et Ntagerura soutiennent que les éléments essentiels des crimes doivent être prouvés au-delà de tout doute raisonnable[343]. Imanishimwe fait quant à lui valoir qu'un acte d'accusation ne devrait pas contenir de *« faits généraux »*, ce qui implique que chaque fait y figurant doit être considéré comme un élément du crime, qui doit par conséquent être prouvé par le Procureur[344]. En fait, il soutient que tout élément à charge contesté devrait être prouvé[345].

177. La Chambre d'appel comprend que le Procureur invoque deux griefs étroitement liés : d'une part, le fait que le principe d'établissement de la preuve au-delà de tout doute raisonnable ne devrait pas s'appliquer, comme l'a fait la Chambre de première instance, au stade de l'établissement des faits, mais plutôt à celui de la « détermination des questions fondamentales de l'innocence ou de la culpabilité des accusés »[346] ; d'autre part, le fait que la Chambre de première instance n'ait pas examiné, à tort, les éléments de preuve dans leur globalité, mais a appliqué le principe en question à chaque élément de preuve pris individuellement[347].

(a) Application des principes relatifs à la preuve au stade de l'établissement des faits

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[338] Mémoire d'appel du Procureur, par. 193.
[339] Mémoire d'appel du Procureur, par. 194.
[340] Mémoire d'appel du Procureur, par. 221 et 222.
[341] Mémoire d'appel du Procureur, par. 198.
[342] Acte d'appel du Procureur, par. 40.
[343] Mémoire en réponse de Bagambiki, par. 188 ; Mémoire en réponse de Ntagerura, par. 126 ; *cf.* Mémoire en réponse d'Imanishimwe, par. 80.
[344] Mémoire en réponse d'Imanishimwe, par. 83.
[345] Mémoire en réponse d'Imanishimwe, par. 80.
[346] Mémoire d'appel du Procureur, par. 193.
[347] Mémoire d'appel du Procureur, par. 218.

178. S'agissant du premier argument, le Procureur invoque l'arrêt rendu par la Cour suprême du Canada dans l'affaire *R. c. Morin* pour étayer l'affirmation selon laquelle le principe d'établissement de la preuve au-delà de tout doute raisonnable doit uniquement être appliqué au stade du verdict et non aux faits de la cause pris individuellement[348]. La Chambre d'appel est d'avis que cette décision ne conforte pas l'argument selon lequel les faits de la cause pris individuellement ne doivent pas être prouvés au-delà de tout doute raisonnable :

> Pendant les délibérations, le jury doit examiner la preuve comme un tout et décider si la poursuite a établi la culpabilité hors de tout doute raisonnable. Cela exige nécessairement que chaque élément de l'infraction ou du point en litige ait été prouvé hors de tout doute raisonnable.[349]

Le Juge Sopinka, parlant au nom de la majorité, souscrit ici à la conclusion dégagée dans un autre arrêt de la Cour suprême du Canada, *Nadeau c. La Reine* :

> Les jurés ne peuvent retenir sa version, ou portion de celle-ci, que s'ils sont, en regard de toute la preuve, satisfaits hors de tout doute raisonnable que les événements se sont passés comme tels ; à défaut de quoi, et à moins qu'un fait ne soit prouvé hors de tout doute raisonnable, l'accusé a droit à la détermination de fait qui lui est la plus favorable, en autant, bien sûr, qu'elle repose sur une preuve au dossier et n'est pas pure spéculation.[350]

La Chambre d'appel relève de plus que certains passages de l'arrêt *R. c. Morin* qui pourraient de prime abord être interprétés comme confortant la thèse du Procureur s'expliquent par le fait que la question en litige dans l'affaire *R. c. Morin* avait trait aux directives données au jury par le juge du procès. En considérant cette affaire dans le contexte du Tribunal, il convient de rappeler que le juge du fait n'est pas ici un jury, mais un collège de juges professionnels. Dans le cas du jury, la seule question à laquelle il faut répondre est celle de savoir si l'accusé est coupable ou non coupable ; les conclusions factuelles à l'appui du verdict ne sont pas exposées et ne peuvent pas être contestées par l'une des parties. Les directives données au jury portent essentiellement sur cette « question fondamentale » de l'affaire. Au Tribunal de céans, en revanche, les Chambres de première instance ne peuvent se limiter à la question fondamentale de la culpabilité ou de la non-culpabilité ; l'article 22 (2) du Statut, repris à l'article 88 (C) du Règlement, leur fait obligation de motiver leurs sentences[351].

179. La Chambre d'appel rappelle que l'article 20 (3) du Statut dispose que toute personne accusée est présumée innocente jusqu'à ce que sa culpabilité ait été établie, consacrant par là le principe général de droit selon lequel il revient au Procureur de prouver la culpabilité de l'accusé au-delà de tout doute raisonnable[352]. L'article 87 (A) du Règlement dispose clairement que l'accusé n'est déclaré coupable que lorsque la majorité de la Chambre de première instance considère que sa culpabilité a été prouvée au-delà de tout doute raisonnable. Bien que le Règlement soit silencieux sur la question de savoir si cette exigence s'applique au stade de l'établissement des faits, et si oui de quels faits, la Chambre d'appel du TPIY ne laisse aucun doute sur le fait que le principe d'établissement de la preuve « au-delà de tout doute raisonnable » ne se limite pas à la conclusion ultime de culpabilité:

> L'Accusation avance [...] que la déposition du Témoin H « [...] n'est qu'un élément d'un ensemble, celui des témoignages à charge se rapportant au chef 1 [persécution] ». La Chambre d'appel n'est pas d'accord. L'argument de l'Accusation trahit une même erreur, celle de penser que l'attaque de la maison du Témoin H n'était qu'une preuve des persécutions, et non un fait essentiel faisant partie intégrante des persécutions, ainsi qu'il a été dit à propos des vices de l'Acte d'accusation modifié. Si Zoran et Mirjan Kupreškić ont été déclarés coupables de

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[348] Mémoire d'appel du Procureur, par. 227 et 228.
[349] *R. c. Morin*, [1988] 2 R.C.S. 345 (non souligné dans l'original).
[350] *Nadeau c. La Reine*, [1984] 2 R.C.S. 570, p. 571, le Juge Lamer (non souligné dans l'original).
[351] Arrêt *Kordić and Čerkez*, par. 383.
[352] Arrêt Kayishema et Ruzindana, par. 107.

persécutions, c'est en raison de leur participation à l'attaque de la maison du Témoin H. L'argument de l'Accusation selon lequel la Chambre de première instance était libre de recourir à tout autre critère que celui de la preuve au-delà de tout doute raisonnable lorsqu'elle appréciait la déposition du Témoin H mettant en cause Zoran et Mirjan Kupreškic dans cette attaque ne saurait être retenu[353].

(b) Approche fragmentaire de l'établissement de la preuve

180. Afin d'étayer l'argument selon lequel la Chambre de première instance a adopté une approche fragmentaire pour apprécier la preuve, le Procureur se réfère à l'Arrêt *Musema* où la Chambre d'appel avait souscrit au point de vue exprimé par la Chambre d'appel du TPIY dans l'Arrêt *Tadić* relatif aux allégations d'outrage :

> [L]e juge des faits ne doit jamais considérer les dépositions de témoin prises individuellement, comme si elles étaient totalement indépendantes les unes des autres ; c'est l'accumulation de *tous les* témoignages de l'espèce qui doit être pris en considération. Pris individuellement, un témoignage peut à priori s'avérer de peu d'utilité, mais il peut se trouver renforcé par les autres témoignages de l'espèce. Le contraire peut également se vérifier.[354]

181. De l'avis de la Chambre d'appel, cette jurisprudence ne relève pas de la question de savoir quel est le principe de preuve applicable à l'établissement de tout fait particulier. L'obligation de la Chambre de première instance d'examiner tous les éléments de preuve dans leur globalité ne dispense pas celle-ci d'appliquer lors de l'établissement d'un fait le principe de preuve requis.

182. En guise d'exemple d'erreurs qui auraient été commises en appliquant les principes relatifs à la preuve à des éléments de preuve pris individuellement, le Procureur cite les conclusions dégagées par la Chambre de première instance au paragraphe 118 du Jugement[355]. La Chambre d'appel constate que la Chambre de première instance a examiné les différents témoignages à propos du même fait dont il est question ici non pas de façon isolée mais en les considérant à la lumière d'autres témoignages. Elle a pris en considération les propos d'un témoin à décharge, le Témoin BLB, qui avaient suscité des doutes quant à la crédibilité du Témoin LAH en général et celui du témoin à charge NL qui ne corroborait pas la déposition du Témoin LAH. En procédant ainsi, la Chambre de première instance a clairement suivi le principe énoncé dans l'Arrêt *Tadić* relatif aux allégations d'outrage. Ce n'est qu'au terme de son analyse qu'elle a apprécié si le fait en question avait été établi au-delà de tout doute raisonnable.

183. La Chambre d'appel est d'avis que le Procureur ne fait pas une distinction nette entre les différentes étapes du processus d'établissement des faits qui débouche en définitive sur une déclaration de culpabilité :

A la première étape, la Chambre de première instance doit apprécier la crédibilité des éléments de preuve pertinents présentés. Cette appréciation ne peut pas se faire de façon morcelée. Les éléments de preuve pris individuellement, tels que les déclarations des différents témoins, ou les pièces versées au dossier, doivent être analysés à la lumière de tous les moyens de preuve présentés. Ainsi, même s'il y a des doutes quant à la fiabilité des propos d'un certain témoin, ceux-ci pourraient être corroborés par d'autres éléments de preuve conduisant la Chambre de première instance à conclure que le témoin est

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[353] Arrêt *Kupreškić et consorts*, par. 226 (notes de bas de page non reproduites).

[354] Arrêt *Tadić* relatif aux allégations d'outrage, par. 92, cité par l'Arrêt *Musema*, par. 134 (souligné dans l'original).

[355] Mémoire d'appel du Procureur, par. 193, note de bas de page 257. Le Témoin à charge LAH a témoigné avoir participé à une réunion au marché de Bushenge, au cours de laquelle, Ntagerura aurait dit que dans peu de temps le Président Habyarimana ne serait plus là « et à ce moment-là, le sort des Tutsis sera réglé » (*cf.* Jugement, par. 114, renvoyant au CRA du 10 octobre 2000, p. 71 à 73, 104, 124 à 126 ; et du 11 octobre 2000, p. 27 à 30). La Chambre de première instance a conclu qu'elle n'était pas convaincue au-delà de tout doute raisonnable que Ntagerura avait bien participé à cette réunion (Jugement, par. 118).

crédible. Ou alors, un témoignage apparemment convaincant peut être remis en question par d'autres témoignages qui démontrent que ce moyen de preuve manque de crédibilité.

Ce n'est qu'après avoir analysé tous les éléments de preuve pertinents dans leur globalité que la Chambre de première instance peut décider si les moyens de preuve sur lesquels le Procureur s'est appuyé devraient être acceptés comme établissant l'existence des faits allégués, nonobstant les moyens de preuve à décharge invoqués. À cette deuxième étape de l'établissement des faits, le principe d'établissement de la preuve « au-delà de tout doute raisonnable » doit être appliqué s'il s'agit d'établir l'existence d'un élément du crime ou du mode de responsabilité retenu à l'encontre de l'accusé, ou encore s'il s'agit d'établir l'existence d'un fait indispensable pour entrer en voie de condamnation.

À l'étape finale, la Chambre de première instance doit déterminer si l'ensemble des éléments constitutifs du crime et du mode de responsabilité retenu à l'encontre de l'accusé a été prouvé lors des étapes antérieures. Même si certains des faits essentiels articulés dans l'acte d'accusation ne sont pas établis au-delà de tout doute raisonnable[356], une Chambre peut prononcer une condamnation dès lors qu'ayant appliqué le droit à ceux des faits qu'elle a acceptés comme étant établis au-delà de tout doute raisonnable, tous les éléments constitutifs du crime et du mode de responsabilité sont établis.

À la lumière de cette analyse, la Chambre d'appel convient avec le Procureur que la démarche qui consisterait à apprécier la valeur probante de chaque élément de preuve de manière fragmentaire constituerait une erreur[357].

Conclusion

184. La Chambre d'appel rappelle que le principe de la présomption d'innocence veut que chaque fait qui fonde la condamnation de l'accusé soit prouvé au-delà de tout doute raisonnable. La Chambre d'appel est d'accord avec l'argument du Procureur selon lequel

> « [si à] la fin de la cause, les faits qui sont essentiels à la culpabilité font encore l'objet de doutes sans être soutenus par d'autres faits [cela] produira un doute dans l'esprit de la Chambre quant à savoir si la preuve a été fournie au-delà de tout doute »[358].

Ainsi, faute de rapporter la preuve de l'un des maillons de la chaîne au-delà de tout doute raisonnable, la chaîne ne pourra justifier une déclaration de culpabilité.

2. Allégations d'exemples de mauvaise application des principes relatifs à la preuve

185. Pour étayer sa thèse, le Procureur identifie un certain nombre d'exemples où la Chambre de première instance aurait mal appliqué les principes relatifs à la preuve. Elle examinera chacun de ces exemples pour déterminer si le traitement des moyens de preuve révèle une erreur de fait de la part de la Chambre de première instance. Le Procureur renvoie par ailleurs à une annexe de son Mémoire d'appel, contenant des tableaux qui « illustrent de manière visuelle les arguments [du Procureur] »[359]. La Chambre d'appel les accepte en tant qu'illustration et s'abstient donc d'examiner en détail chacun des faits qui y figurent.

(a) Implication de Bagambiki dans le massacre de Gashirabwoba et dans le meurtre des réfugiés sélectionnés à la cathédrale de Cyangugu et au stade Kamarampaka

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[356] La Chambre d'appel considère qu'il convient de différencier la notion de « faits essentiels » devant être plaidés dans l'acte d'accusation afin de fournir à l'accusé les informations nécessaires à la préparation de sa défense, des faits dont la preuve doit être apportée au-delà de tout doute raisonnable.
[357] Mémoire d'appel du Procureur, par. 258.
[358] CRA(A) du 6 février 2006, p. 57.
[359] Mémoire d'appel du Procureur, par. 200.

186. À titre d'exemple de la démarche erronée de la Chambre de première instance, le Procureur mentionne la manière dont elle a traité le rôle de Bagambiki dans les faits liés au massacre de Gashirabwoba et au meurtre des réfugiés sélectionnés à la cathédrale de Cyangugu et au stade Kamarampaka[360]. Le Procureur fait valoir que la majorité de la Chambre de première instance a considéré chaque incident de manière isolée, au lieu de les considérer ensemble les uns avec les autres, ainsi qu'avec d'autres éléments de preuve. Vus dans cette perspective, affirme-t-il, il en émerge une ligne de conduite impliquant Bagambiki de manière non équivoque dans les crimes perpétrés[361].

187. En réponse, Bagambiki fait valoir que la Chambre de première instance a relevé une ligne de conduite dans les faits, à savoir qu'il avait tenté d'aider et de protéger les réfugiés[362].

188. La Chambre de première instance a conclu que le 16 avril 1997, Bagambiki, Imanishimwe et d'autres avaient sélectionné douze Tutsis parmi les réfugiés regroupés au stade Kamarampaka, et qu'ils avaient été tués par la suite avec quatre autres réfugiés tutsis qui avaient été sélectionnés à la cathédrale de Cyangugu par les mêmes autorités peu de temps auparavant[363]. La majorité de la Chambre de première instance a estimé ne pas disposer d'éléments de preuve suffisants pour déterminer si Bagambiki avait participé à l'exécution de ces seize réfugiés[364]. Au paragraphe 437 du Jugement, la Chambre de première instance a estimé que le 12 avril 1994, un grand nombre de réfugiés s'étaient regroupés au terrain de football de Gashirabwoba. Après qu'ils eurent été attaqués dans la matinée, Bagambiki est arrivé, a tenté de les rassurer et a promis d'envoyer des soldats pour les protéger. Une heure plus tard, des gardes armés et des soldats ont encerclé les réfugiés et ont tiré sur eux. La Chambre de première instance a conclu qu'elle n'était pas convaincue que Bagambiki avait participé à l'attaque[365].

189. Dans les deux cas, la Chambre de première instance s'est appuyée sur les dépositions d'un certain nombre de témoins pour étayer ses conclusions. Dans le cas des seize réfugiés, il n'y a pas de preuve directe que Bagambiki ait participé à leur exécution. Le Procureur fait valoir que la Chambre de première instance s'est méprise en omettant de tirer la seule déduction raisonnable de la preuve circonstancielle[366]. Il ne s'agit donc pas ici de la manière fragmentaire dont la preuve aurait été examinée. S'agissant des conclusions relatives au massacre perpétré au terrain de football de Gashirabwoba, la Chambre de première instance s'est fondée essentiellement sur la déposition d'un témoin, le Témoin LAC, mais a rejeté les dépositions des Témoins LAH et LAB. Selon la Chambre de première instance, bien que les Témoins LAH et LAB aient corroboré dans une certaine mesure leurs déclarations selon lesquelles Bagambiki et Imanishimwe avaient participé à l'attaque, leurs récits se contredisaient et étaient inconciliables avec celui du Témoin LAC[367]. Le raisonnement de la Chambre de première instance ne révèle pas une démarche erronée ; bien au contraire, la Chambre de première instance a analysé la preuve dans sa globalité, sans considérer chaque élément de preuve individuellement.

190. Par ailleurs, en examinant les deux événements ensemble, une Chambre de première instance raisonnable pouvait néanmoins conclure que la participation de Bagambiki n'avait pas été prouvée. Il ne ressort pas du raisonnement de la Chambre de première instance relatif à l'exécution des seize réfugiés et au massacre du terrain de football de Gashirabwoba qu'il y ait eu mauvaise administration de la preuve.

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[360] Mémoire d'appel du Procureur, par. 202.
[361] Mémoire d'appel du Procureur, par. 202.
[362] Mémoire en réponse de Bagambiki, par. 189 à 191.
[363] Jugement, par. 337.
[364] Jugement, par. 337.
[365] Jugement, par. 438 à 440.
[366] Mémoire d'appel du Procureur, par. 202 et 210. Cet argument est examiné plus loin, dans le cadre du premier motif d'appel du Procureur : Voir *infra*, par. 302 à 328.
[367] Jugement, par. 440.

(b) Paragraphes 3.12 à 3.22 de l'Acte d'accusation Bagambiki/Imanishimwe

191. Le Procureur soutient que la Chambre de première instance n'a pas tenu compte d'un certain nombre de paragraphes de l'Acte d'accusation Bagambiki/Imanishimwe, parce qu'ils étaient trop vagues et ne faisaient état d'aucun comportement criminel identifiable de la part de l'accusé. De l'avis du Procureur, l'acte d'accusation dans son intégralité et l'ensemble des éléments de preuve auraient du être examinés dans leur globalité[368].

192. La Chambre d'appel relève que la plupart des arguments du Procureur ne se rapportent pas aux principes régissant la preuve, mais plutôt à la manière dont la Chambre de première instance a traité les Actes d'accusation. La Chambre d'appel s'est déjà penchée sur la question au chapitre II. D. du présent Arrêt[369].

193. S'agissant du paragraphe 3.22 de l'Acte d'accusation Bagambiki/Imanishimwe, le Procureur avance que la Chambre de première instance a conclu que des gendarmes gardaient le stade Kamarampaka, limitant ainsi les mouvements des réfugiés qui s'y trouvaient. Il argue que la Chambre de première instance a de nouveau « appréci[é] les éléments de preuve par bribes »[370] lorsqu'elle a estimé ne pas disposer de

> « suffisamment de moyens de preuve fiables pour déterminer si les restrictions apportées aux mouvements des réfugiés visaient principalement à les garder prisonniers ou à assurer leur protection »[371].

Le Procureur soutient que la Chambre de première instance aurait dû examiner l'ensemble des éléments de preuve disponibles afin de « déterminer si la présence des gendarmes revêtait un caractère favorable ou sinistre »[372].

194. La Chambre d'appel relève que le Procureur ne précise pas quels autres éléments de preuve auraient permis à la Chambre de première instance de dégager des conclusions permettant d'incriminer les accusés. Bagambiki souligne, à juste titre, que la Chambre de première instance a conclu, par exemple, que des gendarmes protégeaient les réfugiés qui s'étaient rassemblés à la cathédrale de Cyangugu et avaient empêché deux attaques menées contre eux le 11 avril 1994, juste quelques jours avant que les réfugiés ne soient transférés au stade Kamarampaka[373]. Elle a conclu ensuite que les réfugiés avaient été transférés du stade Kamarampaka à un camp à Nyarushishi. Tant lors du transfert que durant leur séjour au camp, les réfugiés étaient protégés par des gendarmes qui avaient repoussé au moins une tentative d'attaque contre le camp[374]. À la lumière de ces conclusions qui ne sont pas contestées par le Procureur, la Chambre d'appel ne peut relever ici aucune erreur dans l'application par la Chambre de première instance des principes relatifs à la preuve.

L'exécution de seize Tutsis à Gataranda

195. Le Procureur s'élève contre la conclusion dégagée par la Chambre de première instance au paragraphe 337 :

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[368] Mémoire d'appel du Procureur, par. 206.
[369] Voir *supra*, par. 47 à 114.
[370] Mémoire d'appel du Procureur, par. 208.
[371] Mémoire d'appel du Procureur, par. 208, citant le Jugement, par. 336.
[372] Mémoire d'appel du Procureur, par. 208.
[373] Mémoire en réponse de Bagambiki, par. 198, se référant au Jugement, par. 309 et 313.
[374] Jugement, par. 609 et 611.

« La Chambre ne dispose pas de suffisamment de moyens de preuve fiables pour déterminer si les 16 Tutsis ont été exécutés à Gataranda »[375].

Ce passage, fait-il valoir,

« révèle une méprise évidente s'agissant du rôle et de la fonction de la charge ultime de la preuve, principe qui doit être appliqué aux éléments de preuve dans leur globalité pour décider de la *culpabilité* de l'accusé et non à chaque élément de preuve pris individuellement »[376].

196. La Chambre d'appel n'est pas de cet avis et estime que l'exécution des seize réfugiés ne constituait pas un élément de preuve mais un fait qui devait être établi pour emporter condamnation. En tant que tel, il devait être prouvé au-delà de tout doute raisonnable.

(d) Participation de Ntagerura aux réunions

(i) Allégation de refus d'examiner des éléments de preuve se situant hors de la portée temporelle de l'acte d'accusation

197. Le Procureur fait valoir que la Chambre de première instance a refusé d'examiner les éléments de preuve liés à un certain nombre de faits, pour la simple raison que ces faits se situaient hors de la portée temporelle définie dans les paragraphes 14.1, 14.3, 17, 18 et 19 de l'Acte d'accusation Ntagerura[377]. Il avance que ces éléments de preuve auraient dû être pris en considération car ils étaient utiles à la compréhension des moyens de preuve qui, eux, relevaient de la portée temporelle de ces paragraphes[378].

198. La Chambre d'appel estime que le Procureur s'est mépris dans sa lecture du Jugement. Au paragraphe 149 du Jugement, la Chambre de première instance a en effet fait remarquer que les faits auxquels le Procureur faisait allusion « se situ[aient] hors de la portée temporelle des paragraphes 14.1, 14.3, 17, 18 et 19 »[379]. Toutefois, dans une note de bas de page relative à cette observation, la Chambre de première instance a remarqué qu'elle avait examiné ces faits dans d'autres parties du Jugement et a renvoyé aux parties pertinentes[380].

(ii) La réunion au marché de Bushenge en février 1993

199. Le Procureur remet par la suite en cause les éléments dont la Chambre de première instance a tenu compte s'agissant des faits mêmes qu'il estimait, seulement quelques paragraphes plus haut, avoir été complètement ignorés par la Chambre de première instance. Par exemple, le Procureur s'élève contre les conclusions de la Chambre de première instance concernant une réunion tenue au marché de Bushenge en février 1993[381]. La Chambre de première instance a analysé le témoignage du Témoin LAN qui avait déposé que Ntagerura s'était adressé à la foule et avait fait des déclarations où il était question de repousser les « *Inkotanyi* » et les « *Inyenzi* », termes qui, selon le témoin, avaient été utilisés pour décrire l'ensemble du groupe ethnique tutsi[382]. La Chambre de première instance a jugé qu'elle ne pouvait accepter

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[375] Mémoire d'appel du Procureur, par. 209, citant le Jugement, par. 337.
[376] Mémoire d'appel du Procureur, par. 209 (souligné dans l'original).
[377] Mémoire d'appel du Procureur, par. 212.
[378] Mémoire d'appel du Procureur, par. 212.
[379] Jugement, par. 149.
[380] Jugement, par. 149, note de bas de page 220.
[381] Mémoire d'appel du Procureur, par. 213.
[382] Jugement, par. 103 et 97.

« l'interprétation non étayée du Témoin LAN, qui a affirmé que les paroles de Ntagerura suggéraient une attaque générale et aveugle contre les civils tutsis»[383].

Le Procureur fait valoir que ce témoignage aurait été mieux apprécié à la lumière des moyens de preuve relatifs à des faits ultérieurs et à la participation de Ntagerura à ceux-ci[384].

200. La Chambre d'appel relève que la Chambre de première instance s'est appuyée sur les dépositions des Témoins LAD, LAN et NG-1, et a également pris en considération la preuve par ouï-dire apportée par le témoin à décharge Hope. La Chambre de première instance a comparé leurs dépositions et est parvenue à la conclusion que malgré certaines différences entre leurs récits, leurs propos se recoupaient largement[385]. Ce raisonnement n'étaye nullement l'argument du Procureur selon lequel la Chambre de première instance aurait abordé la preuve au coup par coup et d'une manière « fragmentaire ». Le Procureur n'indique pas « les preuves relatives à des faits ultérieurs »[386] que la Chambre de première instance aurait dû prendre en considération. La Chambre d'appel comprend que le Procureur fait allusion aux allégations selon lesquelles Ntagerura avait participé à des réunions à l'hôtel Ituze, à Gatare et au bureau de la préfecture de Cyangugu[387].

(iii) Réunions à l'hôtel Ituze, à Gatare et au bureau de la préfecture de Cyangugu

201. S'agissant des réunions qui se seraient tenues à l'hôtel Ituze, à Gatare et au bureau de la préfecture de Cyangugu, le Procureur fait valoir que le traitement de ces allégations par la Chambre de première instance illustre parfaitement l'effet qu'il dénonce d'une évaluation fragmentaire des éléments de preuve[388]. Il soutient que la Chambre de première instance a même eu recours à cette mauvaise application de la « charge de la preuve ultime » pour justifier une autre application également erronée du même principe à un autre fait[389].

202. Ntagerura répond que l'intérêt que présentent ces réunions au regard de la thèse du Procureur n'est pas évident. Soit, affirme-t-il, le Procureur tentait de prouver qu'il avait incité au génocide au cours de ces réunions, soit il tentait de prouver qu'il était animé de la *mens rea* requise pour le crime de génocide. Dans l'un ou l'autre cas, soutient Ntagerura, les réunions étaient des faits essentiels dont la preuve devait être rapportée au-delà de tout doute raisonnable[390].

203. S'agissant de la réunion qui se serait tenue à l'hôtel Ituze, la Chambre de première instance a analysé la déposition du Témoin LAI, le seul à avoir parlé de cette réunion, et a conclu que son témoignage manquait de crédibilité[391]. Le Témoin LAI a été également le seul témoin à avoir mentionné les réunions tenues à Gatare et au bureau de la préfecture de Cyangugu ; dans ce cas également, la Chambre de première instance a refusé d'accepter son témoignage[392].

204. La Chambre d'appel estime que l'appréciation par la Chambre de première instance des éléments de preuve concernant les trois réunions ne révèle pas une mauvaise application des principes relatifs à la preuve. Le Procureur n'a spécifié aucun autre élément de preuve confirmant la présence de Ntagerura à l'une de ces trois réunions. La Chambre de première instance n'a pas analysé isolément la déposition du Témoin LAI quant à chacune des réunions ; elle a estimé plutôt qu'elle ne pouvait se

[383] Jugement, par. 103.
[384] Mémoire d'appel du Procureur, par. 213.
[385] Jugement, par. 102.
[386] Mémoire d'appel du Procureur, par. 213.
[387] *Cf.* Mémoire d'appel du Procureur, par. 217 et 218.
[388] Mémoire d'appel du Procureur, par. 217.
[389] Mémoire d'appel du Procureur, par. 217.
[390] Mémoire en réponse de Ntagerura, par. 128.
[391] Jugement, par. 108.
[392] Jugement, par. 113. Le Procureur conteste également la conclusion de la Chambre quant à la crédibilité du Témoin LAI ; cette question sera examinée ultérieurement. Voir *infra*, par. 198 à 209.

fonder sur la déposition non corroborée d'un témoin qu'elle avait par ailleurs jugé non crédible. En particulier, le Procureur conteste la conclusion de la Chambre de première instance selon laquelle elle n'était pas convaincue que Ntagerura ait participé à la réunion de Gatare au motif que cette réunion avait été planifiée au cours de la réunion tenue à l'hôtel Ituze, réunion à laquelle la présence de Ntagerura n'avait pas été prouvée au-delà de tout doute raisonnable[393]. Le Procureur soutient que la Chambre de première instance s'est fondée sur une conclusion erronée pour dégager une autre conclusion erronée[394]. La Chambre d'appel estime que, compte tenu du fait que le Témoin LAI ait été le seul témoin à évoquer ces deux incidents, la démarche empruntée par la Chambre de première instance n'était pas déraisonnable. Au surplus, la Chambre de première instance a fait exactement ce qu'elle aurait, de l'avis du Procureur, manqué de faire dans d'autres cas : elle a examiné le moyen de preuve relatif à un fait à la lumière d'un moyen de preuve relatif à d'autres faits. Le Procureur n'est peut-être pas satisfait du résultat de cette analyse, mais son appel ne saurait prospérer sur cette base.

(iv) Examen de l'ensemble de la preuve se rapportant aux réunions

205. Le Procureur fait valoir à plusieurs reprises que la Chambre de première instance aurait dû analyser les éléments de preuve de façon cumulative, en prenant en considération les moyens de preuve à charge dans leur ensemble[395]. Toutefois, la Chambre d'appel rappelle qu'une allégation factuelle non étayée par des éléments de preuve suffisants ne saurait établir l'existence d'un autre fait lui aussi non étayé par des éléments de preuve suffisants. Ce principe s'applique tout particulièrement à la participation présumée de Ntagerura aux réunions tenues à l'hôtel Ituze, à Gatare et au bureau de la préfecture de Cyangugu : un témoin jugé peu crédible relativement à un fait, ne devient pas plus crédible parce qu'il donne un récit tout aussi douteux au sujet d'un autre fait connexe.

3. Conclusion

206. La Chambre d'appel rejette l'argument du Procureur selon lequel la Chambre de première instance aurait versé dans l'erreur dans l'application des principes relatifs à la preuve. Le Procureur n'a pas davantage démontré que la Chambre de première instance a abordé la preuve de manière « fragmentaire », analysant de manière isolée les éléments de preuve pris individuellement. Ce motif d'appel est par conséquent rejeté dans son intégralité.

B. APPRÉCIATION DES DÉPOSITIONS DE COMPLICES (6ÈME MOTIF D'APPEL)

207. Dans son sixième motif d'appel, le Procureur soutient que la Chambre de première instance a commis une erreur de droit dans la manière dont elle a géré les dépositions de complices et que cette erreur a faussé l'appréciation des dépositions des Témoins LAP, LAI, LAJ, LAH, LAB, LAK et LAM. Selon le Procureur, ce motif d'appel vise tous les verdicts rendus à l'encontre de Ntagerura, Bagambiki et Imanishimwe[396]. Il divise ce motif en quatre branches :

La Chambre de première instance a appliqué un critère juridique erroné aux dépositions de complices[397] ;

Elle n'a pas tenu compte de certains éléments de preuve corroborant les dépositions de complices[398] ;

Elle n'a pas appliqué la même circonspection aux dépositions des témoins à décharge complices[399] ;

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[393] Mémoire d'appel du Procureur, par. 217, faisant référence au Jugement, par. 113.
[394] Mémoire d'appel du Procureur, par. 217.
[395] Voir par exemple, Mémoire d'appel du Procureur, par. 211 et 218.
[396] Acte d'appel du Procureur, par. 44.
[397] Mémoire d'appel du Procureur, par. 265 à 287.
[398] Mémoire d'appel du Procureur, par. 288 à 301.
[399] Mémoire d'appel du Procureur, par. 302 à 313.

Elle n'a pas autorisé le Procureur à contre-interroger des témoins à décharge sur le rôle qu'ils avaient joués en leur qualité de complices[400].

1. Standard juridique appliqué par la Chambre de première instance

208. Le Procureur fait valoir que la Chambre de première instance a commis une erreur sur un point de droit en présumant que les dépositions de complices devaient nécessairement être regardées avec circonspection, sans tâcher d'examiner de plus près la crédibilité du témoin considéré[401]. Il soutient que le fait que la Chambre de première instance ne se soit fondée sur aucune des dépositions des sept « témoins complices » présumés prouve que la stratégie de la « suspicion automatique » qu'elle a adoptée à l'égard des témoins complices s'est traduite par le « rejet en bloc » de leurs dépositions[402].

209. En réponse, Bagambiki, Imanishimwe et Ntagerura affirment que l'approche adoptée par la Chambre de première instance est correcte. Imanishimwe soutient que la Chambre a analysé les dépositions des complices visés avant de conclure qu'ils n'étaient pas crédibles[403]. Bagambiki ajoute que la Chambre de première instance n'a pas rejeté les dépositions pour la seule raison qu'elles avaient été faites par des complices[404]. Bagambiki, Imanishimwe et Ntagerura soulignent que les témoins en question étaient détenus à la prison de Cyangugu et qu'ils avaient avoué avoir participé à des crimes en 1994[405]. Ntagerura précise qu'ils attendaient tous la fixation de leurs peines par les autorités judiciaires rwandaises et avaient manifestement intérêt à impliquer les « anciennes autorités » du Rwanda dans ces crimes[406].

210. Le Procureur soutient en réplique qu'en traitant automatiquement les dépositions des témoins complices avec circonspection, la Chambre de première instance a choisi un mauvais point de départ pour son appréciation de ces dépositions et a dès lors vicié son analyse[407]. Il prétend que l'argument selon lequel les témoins étaient motivés par leurs propres intérêts n'est que « pure conjecture » dénuée de fondement[408] et ajoute que cet argument a, du reste, été réfuté par les témoins en question[409].

211. La Chambre d'appel observe que le Procureur conteste surtout les termes employés par la Chambre de première instance lors de l'appréciation des dépositions des sept témoins en question :

> « La Chambre relève que les témoins […] sont [des] complices présumés de l'accusé et qu'en conséquence, leurs dépositions doivent être examinées avec circonspection »[410].

212. Dans l'Arrêt *Niyitegeka*, la Chambre d'Appel a souligné que le « complice » est, dans son sens ordinaire, celui qui partage la culpabilité d'une infraction, celui qui participe à l'infraction commise par un autre, le compagnon de crime en d'autres termes[411]. En analysant la jurisprudence applicable, le Procureur relève les affaires *Čelebići* et *Kordić et Čerkez* jugées par le TPIY dans lesquelles les Chambres de première instance auraient ajouté foi aux dépositions de certains témoins

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[400] Acte d'appel du Procureur, par. 45 ; Mémoire d'appel du Procureur, par. 314 à 320.
[401] Mémoire d'appel du Procureur, par. 259 et 260.
[402] Mémoire d'appel du Procureur, par. 265.
[403] Mémoire en réponse d'Imanishimwe, par. 94.
[404] Mémoire en réponse de Bagambiki, par. 207 et 242 ; voir aussi Mémoire en réponse de Ntagerura, par. 150.
[405] Mémoire en réponse de Bagambiki, par. 237 ; Mémoire en réponse d'Imanishimwe, par. 95 ; Mémoire en réponse de Ntagerura, par. 151.
[406] Mémoire en réponse de Ntagerura, par. 151 ; voir aussi Mémoire en réponse d'Imanishimwe, par. 96.
[407] Mémoire en réplique du Procureur, par. 58.
[408] Mémoire en réplique du Procureur, par. 54.
[409] Mémoire en réplique du Procureur, par. 54.
[410] Jugement, par. 92. Cet énoncé est repris presque mot pour mot aux paragraphes 95, 108, 131, 135, 141, 174, 176, 216, 321, 403, 438, 485, 540 et 587.
[411] Arrêt *Niyitegeka*, par. 98.

alors que ceux-ci pouvaient être qualifiés de complices des accusés[412]. La Chambre d'appel souligne toutefois que dans les deux affaires, les Chambres de première instance n'ont pas considéré ces dépositions sans prudence. La Chambre de première instance a indiqué dans le Jugement *Čelebići* avoir « examiné d'un œil critique les éléments de preuve » présentés par le témoin en question[413], tandis que la Chambre de première instance dans l'affaire *Kordić et Čerkez* a relevé dans son Jugement que

> « dans les juridictions de *common law*, la déposition du Témoin AT serait considérée comme celle d'un complice et traitée avec la plus grande prudence »[414].

S'agissant de ce témoin, Dario Kordić a soutenu en appel que la Chambre de première instance aurait dû exiger que sa déposition soit corroborée. La Chambre d'appel du TPIY a rejeté cet argument, jugeant qu'une Chambre de première instance peut condamner un accusé sur la base d'un seul témoignage, pour peu que ce témoignage soit analysé « avec toute la prudence nécessaire » et qu'il soit pris « garde que le témoin ne soit mû par des arrière-pensées »[415].

213. Les Chambres de première instance du Tribunal de céans font preuve de la même prudence lors de l'appréciation des dépositions de témoins complices. Traitant des dépositions de complices présumés dans l'affaire *Niyitegeka*, la Chambre de première instance a indiqué qu'« elle avait fait montre de prudence dans ses délibérations relatives à de telles dépositions »[416] et a relevé par la suite que les dépositions de témoins complices « doivent être considérées avec une prudence toute particulière »[417]. Saisie de l'affaire, la Chambre d'appel a déclaré que la déposition d'un complice n'est pas en soi dépourvue de crédibilité, notamment lorsque le témoin complice peut être contre interrogé de façon approfondie. Elle a néanmoins précisé que sachant, que des témoins complices peuvent avoir des motifs de mettre en cause l'accusé devant le Tribunal, ou être incités à le faire, toute Chambre est tenue d'examiner avec prudence l'ensemble des circonstances dans lesquelles une telle déposition a été faite lorsqu'elle en apprécie la valeur probante[418].

214. La Chambre d'appel conclut que, contrairement aux arguments avancés par le Procureur, la jurisprudence du Tribunal et du TPIY n'étaye pas la thèse selon laquelle une Chambre de première instance verse dans l'erreur lorsqu'elle fait preuve de circonspection dans l'appréciation des dépositions de complices. En outre, la Chambre d'appel ne souscrit pas à l'argument du Procureur selon lequel cette approche cadre mal avec le fait que diverses juridictions nationales aient aboli les règles exigeant la corroboration des dépositions de complices[419]. Même si certaines législations nationales n'exigent plus que les dépositions de complices soient corroborées, elles n'interdisent certainement pas au juge du fond de faire preuve de prudence lorsqu'il analyse ce type de dépositions. La Chambre d'appel rejette l'argument selon lequel la Chambre de première instance a utilisé un standard juridique erroné pour apprécier les dépositions de complices.

215. Il ressort de l'analyse de la jurisprudence susmentionnée que, lorsqu'elle procède à l'appréciation de la fiabilité d'une déposition de complice, la Chambre de première instance doit rechercher si le témoin considéré avait des motifs précis de déposer comme il l'a fait et de mentir[420]. À la lecture du Jugement, on constate que la Chambre de première instance s'est contentée de dire que

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[412] Mémoire d'appel du Procureur, par. 270 à 273, citant le Jugement *Čelebići*, par. 759 et 762, et le Jugement *Kordić et Čerkez*, par. 628 et 629.
[413] Jugement *Čelebići*, par. 761.
[414] Jugement *Kordić et Čerkez*, par. 628 (non souligné dans l'original).
[415] Arrêt *Kordić et Čerkez*, par. 274.
[416] Jugement *Niyitegeka*, par. 48.
[417] Jugement *Niyitegeka*, par. 73.
[418] Voir Arrêt *Niyitegeka*, par. 98. Voir aussi Arrêt *Kajelijeli*, par. 18, où la Chambre d'appel a approuvé la décision de la Chambre de première instance de traiter « avec prudence » la déposition d'un témoin ayant prétendument un parti pris contre l'accusé.
[419] Mémoire d'appel du Procureur, par. 281.
[420] Jugement *Čelebići*, par. 759 et 762 ; Jugement *Kordić et Čerkez*, par. 630.

les témoins en question étaient des « complices présumés », sans fournir de précisions sur la nature de la complicité alléguée, ni rechercher si l'un de ces témoins avait personnellement des motifs de faire un faux témoignage. La Chambre d'appel considère toutefois que le fait que la Chambre de première instance n'ait pas expressément évoqué ces motifs ne signifie pas qu'elle n'en ait pas tenu compte. La Chambre d'appel rappelle qu'une Chambre de première instance n'est pas tenue de justifier chacune des étapes de son raisonnement. En particulier, une Chambre de première instance a toute latitude pour apprécier les éléments de preuve produits et rechercher s'ils sont fiables dans l'ensemble, sans expliquer sa décision en détail[421].

216. Lors des audiences en appel, le Procureur a, pour illustrer l'erreur alléguée, cité les conclusions de la Chambre de première instance concernant un incident survenu le 20 janvier 1994, lors duquel Ntagerura serait prétendument monté dans un hélicoptère pour Bugarama ou Bigogwe afin d'y distribuer des armes. Le Procureur soutient que la Chambre de première instance a rejeté la preuve de la présence de Ntagerura pour la seule raison qu'elle a été fournie par des témoins complices[422].

217. La Chambre d'appel note que la Chambre de première instance a consacré deux paragraphes entiers à l'examen attentif des éléments de preuve présentés par les trois témoins en question, les Témoins LAI, LAJ et LAP. La Chambre de première instance fait état des contradictions entre leur version des faits et celle du Témoin Gratien Kabiligi[423] et discute les divergences entre la déposition au procès du Témoin LAJ et sa déposition antérieure pour les juger irréconciliables[424]. Ce n'est qu'après cet examen que la Chambre de première instance a « rappel[é] » que les Témoins LAI, LAJ et LAP étaient des « complices présumés » et que leur témoignage devait donc être apprécié avec circonspection[425]. Par conséquent, la Chambre d'appel ne considère pas que la crédibilité des Témoins LAI, LAJ et LAP « n'a pas été jugée d'une manière correcte »[426].

218. De surcroît, la Chambre d'appel considère que le Procureur ne reflète pas correctement le raisonnement de la Chambre de première instance ; contrairement à ce que prétend le Procureur[427] la Chambre de première instance ne « conclut » pas que les Témoins LAI, LAJ et LAP ont fabriqué leur preuve, mais « retient la possibilité que les dépositions […] sur cet événement aient été fabriquées de toutes pièces »[428] et conclut que

> « le Procureur n'a pas prouvé au-delà de tout doute raisonnable la participation de Ntagerura à ces événements »[429].

Le Procureur n'a pas démontré que cette conclusion n'était pas ouverte à un juge des faits raisonnable.

219. Comme deuxième exemple de l'erreur alléguée, le Procureur mentionne la conclusion de la Chambre de première instance relative à la crédibilité des Témoins BLB et JNQ et à la lettre prétendument écrite par le Témoin LAP[430]. Cette question sera discutée en détail dans le cadre de l'examen du huitième motif d'appel du Procureur[431].

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[421] Arrêt *Kvočka et consorts*, par. 23.
[422] CRA(A) du 6 février 2006, p. 14, 15.
[423] Le Procureur reproche également à la Chambre de première instance son approche des éléments de preuve apportés par Gratien Kabiligi. Cette question est discutée *infra*, par. 239 à 244.
[424] Jugement, par. 129 et 130.
[425] Jugement, par. 131.
[426] CRA(A) du 6 février 2006, p. 14.
[427] CRA(A) du 6 février 2006, p. 15.
[428] Jugement, par. 131 (non souligné dans l'original).
[429] Jugement, par. 132.
[430] CRA(A) du 6 février 2006, p. 15, 16.
[431] Voir *infra*, par. 265 à 268.

2. Dépositions de complices corroborées

220. Dans la deuxième branche du présent motif, le Procureur reproche à la Chambre de première instance d'avoir versé dans l'erreur en ne tenant pas compte de certaines versions des faits qui corroboraient les dépositions de complices[432]. Selon le Procureur, la Chambre de première instance a exigé que chaque point de la déposition d'un complice soit corroboré par un autre témoignage, sans rechercher si elle pouvait aussi porter crédit aux points non corroborés[433]. Il soutient que dès lors qu'il est démontré qu'un « témoin suspect » dit la vérité sur un certain nombre de sujets, même si aucun d'entre eux n'incrimine l'accusé, une juridiction connaissant des faits peut aussi ajouter foi aux points de sa déposition qui n'ont pas été corroborés[434].

221. Bagambiki répond qu'une Chambre de première instance peut décider de rejeter toute la déposition d'un témoin dès lors qu'elle estime que sa crédibilité est en cause ou de retenir uniquement les éléments de dépositions de complices qui ont été corroborés[435]. Ntagerura ajoute que la Chambre de première instance n'était pas tenue de mentionner tous les témoignages corroborant ceux de complices qui ne l'ont pas convaincue[436].

222. La Chambre d'appel analysera l'un après l'autre les exemples cités par le Procureur qui illustrent d'après lui l'« approche problématique » adoptée par la Chambre de première instance[437]. Avant de procéder à cette analyse, la Chambre d'appel juge cependant utile de rappeler qu'elle n'infirme pas à la légère les conclusions de fait dégagées par une Chambre de première instance. Cette retenue repose essentiellement sur le fait que la Chambre de première instance soit la seule à pouvoir observer et entendre les témoins lors de leur déposition, et qu'elle est donc mieux à même de choisir entre deux versions divergentes d'un même événement. La Chambre d'appel n'infirmera les constatations de la Chambre de première instance que lorsqu'aucun juge des faits n'aurait raisonnablement pu parvenir à la même conclusion ou lorsque celle-ci est totalement erronée. Au demeurant, la constatation erronée sera infirmée ou réformée uniquement s'il en est résulté une erreur judiciaire[438].

223. La Chambre d'appel rappelle de surcroît qu'il n'est pas déraisonnable pour un juge des faits d'admettre certaines parties d'un témoignage et d'en rejeter d'autres[439]. Même si certains éléments de la déposition d'un témoin ont été corroborés par un autre témoignage, une Chambre de première instance n'est pas tenue d'ajouter foi à l'ensemble de cette déposition.

Terrain de football de Gashirabwoba

224. S'agissant de l'attaque lancée au terrain de football de Gashirabwoba, le Procureur reproche à la Chambre de première instance d'avoir rejeté les dépositions des Témoins LAB et LAH alors que celles-ci avaient été corroborées dans une large mesure par le récit du Témoin LAC dont la déposition a, elle été retenue. D'après lui, la seule contradiction existant entre les différents récits réside dans la date de l'attaque, ce qui ne devrait pas être considéré comme un élément important[440].

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[432] Mémoire d'appel du Procureur, par. 288.
[433] Mémoire d'appel du Procureur, par. 292.
[434] Mémoire d'appel du Procureur, par. 289.
[435] Mémoire en réponse de Bagambiki, par. 246 et 247.
[436] Mémoire en réponse de Ntagerura, par. 166.
[437] Mémoire d'appel du Procureur, par. 293 à 299.
[438] Arrêt *Semanza*, par. 8 ; voir aussi Arrêt *Tadić*, par. 64 ; Arrêt *Aleksovski*, par. 63 ; Arrêt *Krnojelac*, par. 11 à 13 ; Arrêt *Vasiljević*, par. 8 ; Arrêt *Krstić*, par. 40 ; Arrêt *Niyitegeka*, par. 8.
[439] Arrêt *Kupreškić et consorts,* par. 333 ; Arrêt *Ntakirutimana*, par. 215 ; Arrêt *Kamuhanda*, par. 248.
[440] Mémoire d'appel du Procureur, par. 294. Voir aussi CRA(A) du 6 février 2006, p. 21 à 24.

225. La Chambre d'appel relève que l'une des raisons pour lesquelles la Chambre de première instance a rejeté la déposition du Témoin LAB réside dans le fait qu'elle avait été « largement contredite par d'autres moyens de preuve versés au dossier »[441]. La principale contradiction relevée par la Chambre de première instance porte sur la présence de Bagambiki lors de l'attaque lancée contre les réfugiés. Au dire du Témoin LAC, un grand nombre de personnes ont commencé à attaquer les réfugiés au terrain de football de Gashirabwoba dans la matinée du 12 avril 1994. Bagambiki serait arrivé en compagnie d'une autre personne au cours de l'attaque et aurait demandé aux réfugiés de lui expliquer la situation. Il leur aurait ensuite promis d'envoyer des militaires pour les protéger. Une heure plus tard, des gardes armés et des militaires seraient arrivés, mais, au lieu de protéger les réfugiés, les auraient attaqués[442]. Selon les Témoins LAH et LAB, en revanche, Bagambiki et Imanishimwe auraient organisé et été présents lors de l'attaque[443].

226. La Chambre d'appel considère qu'il n'était pas déraisonnable de la part de la Chambre de première instance de rejeter la version des faits donnée par les Témoins LAH et LAB s'agissant du massacre de Gashirabwoba. Même si certains détails de leurs dépositions étaient corroborés par celle du Témoin LAC, la présence de Bagambiki et d'Imanishimwe lors de l'attaque faisait l'objet d'une contradiction manifeste. Le Témoin LAC a clairement indiqué que Bagambiki était parti après avoir promis d'envoyer des soldats protéger les réfugiés et n'a à aucun moment fait mention de la présence d'Imanishimwe lors de l'attaque[444]. Les Témoins LAH et LAB ont quant à eux tous les deux déclaré que Bagambiki et Imanishimwe étaient présents lorsque les militaires ont ouvert le feu sur les réfugiés[445]. La Chambre de première instance devait choisir entre ces deux versions et le Procureur n'est pas parvenu à démontrer qu'il était déraisonnable de retenir celle du Témoin LAC.

Paroisse de Shangi

227. Le Procureur soutient que la Chambre de première instance a eu tort de ne pas tenir compte de la déposition du Témoin LAK concernant les incidents survenus à la paroisse de Shangi. Selon ses dires, le Témoin LAK aurait parlé des faits mêmes qui ont été acceptés par la Chambre de première instance sans que cette dernière ne daigne le mentionner. La Chambre de première instance se serait au contraire concentrée sur les points de la déposition du témoin qui n'avaient pas été corroborés pour écarter la déposition dans son intégralité[446].

228. La Chambre de première instance offre dans le Jugement un résumé exhaustif de la déposition du Témoin LAK[447]. Après analyse de cette déposition, elle conclut la trouver sujette à caution, le témoin ayant déclaré avoir vu Ntagerura livrer des armes et parler à une foule entre le 20 et le 25 décembre 1993 alors qu'il est établi que l'accusé était en mission au Cameroun à l'époque[448]. Elle relève qu'aucun autre témoin n'avait témoigné avoir vu Bagambiki ou Imanishimwe distribuer des armes au barrage routier de Shangi, ni corroboré le récit fait par le Témoin LAK au sujet de ce barrage routier[449].

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[441] Jugement, par. 439.
[442] Jugement, par. 417 et 418.
[443] Jugement, par. 423 (Témoin LAH) et 426 (Témoin LAB).
[444] Témoin LAC, T. du 9 octobre 2000, p. 34 à 39. Selon le Témoin LAC, Bagambiki était accompagné de Callixte Nsabimana, le directeur de l'usine à thé de Shagasha.
[445] Témoin LAB, CRA du 24 janvier 2001, p. 14 à 16 et CRA du 29 janvier 2001, p. 67 à 68 ; Témoin LAH, CRA du 10 octobre 2000, p. 98 et CRA du 11 octobre 2000, p. 102 à 104.
[446] Mémoire d'appel du Procureur, par. 297 ; CRA(A) du 6 février 2006, p. 24 à 28.
[447] Jugement, par. 443 à 448.
[448] Jugement, par. 485. La version anglaise du Jugement vise le mois de « décembre 1994 ». D'après les références visées par la Chambre de première instance, il s'agit manifestement d'une erreur typographique ; *cf.* CRA du 19 janvier 2001, p. 58 et 59.
[449] Jugement, par. 485.

229. D'après le Témoin LAK, un barrage routier avait été installé sur ordre des autorités communales près de la petite boutique d'un certain Bonaventure Harerimana – boutique pour laquelle le Témoin LAK travaillait trois jours par semaine – et tout Tutsi qui essayait de traverser ce barrage routier était tué[450]. Prétendument, Bagambiki et Imanishimwe seraient venus au barrage routier le 9 avril 1994 et y auraient distribué des armes[451]. À l'inverse, les Témoins PCG et PCF ont déclaré qu'il n'y avait pas de barrage routier devant la boutique de Bonaventure Harerimana. Selon eux, le premier barrage routier se trouvait à environ un kilomètre de là[452]. Le Témoin PCG, qui tenait ce barrage, a déclaré qu'aucun responsable ne s'y était rendu et qu'aucune arme n'y avait jamais été distribuée[453]. De plus, le Témoin PCF a déclaré qu'il buvait de la bière à la boutique de Harerimana le 9 avril 1994 au moment considéré et qu'il n'avait remarqué aucune distribution d'armes[454].

230. La Chambre d'appel constate qu'il existe des contradictions manifestes entre la déposition du Témoin LAK et celles des Témoins PCF et PCG au sujet du barrage routier de Shangi et du passage allégué de Bagambiki et d'Imanishimwe à ce barrage. Un juge des faits raisonnable pouvait conclure que la déposition du Témoin LAK n'était pas fiable à cet égard, même si sa version d'autres faits survenus à la paroisse de Shangi était corroborée par d'autres témoins.

Paroisse de Mibilizi

231. Un autre cas qui, d'après le Procureur, est « révélateur » des conséquences de l'approche adoptée par la Chambre de première instance concerne le traitement de la déposition du Témoin LAJ sur l'attaque lancée à la paroisse de Mibilizi. Le Procureur soutient que la Chambre de première instance a ignoré l'intégralité de la déposition alors même que ce que le Témoin LAJ avait dit au sujet de l'attaque était amplement corroboré par les Témoins MM, MP et Théodore Munyangabe[455].

232. La Chambre d'appel considère que, contrairement à ce que prétend le Procureur, le récit fait par le Témoin LAJ de l'attaque lancée à la paroisse de Mibilizi n'était pas corroboré par les Témoins MM, MP et Théodore Munyangabe[456]. La Chambre de première instance a relevé que le récit du Témoin LAJ manquait « souvent de cohérence interne et [était] contredit par d'autres moyens de preuve crédibles et fiables versés au dossier »[457]. Par exemple, explique la Chambre de première instance, le Témoin LAJ a déclaré qu'il avait participé à une attaque de grande envergure lancée contre la paroisse le 20 avril 1994 et que Munyakazi et les *Interahamwe* placés sous ses ordres avaient perpétré une attaque plus tard dans le courant de la journée. Par la suite, fait-elle observer, il a nié avoir participé à une attaque le 20 avril 1994. Au demeurant, il ressort des éléments de preuve versés au dossier que Munyakazi a attaqué la paroisse le 30 avril[458]. La Chambre de première instance a aussi relevé que Bagambiki et Imanishimwe avaient participé à une réunion du conseil préfectoral de sécurité le 18 avril 1994, discréditant ainsi l'allégation du Témoin LAJ selon laquelle il avait eu un entretien avec eux le même jour à l'hôtel Ituze et reçu d'eux des grenades et de l'argent[459]. La Chambre d'appel conclut que le Procureur n'est pas parvenu à établir que cette conclusion de la Chambre de première instance était déraisonnable.

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[450] Jugement, par. 443 ; Témoin LAK, T. du 18 novembre 2001, p. 96 et 97 ainsi que 102.
[451] Jugement, par. 444 ; Témoin LAK, T. du 18 novembre 2001, p. 116 et 117.
[452] Jugement, par. 476 et 477 ; Témoin PCG, CRA du 23 octobre 2002, p. 3 à 6 ; Témoin PCF, CRA du 21 octobre 2002, p. 86, 87.
[453] Jugement, par. 476 ; Témoin PCG, CRA du 23 octobre 2002, p. 12.
[454] Jugement, par. 477 ; Témoin PCF, CRA du 21 octobre 2002, p. 95 à 96.
[455] Mémoire d'appel du Procureur, par. 298.
[456] Témoin LAJ, CRA du 23 octobre 2000, p. 103 à 129 ; Témoin MM, CRA du 12 octobre 2000, p. 45 à 141 ; Témoin MP, CRA du 12 octobre 2000, p. 159 à 216 ; Théodore Munyangabe, CRA du 24 mars 2003, p. 29 à 44 et CRA du 25 mars 2003, p. 4 à 13.
[457] Jugement, par. 540.
[458] Jugement, par. 540. La preuve que Munyakazi a attaqué la paroisse le 30 a été fournie par les Témoins à charge MM (CRA du 12 octobre 2000, p. 72) et MP (CRA du 12 octobre 2000, p. 186).
[459] Jugement, par. 540 ; *cf.* Témoin LAJ, CRA du 23 octobre 2000, p. 107 à 115.

Paroisse de Nyamasheke

233. Le Procureur affirme que, comme dans les cas précédents, la Chambre de première instance n'a pas tenu compte de la déposition faite par le Témoin LAM sur les incidents survenus à la paroisse de Nyamasheke alors qu'elle avait été corroborée à plusieurs égards par celles des Témoins LBI et LAY[460].

234. La Chambre de première instance a rejeté la déposition du Témoin LAM sur les incidents de la paroisse de Nyamasheke « parce qu'elle entre en contradiction avec d'autres moyens de preuve versés au dossier et qu'elle n'est ni crédible ni fiable »[461]. Pour illustrer ces contradictions, la Chambre de première instance a relevé les différences existant entre le récit du Témoin LAM relatif à l'arrivée de Bagambiki à la paroisse et ceux des Témoins LAY et LBI. Le Témoin LAM a déclaré qu'après qu'un gendarme eut tué par balles trois *Interahamwe*, les assaillants s'étaient repliés, avaient enlevé leurs morts et les gendarmes étaient également partis. Au dire de ce témoin, Bagambiki serait arrivé plus tard et l'aurait rencontré au bureau communal[462]. La Chambre de première instance a relevé que les Témoins LAY et LBI avaient en revanche déclaré que Bagambiki était arrivé à la paroisse lorsque les assaillants et les *Interahamwe* morts y étaient encore[463]. Elle a par ailleurs jugé « hautement improbable » que Bagambiki et Imanishimwe aient pu, comme l'a déclaré le Témoin LAM, distribuer des armes dans l'après-midi du 15 avril 1994, puisqu'elle a pu établir qu'ils s'occupaient, avec des autorités ecclésiastiques, du transfert de réfugiés de la cathédrale de Cyangugu au stade Kamarampaka[464].

235. Il ressort d'un examen minutieux du dossier que les conclusions de la Chambre de première instance relatives à la déposition du Témoin LAM sont partiellement erronées : en réalité, le Témoin LBI a lui aussi déclaré que les assaillants s'étaient retirés après que trois des leurs eurent été tués et sa déposition ne permet pas de savoir si Bagambiki est venu d'abord à la paroisse ou au bureau communal[465]. La déposition du Témoin LBI ne contredit par conséquent pas celle du Témoin LAM à cet égard. Un juge des faits pouvait cependant raisonnablement conclure de la déposition du Témoin LAY que les assaillants et les gendarmes étaient encore présents lorsque Bagambiki est arrivé à la paroisse[466] et considérer dès lors que la déposition du Témoin LAM était contredite.

236. Le Procureur ne conteste la conclusion à laquelle est parvenue la Chambre de première instance au sujet des activités de Bagambiki et Imanishimwe dans l'après-midi du 15 avril 1994, ni ne tente d'expliquer les contradictions entre les différents récits de l'arrivée de Bagambiki à la paroisse de Nyamasheke. Puisqu'il semble invraisemblable que Bagambiki et Imanishimwe aient été présents dans cette zone dans l'après-midi du 15 avril 1994 et puisque le récit du Témoin LAM était plutôt confus lorsqu'il parlait de leur participation à la distribution d'armes et à l'attaque perpétrée par la suite[467], l'interprétation erronée de la déposition du Témoin LBI ne constitue pas une erreur judiciaire. La Chambre d'appel conclut que, même si certains points de la déposition faite par le Témoin LAM au sujet des incidents survenus à la paroisse de Nyamasheke cadraient avec d'autres témoignages, un juge des faits raisonnable pouvait toujours conclure que les informations qu'il a fournies au sujet de la participation de Bagambiki et d'Imanishimwe à l'attaque n'étaient pas fiables.

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[460] Mémoire d'appel du Procureur, par. 299.
[461] Jugement, par. 587.
[462] Témoin LAM, CRA du 2 novembre 2000, p. 25 à 28.
[463] Jugement, par. 587 ; Témoin LAY, CRA du 26 octobre 2000, p. 121.
[464] Jugement, par. 588 ; *cf.* Témoin LAM, CRA du 20 novembre 2000, p. 37 à 38.
[465] Témoin LBI, CRA du 25 octobre 2000, p. 67 : « Après la mort de ces trois personnes, l'attaque s'est arrêtée, les assaillants sont repartis ». Voir aussi Témoin LBI, CRA du 25 octobre 2000, p. 68 et 69.
[466] Témoin LAY, CRA du 26 octobre 2000, p. 121 : « Après l'arrivée du préfet et de sa délégation, les assaillants ont un peu reculé ».
[467] Témoin LAM, CRA du 2 novembre 2000, p. 25 à 32.

Stade Kamarampaka

237. Lors des audiences en appel, le Procureur a, comme autre exemple, fait référence à la déposition du Témoin LAP sur les événements survenus au stade Kamarampaka. Le Procureur soutient que la Chambre de première instance a rejeté la déposition du Témoin LAP selon laquelle Bagambiki aurait ordonné de tuer les réfugiés évacués du stade le 16 avril 1994 bien qu'elle fût largement corroborée par d'autres témoins[468].

238. Comme le Procureur le concède, la Chambre de première instance « a donné plusieurs raisons pour lesquelles elle a rejeté la déposition [du Témoin] LAP »[469]. La Chambre de première instance a en effet consacré deux paragraphes entiers à une ample discussion sur les contradictions entre la déposition du Témoin LAP et d'autres moyens de preuve contenus dans le dossier, et sur les incohérences entre son témoignage à la barre et ses dépositions antérieures[470]. La plupart de ces contradictions et de ces incohérences concernaient précisément la partie non corroborée du témoignage du Témoin LAP relative à la participation directe de Bagambiki au meurtre des réfugiés. La Chambre d'appel considère qu'au vu de ces contradictions, il était tout à fait raisonnable pour la Chambre de première instance de ne pas tenir compte du fait que certains des aspects du témoignage étaient corroborés par d'autres moyens de preuve.

3. Manque de circonspection dans l'appréciation des dépositions de témoins à décharge complices

239. Le Procureur soutient que la Chambre de première instance a aggravé son traitement erroné des dépositions des témoins à charge complices en ne faisant pas preuve de la même circonspection à l'égard des complices qui ont témoigné à décharge. Il cite notamment quatre témoins à décharge – Augustin Ndindiliyimana, le Témoin BLB, Gratien Kabiligi, le sous-préfet Théodore Munyangabe – qui, d'après lui, auraient dû être qualifiés de témoins complices. Or, poursuit-il, aucun de ces témoins à décharge n'a même été considéré comme un complice éventuel dans le Jugement[471].

Augustin Ndindiliyimana

240. Le Procureur prétend qu'Augustin Ndindiliyimana a admis être accusé de génocide et de crimes contre l'humanité devant le Tribunal et que Bagambiki et lui avaient servi sous le même régime au Rwanda en 1994. Il ajoute qu'Augustin Ndindiliyimana a clairement exprimé le souhait de voir acquitter Bagambiki[472]. Rappelant qu'Augustin Ndindiliyimana est accusé de crimes commis par ses troupes à Cyangugu, le Procureur soutient qu'il s'employait manifestement ainsi à se soustraire, de même que Bagambiki, à toute responsabilité pénale[473].

241. La Chambre d'appel constate que le Procureur ne donne aucune précision sur les accusations portées contre Augustin Ndindiliyimana devant le Tribunal pas plus qu'il ne conteste l'argument de Bagambiki selon lequel ces accusations reposent sur des actes criminels différents de ceux qui sont imputés aux Accusés en l'espèce[474]. Il s'agit alors pour la Chambre d'appel de déterminer si Augustin Ndindiliyimana peut être qualifié de complice de Bagambiki au sens ordinaire du terme.

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[468] CRA(A) du 6 février 2006, p. 27 à 30.
[469] CRA(A) du 6 février 2006, p. 28.
[470] Jugement, par. 321 et 322.
[471] Mémoire d'appel du Procureur, par. 302 et 303.
[472] Mémoire d'appel du Procureur, par. 304.
[473] Mémoire d'appel du Procureur, par. 306.
[474] Mémoire en réponse de Bagambiki, par. 257.

242. Dans l'affaire *Niyitegeka*, la Défense a fait valoir que l'un des témoins, le Témoin KJ, avait été complice et que la Chambre de première instance devait apprécier sa déposition avec circonspection[475]. Statuant sur cet argument, la Chambre de première instance a relevé que ce témoin n'était accusé d'aucun crime même s'il était détenu dans un camp militaire rwandais. Son raisonnement se poursuit ainsi :

> « En outre, aucune preuve tendant à établir qu'il a participé aux actes criminels qui servent de base aux charges dont l'accusé doit répondre n'a été produite »[476].

La Chambre de première instance en a conclu que le témoin visé n'était pas un complice dont la déposition non corroborée devait être appréciée avec une prudence particulière[477]. Saisie de la question, la Chambre d'appel a conclu de même[478]. Après examen de la jurisprudence citée dans la première section du présent chapitre[479], la Chambre d'appel constate qu'elle traite exclusivement des complices au « sens ordinaire » du terme. Dans l'affaire *Čelebići*, le témoin considéré comme un complice par la Chambre de première instance travaillait dans le même camp de détention que l'accusé et était impliqué dans les crimes commis contre les détenus[480]. Dans l'affaire *Kordić et Čerkez*, le TPIY avait condamné le témoin jugé complice du fait de sa participation à une attaque pour laquelle l'accusé était aussi poursuivi[481].

243. La Chambre rappelle que la nécessité d'apprécier avec « prudence » la déposition d'un complice procède du fait que les témoins complices peuvent avoir des motifs de mettre en cause la personne accusée devant le Tribunal ou être mûs par des arrières-pensées[482]. De toute évidence, les motivations en question sont beaucoup plus puissantes lorsque le témoin est poursuivi pour les mêmes actes criminels que l'accusé. Si les circonstances de la cause le demandent, il peut s'avérer nécessaire de faire preuve d'esprit critique aussi à l'envers les témoins qui ne sont accusés que de crimes de même nature. Dans la plupart des cas, cependant, ils n'ont pas les mêmes motifs tangibles de faire un faux témoignage qu'un témoin qui aurait participé aux mêmes actes criminels que l'accusé. En conséquence, tant qu'aucune circonstance particulière n'a été mise en évidence, il n'est pas nécessaire d'apprécier les dépositions de témoins accusés de crimes similaires avec la même prudence que celle applicable dans le cas des complices au sens ordinaire du terme.

244. Comme la Chambre d'appel l'a déjà indiqué, la Chambre de première instance n'a fourni aucune précision sur la nature de la complicité des « témoins complices » appelés à la barre par le Procureur. Le Procureur ne conteste toutefois pas l'allégation de Bagambiki selon laquelle ils étaient poursuivis en raison de leur participation aux mêmes actes criminels que ceux imputés aux Accusés[483]. De fait, les Témoins LAB et LAH ont déclaré avoir participé à l'attaque lancée au terrain de football de Gashirabwoba[484]. Même s'il a soutenu n'avoir commis aucun crime, le Témoin LAK est détenu à la prison de Cyangugu pour sa participation aux faits survenus à Shangi[485]. Le Témoin LAJ a dit qu'il avait mené l'attaque lancée à la paroisse de Mibilizi[486], le Témoin LAM qu'il avait participé à celles lancées à la paroisse de Nyamasheke[487] et le Témoin LAP qu'il avait participé au meurtre de Tutsis amenés au barrage routier de Gatandara par Bagambiki et Imanishimwe[488]. Quant au Témoin LAI, il a

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[475] Jugement *Niyitekega*, par. 72.
[476] Jugement *Niyitekega*, par. 73.
[477] Jugement *Niyitekega*, par. 73.
[478] Arrêt *Niyitegeka*, par. 105.
[479] Voir *supra*, par. 203 et 204.
[480] Jugement *Čelebići*, par. 759.
[481] Jugement *Kordić* et *Čerkez*, par. 627.
[482] Arrêt *Niyitegeka*, par. 98. Voir *supra*, par. 204.
[483] Mémoire en réponse de Bagambiki, par. 255 et 256.
[484] Témoin LAH, CRA du 10 octobre 2000, p. 100 à 104 ; Témoin LAB, CRA du 24 janvier 2001, p. 13 à 16.
[485] Témoin LAK, CRA du 19 janvier 2001, p. 25 à 27 (huis clos).
[486] Témoin LAJ, CRA du 23 octobre 2000, p. 103, 104.
[487] Témoin LAM, CRA du 2 novembre 2000, p. 25, 26.
[488] Témoin LAP, CRA du 10 septembre 2001, p. 22 à 25.

déclaré avoir participé à plusieurs attaques dans la préfecture de Cyangugu, notamment à celle lancée à la paroisse de Mibilizi[489]. Il s'ensuit que les « témoins complices » qui ont déposé à charge étaient en fait complices des crimes mêmes imputés à Bagambiki, Imanishimwe et Ntagerura.

245. La Chambre d'appel considère que l'allégation générale selon laquelle Augustin Ndindiliyimana « est accusé de crimes commis par ses troupes à Cyangugu »[490] n'est pas une raison valable pour le qualifier de complice au sens ordinaire du terme, c'est-à-dire de « compagnon de crime »[491]. De fait, l'acte d'accusation établi contre lui ne mentionne qu'en termes très généraux les faits survenus à Cyangugu[492]. Il n'existe aucun lien direct entre Augustin Ndindiliyimana et les événements survenus à Cyangugu si ce n'est le fait qu'il était chef d'état-major de la gendarmerie nationale à l'époque[493]. En conséquence, la Chambre d'appel conclut que la Chambre de première instance n'a pas commis d'erreur en décidant de ne pas traiter la déposition d'Augustin Ndindiliyimana avec la même circonspection que celle observée pour les témoins qui avaient directement participé aux crimes retenus contre les Accusés.

246. De plus, la Chambre d'appel relève que la Chambre de première instance n'a mentionné la déposition d'Augustin Ndindiliyimana qu'à deux reprises. Dans les deux cas, le témoin a déclaré, en termes généraux, qu'en droit rwandais, la loi habilitait le préfet à réquisitionner la gendarmerie (mais pas l'armée)[494]. Le Procureur n'a pas indiqué dans quelle mesure cet élément de preuve pouvait avoir été affecté par le fait qu'Augustin Ndindiliyimana faisait l'objet d'accusations dont la nature juridique était semblable à celle des accusations portées contre les personnes poursuivies en l'espèce.

Témoin BLB

247. Le Procureur affirme que le Témoin BLB était poursuivi au Rwanda à raison de sa participation aux mêmes infractions. Selon lui, ce témoin

> « aurait manifestement pu tirer profit d'un verdict innocentant des personnes accusées d'avoir commis des infractions dans la même commune »[495].

En réponse, Bagambiki souligne que le Témoin BLB a été acquitté par le tribunal de première instance de Cyangugu[496]. Le Procureur fait aussi mention de cet acquittement, mais ajoute que le ministère public rwandais a interjeté appel[497].

248. La Chambre d'appel constate que le Procureur n'a apporté aucune précision sur les accusations portées contre le Témoin BLB. Elle croit comprendre que ces accusations avaient trait à l'enlèvement de Côme Simugomwa et aux faits survenus au terrain de football de Gashirabwoba,

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[489] Témoin LAI, CRA du 17 septembre 2001, p. 17 à 20.
[490] Mémoire d'appel du Procureur, par. 306.
[491] Voir *supra*, par. 203.
[492] *Le Procureur c. Bizimungu et consorts*, affaire n°ICTR-2000-56-I, Acte d'accusation, modifié conformément à la décision de la Chambre de première instance II datée du 25 septembre 2002 (« Acte d'accusation modifié *Bizimungu* »), par. 5.66 :
Dans la préfecture de Cyangugu, comme dans toutes les régions du pays, durant toute la période des événements, des membres de la population Tutsi ont cherché refuge dans des endroits qu'ils croyaient sûrs et souvent indiqués par les autorités dont entre autres, le Stade Kamparampaka et le camp de Nyarushishi. Dans ces endroits, malgré la promesse faite par les autorités qu'ils seraient protégés, des militaires et des *Interahamwe* ont enlevé et tué des réfugiés. Des viols et des agressions sexuelles ont été notoirement commis à l'encontre de femmes et jeunes filles tutsi, par des militaires et des *Interahamwe*. En outre, des militaires et des *Interahamwe* ont enlevé des femmes et jeunes filles tutsi qu'ils ont conduites à des endroits isolés où elles ont été violées et soumises à différents actes de violence sexuelle, incluant des traitements dégradants et humiliants, tels qu'exhiber leurs organes génitaux, la nudité et un language dérogatoire et abusif.
[493] Acte d'accusation modifié *Bizimungu*, par. 1.5.
[494] Jugement, par. 194 et note de bas de page 1609.
[495] Mémoire d'appel du Procureur, par. 308.
[496] Mémoire en réponse de Bagambiki, par. 257.
[497] Mémoire d'appel du Procureur, par. 308, note de bas de page 358.

c'est-à-dire à des actes criminels également imputés à Bagambiki et Imanishimwe[498]. Or, comme le reconnaît le Procureur, la Chambre de première instance était au courant des accusations portées contre le Témoin BLB[499]. La Chambre d'appel comprend que le Procureur fait grief à la Chambre de première instance de s'être appuyée sur la déposition du Témoin BLB. Elle constate cependant que le Procureur n'avance aucun argument de nature à établir que la manière dont la Chambre de première instance avait apprécié cette déposition était « totalement erronée ».

249. La Chambre d'appel rappelle qu'une Chambre de première instance a toute latitude pour apprécier les éléments de preuve produits et rechercher s'ils sont fiables dans l'ensemble, sans expliquer sa décision en détail[500]. La Chambre d'appel relève que le Témoin BLB a été acquitté, même si cette décision fait l'objet d'un recours. En outre, elle estime que contrairement à ce qu'affirme le Procureur, la mesure dans laquelle le témoin aurait pu profiter de l'acquittement de Bagambiki et d'Imanishimwe n'est pas « manifeste ». Il demeure en effet que le témoin a été acquitté en première instance avant de déposer au procès de Bagambiki et d'Imanishimwe. Qui plus est, ni Bagambiki ni Imanishimwe n'est mentionné dans le jugement de la juridiction rwandaise acquittant le témoin[501]. Dans ces circonstances, la Chambre d'appel conclut que le Procureur n'a pas établi que la Chambre de première instance avait versé dans l'erreur en appréciant la déposition du Témoin BLB sans explicitement déclarer avoir fait preuve de « circonspection ».

Gratien Kabiligi

250. Le Procureur fait valoir que durant le contre-interrogatoire de Gratien Kabiligi, la Chambre de première instance a reconnu que ce témoin était accusé dans une autre affaire portée devant le Tribunal et qu'il était clair que les crimes qui lui étaient imputés pouvaient être liés à ceux imputés à Bagambiki. Malgré tout, soutient-il, la Chambre de première instance n'a pas fait preuve de circonspection particulière lorsqu'il s'est agi d'apprécier la déclaration selon laquelle il se trouvait à l'étranger le 28 janvier 1994. Bien au contraire, elle l'aurait admise et utilisée pour discréditer les Témoins LAI, LAJ et LAP qui affirmaient l'avoir vu ce jour-là. Le Procureur ajoute que la Chambre de première instance n'a même pas tenu compte du fait qu'il était possible de démontrer que Gratien Kabiligi avait utilisé à plusieurs reprises des documents falsifiés pour quitter le Rwanda[502].

251. La Chambre d'appel constate que le Procureur n'a apporté aucune précision sur les accusations portées contre Gratien Kabiligi et relève que l'acte d'accusation établi contre lui ne mentionne aucun acte criminel commis dans la préfecture de Cyangugu[503]. Les références invoquées par le Procureur pour soutenir que les crimes commis par Gratien Kabiligi pouvaient être liés à ceux imputés à Bagambiki ne sont d'aucune utilité : tout ce qu'elles prouvent, c'est que le témoin a fait usage d'un faux passeport à un moment donné[504]. La Chambre d'appel en conclut Gratien Kabiligi n'est pas « complice » de Bagambiki et Ntagerura au sens ordinaire du terme, mais une personne accusée de crimes ayant la même qualification juridique que ceux qui leur sont imputés.

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[498] Témoin BLB, CRA du 19 février 2003, p. 28 et 29 (huis clos).
[499] Jugement, par. 432.
[500] Arrêt *Kvočka et consorts*, par. 23.
[501] Pièce à conviction D-EBA-9, « Jugement du 31/03/2000 N°RMP.79.901/S2/B.A RP.22/99 de la Chambre spécialisée du Tribunal de première instance de Cyangugu, y siégeant au 1er degré en matière pénale dans les affaires relatives au génocide et autres crimes contre l'humanité commis depuis le 1/10/1990 ».
[502] Mémoire d'appel du Procureur, par. 309.
[503] *Le Procureur c. Kabiligi et Ntabakuze*, affaire n°ICTR-97-30-I et ICTR-97-34-I, Acte d'accusation modifié, 13 août 1999. L'acte d'accusation renferme des allégations précises en ce qui concerne les actes criminels commis à Kigali (par. 6.34 à 6.39), Butare (par. 6.40 et 6.41) et Gitarama (par. 6.42).
[504] Mémoire d'appel du Procureur, par. 309, visant le CRA du 25 mars 2002, p. 143, 144 ainsi que 145 à 149.

252. La Chambre de première instance a relevé que les Témoins LAP, LAI et LAJ avaient déclaré avoir vu Ntagerura et Gratien Kabiligi le 28 janvier 1994 et distribuer des armes[505]. Relevant aussi d'autres incohérences dans la déposition du Témoin LAJ[506], elle a admis la version des faits corroborée selon laquelle Gratien Kabiligi était en mission en Égypte du 27 janvier au 10 février 1994[507]. La Chambre de première instance était consciente du fait que Gratien Kabiligi avait reconnu qu'après avoir quitté le Rwanda comme réfugié, il avait obtenu de faux documents pour ne pas être arrêté par les autorités rwandaises[508].

253. La Chambre d'appel conclut que le Procureur n'a pas démontré que le crédit porté à la déposition de Gratien Kabiligi par la Chambre de première instance était totalement mal fondé. Le fait que le témoin ait utilisé de faux documents pour voyager et échappé à l'arrestation lorsqu'il est devenu réfugié ne signifie pas nécessairement que ce qu'il a dit au sujet des fonctions et activités officielles qu'il exerçait avant son départ du pays est sujette à caution.

Théodore Munyangabe

254. Le Procureur conteste la manière dont la Chambre de première instance a traité la déposition du témoin Théodore Munyangabe. Selon lui, ce témoin a été accusé et reconnu coupable en première instance avant d'être acquitté en appel par les juridictions rwandaises. La cour d'appel de Cyangugu, affirme le Procureur, a accepté le moyen de défense de Théodore Munyangabe selon lequel « d'autres personnes nommément désignées », notamment Bagambiki et Imanishimwe, étaient responsables des crimes qui lui étaient imputés, dont l'enlèvement et le meurtre de 17 civils tutsis réfugiés au stade Kamarampaka[509]. D'après le Procureur, il était évident que le témoin a changé son récit devant le Tribunal, mais la Chambre de première instance n'a ni fait mention de cette contradiction flagrante ni relevé que le témoin était peut-être complice de Bagambiki et d'Imanishimwe[510].

255. Imanishimwe et Bagambiki répondent que le jugement du tribunal de première instance de Cyangugu auquel le Procureur se réfère a été par la suite infirmé par la cour d'appel de Cyangugu[511]. Imanishimwe invoque l'arrêt qui dit explicitement que les comptes rendus d'audience ont été altérés et contiennent des propos que les témoins n'ont jamais tenus[512].

256. La Chambre d'appel constate que le Procureur n'a pas indiqué dans quelle mesure la Chambre de première instance a effectivement utilisé la déposition de Théodore Munyangabe. Le Procureur semble surtout invoquer la manière dont la Chambre de première instance a traité cette déposition pour illustrer la ligne de conduite par elle adoptée. Il ressort cependant de l'examen du Jugement que la Chambre de première instance a plutôt fait preuve de circonspection envers la déposition, même si elle n'a pas considéré le témoin comme un complice présumé.

257. La Chambre de première instance a invoqué à trois reprises la déposition de Théodore Munyangabe :

Au paragraphe 317 du Jugement, elle a invoqué la déposition de Théodore Munyangabe et celle de Bagambiki pour conclure que les réfugiés qui avaient quitté la cathédrale de Cyangugu pour le stade Kamarampaka s'étaient joints à 50 à 100 autres qui s'y trouvaient depuis le 9 avril 1994. Pour les

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[505] Jugement, par. 119 à 124.
[506] Jugement, par. 130.
[507] Jugement, par. 129. La Chambre de première instance n'a pas indiqué les éléments qui corroboraient la déposition. Le seul élément de preuve qui corrobore la déposition de Gratien Kabiligi est apparemment une photocopie de son rapport de mission accompagnée de la lettre d'envoi du rapport adressée au Président rwandais, pièce à conviction DAN-5.
[508] Jugement, par. 126.
[509] Mémoire d'appel du Procureur, par. 310.
[510] Mémoire d'appel du Procureur, par. 312.
[511] Mémoire en réponse de Bagambiki, par. 257 ; Mémoire en réponse d'Imanishimwe, par. 108.
[512] Mémoire en réponse d'Imanishimwe, par. 125.

autres faits survenus à la cathédrale et au stade, la Chambre de première instance s'est appuyée sur un certain nombre d'autres témoins, notamment le Témoin LY[513] ;

Pour certains détails concernant les attaques perpétrées à la paroisse de Mibilizi, la Chambre de première instance a invoqué la déposition de Théodore Munyangabe. Pour dégager les conclusions principales relatives à ces faits, elle s'est appuyée sur les dépositions des Témoins MM et MP[514] ;

Ce n'est qu'à propos des faits survenus à la paroisse de Shangi que la déposition de Théodore Munyangabe a été utilisée de manière plus approfondie. Cela dit, la Chambre ne s'est jamais fondée exclusivement sur sa déposition : il n'est que l'un des nombreux témoins mentionnés dans ce cadre[515].

Ses conclusions relatives à certains détails des faits survenus à la paroisse de Mibilizi mises à part, la Chambre de première instance ne s'est jamais fondée sur la seule déposition non corroborée de Théodore Munyangabe. S'agissant des faits survenus à la paroisse de Shangi, elle a relevé que la déposition de Théodore Munyangabe était « en grande partie conforme » à celles des témoins à charge NG-1 et LAD et du témoin à décharge GLB appelé par Bagambiki[516]. La Chambre d'appel relève en particulier que la Chambre de première instance n'a jamais utilisé la déposition de Théodore Munyangabe pour discréditer les témoins à charge.

258. La Chambre d'appel relève en outre que Théodore Munyangabe avait déjà été acquitté du chef de participation aux crimes commis dans la préfecture de Cyangugu en 1994 lorsqu'il a témoigné devant le Tribunal. S'il avait un motif de faire un faux témoignage, ce motif s'était donc considérablement réduit. S'agissant de la présumée « contradiction flagrante » qui existerait entre la déposition de Théodore Munyagabe devant le tribunal rwandais et celle qu'il a faite devant le Tribunal, la Chambre d'appel relève que lorsqu'on lui a opposé le jugement rendu au Rwanda, Munyangabe a soutenu que sa déposition y avait été déformée[517]. De surcroît, la Cour d'appel de Cyangugu a conclu que

> « les procès-verbaux d'audience [avaient] été altérés en inventant des propos des témoins, qui n'[avaient] jamais été tenus devant la Chambre »[518].

La Chambre d'appel estime qu'un juge des faits raisonnable pouvait ne pas tenir compte de la contradiction alléguée, puisqu'il est malaisé de déterminer ce que Théodore Munyangabe a réellement dit devant le tribunal rwandais.

4. Refus d'autoriser le Procureur à contre-interroger des témoins à décharge sur leur rôle de complice

259. Dans le même ordre d'idées, le Procureur fait valoir que la Chambre de première instance a commis une erreur sur un point de droit en ce qu'elle a indûment limité le contre-interrogatoire de certains témoins à décharge et a empêché le Procureur d'éprouver leur crédibilité[519]. Tel a été le cas,

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[513] Jugement, par. 308 à 331.
[514] Jugement, par. 528 et 534.
[515] Jugement, par. 479 à 487.
[516] Jugement, par. 479.
[517] Témoin Théodore Munyangabe, CRA du 25 mars 2003, p. 43, 44 :

[…]

Q. Il est également exact que vous faites référence au préfet Bagambiki et à Samuel Imanishimwe, comme étant parmi les personnes qui ont enlevé des personnes du stade et les ont assassinées à une date que vous ignorez, n'est-ce pas ?

R. La phrase également ici n'est pas correcte. C'est pour cela que ce jugement, j'ai fait l'appel, parce que je n'étais pas content du jugement. Je voudrais, si vous me le permettez, Monsieur le Procureur, vous dire ce que j'ai dit, avec une petite nuance qu'il y a, marquée ici.

Q. Monsieur le Témoin, dans ce paragraphe, le jugement fait référence à votre déposition, n'est-ce pas ?

R. Non, le jugement a mal utilisé ma déclaration, et c'est pour cela que j'ai fait appel [de] ce jugement justement, parce que, pour moi, il est incorrect.

[518] Témoin Théodore Munyangabe, CRA du 25 mars 2003, p. 51, citation tirée de l'arrêt rendu en kinyarwanda (pièce à conviction D-EBA 15, « Procès en appel de Munyangabe Théodore »).
[519] Mémoire d'appel du Procureur, par. 314.

soutient-il, pour les dépositions des Témoins Augustin Ndindiliyimana, BLB, Gratien Kabiligi et PNA[520]. Le Procureur conclut que la Chambre de première instance ne lui a pas permis

> « d'évoquer des questions qui se rapporteraient au rôle personnel du témoin dans les affaires dont elle était saisie »[521].

Augustin Ndindiliyimana

260. Le Procureur soutient qu'il a tenté de mettre à l'épreuve la crédibilité d'Augustin Ndindiliyimana « en évoquant sa participation aux crimes », mais en a été empêché, la Chambre de première instance n'ayant pas voulu obliger le témoin à déposer dans les conditions prévues par l'article 90 (E) du Règlement qui aurait offert au témoin la protection nécessaire[522].

261. L'article 90 (E) du Règlement est ainsi libellé:

> Un témoin peut refuser de faire toute déclaration qui risquerait de l'incriminer. La Chambre peut toutefois obliger le témoin à répondre. Aucun témoignage obtenu de la sorte ne peut être utilisé par la suite comme élément de preuve dans une poursuite contre le témoin, hormis le cas de poursuite pour faux témoignage.

À n'en pas douter, la Chambre de première instance a refusé de recourir à cette option. La Chambre d'appel relève toutefois que pendant la déposition d'Augustin Ndindiliyimana, le Procureur n'a pas explicitement demandé à la Chambre de première instance d'obliger le témoin à répondre :

> Si le témoin refuse de répondre aux questions, c'est son droit. [Les juges peuvent l'obliger à répondre], mais si ce n'est pas le cas, moi, je ne peux pas poursuivre. Mais je sais que c'est le droit en premier lieu du Procureur de pouvoir poser ce genre de questions.[523]

La question envisagée a été finalement autorisée, mais le témoin a refusé d'y répondre[524]. Elle portait sur le transport d'*Interahamwe* par des autobus de l'Onatracom dans le nord du Rwanda[525]. D'autres questions posées par la suite portaient sur la distribution d'armes à Kigali et dans ses environs[526], ainsi que sur un rapport traitant de la situation militaire au Rwanda que le témoin avait reçu en septembre 1992[527]. Finalement, le Président de la Chambre a jugé nécessaire de donner un avertissement au substitut du Procureur[528].

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[520] Mémoire d'appel du Procureur, par. 316 à 319.
[521] Mémoire d'appel du Procureur, par. 318.
[522] Mémoire d'appel du Procureur, par. 316.
[523] CRA du 18 février 2003, p. 58.
[524] Témoin Augustin Ndindiliyimana, CRA du 18 février 2003, p. 60.
[525] CRA du 18 février 2003, p. 57 ainsi que 60 et 61.
[526] CRA du 18 février 2003, p. 65 à 66.
[527] CRA du 18 février 2003, p. 69 à 72.
[528] CRA du 19 février 2003, p. 3, 4 :
[…] C'est le problème même que la Chambre a traité avec vous hier tout l'après-midi. Vous utilisez l'acte d'accusation de ce témoin pour mettre en doute sa crédibilité. Vous n'avez pas le droit de le faire. Il n'est pas mis en accusation devant cette Chambre. Ce n'est pas lui qui passe en jugement. C'est Imanishimwe et Bagambiki qui sont jugés ici. Donc, tout ce temps que vous prenez, c'est du temps perdu. Vous gaspillez le temps de la Chambre. Je crois qu'il est temps que vous cessiez d'avancer dans cette voie, car je ne vais plus vous donner d'avertissement. Nous ne pouvons pas continuer de cette manière. Alors, abandonnez cette stratégie d'exécution du contre-interrogatoire. Passez à une autre ou, si vous n'avez pas de solution de rechange, asseyez-vous, car il nous faut avancer.
Nous n'allons pas reprendre les débats d'hier après-midi au cours desquels j'ai dû sans cesse vous rappeler que tout ce que vous reprocheriez à ce témoin de n'avoir pas fait ou tout acte répréhensible que vous estimeriez qu'il a peut-être commis ou pas ne présente aucun intérêt pour le présent procès. Voilà donc le dernier avertissement que je vous adresse. À présent, passons à un autre sujet au lieu d'évoquer ceux dans le cadre desquels vous tentez de vous appuyer sur l'acte d'accusation du témoin même pour mettre en doute sa crédibilité.

262. La principale question dont est saisie la Chambre d'appel est celle de savoir si, comme le prétend le Procureur[529], la Chambre de première instance a abusé du pouvoir discrétionnaire que lui confère l'article 90 (E) du Règlement en n'obligeant pas le témoin à répondre à la première question. Le Procureur a apparemment abandonné ses deuxième et troisième questions après les interventions de la Défense et du Président de la Chambre[530]. La Chambre d'appel garde à l'esprit le fait que la responsabilité première de la Chambre de première instance est d'exercer un contrôle sur les modalités de l'interrogatoire des témoins et l'ordre dans lequel ils interviennent et qu'elle doit, dans l'exercice de cette fonction, faire en sorte que l'interrogatoire serve à la manifestation de la vérité et éviter toute perte de temps injustifiée[531].

263. De l'avis de la Chambre d'appel, la question relative au transport d'*Interahamwe* dans le nord du Rwanda ne se rapportait guère aux faits de l'espèce ni à l'objet de la déposition d'Augustin Ndindiliyimana[532]. Le substitut du Procureur a fait valoir qu'il était nécessaire de la poser pour mettre à l'épreuve la crédibilité du témoin[533]. L'article 90 (G) (i) du Règlement prévoit la possibilité de poser des questions sur des points ayant trait à la crédibilité du témoin lors de son contre-interrogatoire. Toutefois, cette possibilité de poser des questions tendant à vérifier la crédibilité du témoin n'est pas illimitée[534]. La Chambre d'appel a déjà relevé qu'Augustin Ndindiliyimana n'était pas un complice au sens ordinaire du terme mais une personne accusée de crimes semblables à ceux qui sont imputés à Bagambiki et Imanishimwe[535]. La question que le Procureur voulait poser au témoin avait trait à un sujet bien précis qui n'était lié que d'une manière très générale aux accusations portées contre les Accusés. Le nombre de points abordés dans la déposition d'Augustin Ndindiliyimana étant très limité[536], la Chambre d'appel conclut que le Procureur n'a pas établi que cette question précise était nécessaire pour vérifier la fiabilité du récit offert par le témoin en l'espèce. La Chambre d'appel n'estime pas que la Chambre de première instance a commis une erreur de droit lorsqu'elle a omis d'invoquer l'article 90 (E) du Règlement pour obliger le témoin à répondre à la question.

Gratien Kabiligi

264. Le Procureur avance un argument similaire s'agissant du contre-interrogatoire de Gratien Kabiligi. Il affirme avoir

> « tenté de vérifier sa crédibilité sur une question relative aux lieux où il se trouvait à l'époque des faits »[537].

Lorsque le témoin a refusé de répondre à la question, soutient-il, la Chambre de première instance aurait dû l'obliger à répondre en vertu de l'article 90 (E), mais elle n'a pas voulu le faire.

> « Par conséquent, la Chambre de première instance a limité le contre-interrogatoire qu'effectuait le Procureur en lui interdisant d'évoquer des questions qui se rapporteraient au rôle personnel du témoin dans les affaires dont elle était saisie »[538].

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[529] Mémoire d'appel du Procureur, par. 316.
[530] CRA du 18 février 2003, p. 68, 69 ; CRA du 19 février 2002, p. 4.
[531] Article 90 (F) (i) et (ii) du Règlement.
[532] *Cf. supra*, par. 237.
[533] CRA du 18 février 2003, p. 58, 59.
[534] Voir Archbold, Criminal Pleading, Evidence and Practice (Londres, 2004), par. 8-138, p. 1176 : « [A] witness may be asked questions about his antecedents, associations or mode of life which although irrelevant to the issue would be likely to discredit his testimony. […] The judge has a discretion to excuse an answer when the truth of the matter suggested would not in his opinion affect the credibility of the witness as to the subject matter of his testimony. ».
[535] Voir *supra*, par. 236.
[536] Voir *supra*, par. 237.
[537] Mémoire d'appel du Procureur, par. 318.
[538] Mémoire d'appel du Procureur, par. 318.

265. La Chambre d'appel relève que la question posée était de savoir si le témoin avait été informé de l'attaque lancée par le FPR à Ruhengeri le 22 janvier 1991[539]. Le Procureur n'a pas établi en quoi cette question était liée aux faits visés en l'espèce ni comment la réponse du témoin aurait entamé sa crédibilité. La Chambre d'appel conclut que le Procureur n'a pas établi que la Chambre de première instance a abusé de son pouvoir discrétionnaire lorsqu'elle a refusé d'obliger le témoin à répondre.

Témoin BLB

266. Le Procureur soutient que la Chambre de première instance est aussi intervenue pendant le contre-interrogatoire du Témoin BLB d'une manière inadmissible. Selon ses dires, il a demandé au témoin

> « si sa déposition avait pour but de soustraire Bagambiki et lui-même à la responsabilité qu'ils encourraient à raison des massacres perpétrés dans la commune »

et la Chambre de première instance n'a pas permis au témoin de répondre à cette question[540].

267. Après examen du compte rendu de l'audience, la Chambre d'appel constate que même si le Président de la Chambre entretenait au départ certains doutes quant à l'admissibilité de la question[541], il a fini par l'autoriser et le témoin y a dûment répondu[542]. L'argument du Procureur est donc manifestement dénué de fondement.

Témoin PNA

268. Le Procureur fait valoir que la Chambre de première instance l'a également empêché de poser au Témoin PNA des questions concernant son identité qui touchaient à sa crédibilité[543].

269. La Chambre d'appel relève que le Témoin PNA n'est pas du tout mentionné dans le Jugement. Le Procureur n'a pas démontré l'intérêt que sa déposition présente dans le cadre du procès intenté contre Bagambiki, Imanishimwe et Ntagerura. Par conséquent, la Chambre d'appel n'examinera pas le bien-fondé de l'argument du Procureur.

5. Apparence d'iniquité

270. Au dire du Procureur, la Chambre de première instance a usé de son pouvoir discrétionnaire pour traiter différemment les témoins complices selon qu'ils déposaient à charge ou à décharge et a examiné plus rigoureusement les dépositions des témoins à charge, donnant ainsi lieu à une apparence d'iniquité qui « constitue en soi une erreur de droit supplémentaire »[544]. Le Procureur souligne qu'il ne met en doute ni l'indépendance du Tribunal ni l'impartialité de ses juges, mais estime qu'il y a en l'espèce apparence d'iniquité entre les parties[545].

271. La Chambre d'appel est d'avis qu'un examen du Jugement infirme l'affirmation du Procureur selon laquelle la Chambre de première instance n'a pas fait preuve de la même circonspection à l'égard des complices témoignant à décharge, créant ainsi « une norme différente pour le Procureur ». Lorsqu'elle appréciait les dépositions de cinq témoins à décharge cités par Imanishimwe, la Chambre de première instance a pris en considération

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[539] CRA du 25 mars 2002, p. 119 à 121.
[540] Mémoire d'appel du Procureur, par. 317.
[541] CRA du 20 février 2003, p. 13.
[542] Témoin BLB, 20 février 2003, p. 16 (huis clos).
[543] Mémoire d'appel du Procureur, par. 319.
[544] Mémoire d'appel du Procureur, par. 321.
[545] Mémoire d'appel du Procureur, par. 322 et 323.

> « le fait que les déclarations des témoins à décharge cités par Imanishimwe sont teintées de parti pris et intéressées puisque ceux-ci ont antérieurement servi en tant que soldats sous les ordres d'Imanishimwe et que reconnaître que des civils ont été amenés au camp reviendrait à admettre leur implication ou celle de leurs collègues dans les mauvais traitements infligés aux premiers »[546].

La Chambre de première instance a manifestement tenu compte de l'éventualité de la participation de ces témoins à décharge à la perpétration des crimes imputés à Imanishimwe et a conclu qu'elle rendait leurs dépositions peu fiables.

272. La Chambre d'appel a conclu que les arguments présentés par le Procureur au sujet des erreurs qu'aurait commises la Chambre de première instance dans la manière dont elle a traité les témoins à décharge « complices » sont dénués de fondement. En conséquence, il n'y a aucune raison de soutenir que la Chambre de première instance ait fait preuve de discrimination dans l'appréciation des dépositions de complices.

6. Conclusion

273. Le sixième motif d'appel du Procureur est rejeté.

C. MOYENS DE PREUVE EN RÉFUTATION SE RAPPORTANT À CERTAINES LETTRES (8ÈME MOTIF D'APPEL)

1. Témoin PR3/LAP

274. En son huitième motif d'appel, le Procureur soutient que la Chambre de première instance a commis une erreur de droit dans sa décision du 21 mai 2003[547] par laquelle elle a refusé au Procureur l'autorisation de présenter des moyens preuves en réfutation relatifs à certaines lettres[548]. Selon le Procureur, ce motif d'appel vise tous les verdicts rendus à l'encontre de Ntagerura, Bagambiki et Imanishimwe[549]. Il soutient que la Chambre de première instance a versé dans l'erreur en autorisant que cinq lettres qui auraient été écrites par les témoins à charge LAP, LAB et LAJ soient versées au dossier de première instance[550] aux motifs que le témoin qui les a présentées, le témoin JNQ, n'a pas été en mesure d'en certifier l'authenticité et qu'elles n'ont à aucun moment été opposées aux témoins à charge lors de leur contre-interrogatoire[551]. Le Procureur ajoute qu'il a alors essayé d'administrer la preuve en réfutation s'agissant de l'authenticité de ces lettres, mais que la Chambre de première instance a, à tort, rejeté sa requête.

275. En réponse, Bagambiki et Ntagerura soutiennent notamment que la Chambre de première instance ne s'est quoi qu'il en soit pas fondée sur les lettres en question, et que, par conséquent, ni l'admission de ces dernières comme moyens de preuve, ni le refus d'autoriser le Procureur à administrer la preuve en réfutation n'ont eu d'incidence sur le verdict final[552].

276. La Chambre d'appel relève que bien que cinq lettres aient été présentées comme moyens de preuve, les arguments du Procureur se concentrent sur les deux lettres prétendument écrites par le

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[546] Jugement, par. 399. Ces cinq témoins sont les Témoins PCD (Jugement, par. 367), PCE (Jugement, par. 372), PKB (Jugement, par. 374), PNC (Jugement, par. 376) et PNF (Jugement, par. 382).
[547] *Le Procureur c. Ntagerura, Bagambiki et Imanishimwe*, affaire n°ICTR-99-46-T, Décision relative à la requête du Procureur aux fins de présenter des moyens de preuve en réplique conformément aux articles 54, 73 et 85 (A) (iii) du Règlement de procédure et de preuve, 21 mai 2003.
[548] Mémoire d'appel du Procureur, par. 341.
[549] Acte d'appel du Procureur, par. 50.
[550] Mémoire d'appel du Procureur, par. 341 et 342.
[551] Mémoire d'appel du Procureur, par. 342.
[552] Mémoire en réponse de Ntagerura, par. 221 et 222 ; Mémoire en réponse de Bagambiki, par. 267.

Témoin LAP. En fait, les lettres qui auraient prétendument été écrites par les Témoins LAB et LAJ ne sont nullement mentionnées dans le Jugement.

277. S'agissant du Témoin LAP et des deux lettres présentées par le Témoin JNQ, la Chambre de première instance s'est prononcée dans les termes suivants :

> De plus, de l'avis de la Chambre, le fait que le témoin LAP ait demandé de l'argent en échange de son témoignage donne l'impression que celui-ci est à vendre, ce qui est également corroboré par les témoins à décharge GLB et JNQ, cités par Bagambiki, qui ont déclaré que le témoin LAP avait la réputation de porter de fausses accusations pour son profit personnel. La Chambre relève également que le témoin JNQ a témoigné au sujet d'une série de lettres portant le cachet de la prison de Cyangugu, dans lesquelles le témoin LAP a admis avoir falsifié des preuves se rapportant à d'autres affaires. Le Procureur a affirmé que ces lettres n'étaient pas dignes de foi en raison de leur provenance suspecte. Etant donné les nombreux indices de l'absence de crédibilité ou de fiabilité du témoin LAP, la Chambre n'a pas besoin d'examiner cette question plus avant.[553]

De l'avis de la Chambre d'appel, il apparaît clairement que la Chambre de première instance ne s'est pas fondée sur les lettres en question, d'autres moyens de preuve lui ayant permis d'établir que le témoignage du Témoin LAP n'était pas fiable. Le Procureur n'a pas démontré que cette conclusion était déraisonnable. La Chambre d'appel estime que, si erreur de droit il y avait, le Procureur n'a pas démontré que l'erreur alléguée serait susceptible d'invalider la décision et, pour cette raison, décline d'examiner plus avant les arguments du Procureur.

2. La lettre prétendument écrite par le Témoin LAH

278. Le Procureur soutient que la Chambre de première instance a adopté la même approche quant à l'admission de moyens de preuve entamant la crédibilité de témoins à charge à plusieurs reprises. Il fait référence à une lettre qui aurait été écrite par le Témoin LAH dans laquelle ce dernier énumère des éléments de preuve qu'il aurait présentés contre le Témoin BLB devant les juridictions rwandaises. Le Procureur fait valoir que la lettre n'a jamais été présentée au Témoin LAH lors de son contre-interrogatoire et que l'on n'en a jamais prouvé l'authenticité[554]. Il soutient que la Chambre de première instance a commis une erreur en permettant que la lettre susvisée soit versée au dossier et en se fondant sur elle par la suite pour discréditer le Témoin LAH[555].

279. Ntagerura et Bagambiki répondent que le Procureur n'a pas cherché à examiner l'authenticité de la lettre ou à présenter des éléments de preuve en réfutation[556]. Après avoir souligné que le Témoin BLB avait été acquitté par les juridictions rwandaises, Ntagerura ajoute que la lettre n'avait joué qu'un rôle secondaire dans les conclusions de la Chambre[557].

280. La Chambre de première instance a admis la lettre considérée comme pièce à conviction D-EBA 8, en écartant une objection formulée par le Procureur[558]. Il est fait référence à cette pièce à conviction à plusieurs reprises dans le Jugement. Aux paragraphes 118, 141 et 438 du Jugement, on retrouve la même conclusion, à savoir :

> La Chambre a examiné la déposition du témoin à la lumière des éléments de preuve apportés par le témoin à décharge BLB, qui a déclaré que le témoin LAH avait porté de fausses

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[553] Jugement, par. 322 (note de bas de page omise).
[554] Mémoire d'appel du Procureur, par. 357.
[555] Mémoire d'appel du Procureur, par. 357.
[556] Mémoire en réponse de Ntagerura, par. 210 et 224 ; Mémoire en réponse de Bagambiki, par. 283 et 284.
[557] Mémoire en réponse de Ntagerura, par. 225 et 229.
[558] CRA du 19 février 2003, p. 42, 43 (huis clos).

accusations à son égard en relation avec des infractions graves dont étaient saisis les tribunaux rwandais, avant de se rétracter.

À l'appui de cette conclusion, la Chambre de première instance a fait état de la déposition du Témoin BLB ainsi que des pièces à conviction 8 et 9 versées au dossier par la Défense de Bagambiki[559], la pièce à conviction 9 étant le jugement acquittant le Témoin BLB[560].

281. Avant de déterminer si la Chambre de première instance a versé dans l'erreur en admettant la lettre comme moyen de preuve, la Chambre d'appel rappelle que:

> La Chambre de première instance a le pouvoir de décider si, au vu des circonstances, l'exigence d'un procès équitable interdit le versement au dossier d'un élément de preuve particulier. La Chambre d'appel ne reviendra sur la décision de la Chambre de première instance que si la partie qui la conteste a établi qu'aucun juge du fait n'aurait pu raisonnablement parvenir à la même conclusion […].[561]

282. Aux termes de l'article 89 (C) du Règlement, une Chambre peut admettre tout élément de preuve pertinent dont elle estime qu'il a valeur probante. Conformément à cet article, la fiabilité d'un élément de preuve est pertinente au regard de son admissibilité. La capacité de décider qu'un élément de preuve n'est pas admissible est toutefois limitée. Pour refuser d'admettre un élément de preuve, il doit être à ce point peu fiable qu'il soit dépourvu de toute valeur probante[562]. Dès lors qu'il existe des indices suffisants permettant d'établir provisoirement sa fiabilité, l'élément de preuve peut être admis[563].

283. Selon le Témoin BLB, une copie de la lettre qu'aurait écrite le Témoin LAH – ou qui aurait été écrite en son nom[564]– avait été envoyée à son épouse par le ministère public rwandais. Par la suite, toujours selon le témoin, il avait utilisé la lettre comme moyen de preuve à décharge à son procès, lequel s'est soldé par son acquittement[565]. La Chambre d'appel estime qu'un juge des faits raisonnable pourrait déduire de cette déposition qu'il existe des indices suffisants permettant de croire à l'authenticité de la lettre. La Chambre de première instance n'a donc pas commis d'erreur en acceptant que la lettre soit versée au dossier.

284. Le Procureur prétend en outre que la Chambre de première instance a commis une erreur de fait en utilisant cette lettre pour apprécier la crédibilité du Témoin LAH[566]. Il soutient que le Témoin BLB n'était ni l'auteur ni le destinataire de cette lettre et qu'il n'a pas été en mesure de confirmer que le Témoin LAH l'avait écrite, ainsi que cela était allégué[567].

285. Pour apprécier la crédibilité du Témoin LAH, la Chambre de première instance s'est fondée avant tout sur la déposition du Témoin BLB selon laquelle le Témoin LAH l'avait au départ accusé de crimes graves pour se rétracter par la suite. Il est certes fait référence à la lettre dans les notes de bas de page, mais la Chambre de première instance a sans conteste accordé plus d'importance à la déposition du Témoin BLB[568]. Étant donné que celui-ci a été acquitté par le tribunal rwandais, la

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[559] Jugement, par. 118, note de bas de page 153 ; par. 141, note de bas de page 214. Au paragraphe 438, note de bas de page 1029, la Chambre a fait référence aux conclusions qu'elle avait tirées aux paragraphes 118 et 141.
[560] CRA du 19 février 2003, p. 44 (huis clos).
[561] Arrêt *Kordić et Čerkez*, par. 232.
[562][562] *Le Procureur c. Zlatko Aleksovski*, affaire n°IT-95-14/1-AR73, Arrêt relatif à l'appel du Procureur concernant l'admissibilité d'éléments de preuve, 16 février 1999, par. 15 ; Arrêt *Rutaganda*, par. 266.
[563] Arrêt *Rutaganda*, par. 266.
[564] Témoin BLB, T. du 19 février 2003, p. 43 (huis clos).
[565] Témoin BLB, CRA du 19 février 2003, p. 27, 37, 49, 50 (huis clos).
[566] Acte d'appel du Procureur, par. 57.
[567] Mémoire d'appel du Procureur, par. 357.
[568] Jugement, par. 118, 141 et 438.

Chambre d'appel estime que le Procureur n'a pas démontré que la façon dont la Chambre de première instance avait apprécié la crédibilité du Témoin LAH n'était pas celle d'un juge des faits raisonnable.

3. Conclusion

286. Le huitième motif d'appel du Procureur est rejeté.

D. L'ADMINISTRATION DE LA PREUVE RELATIVE AUX RAPPORTS PRÉSUMÉS D'ANDRÉ NTAGERURA AVEC LA RTLM (7ÈME MOTIF D'APPEL)

287. Le Procureur soutient que la Chambre de première instance a commis une erreur de droit en l'empêchant d'administrer la preuve des rapports de Ntagerura avec la Radio Télévision Libre des Mille Collines (« RTLM »), en sa qualité de membre fondateur et d'actionnaire[569]. Ce faisant, la Chambre de première instance a, de l'avis du Procureur, versé dans l'erreur en omettant de considérer et d'évaluer la pertinence et la force probante des éléments de preuve permettant de démontrer la *mens rea* de Ntagerura pour l'ensemble des crimes qui lui étaient reprochés[570].

288. Le Procureur soutient en outre que la Chambre de première instance a commis une erreur de droit en l'empêchant subséquemment de contre-interroger Ntagerura au sujet de ses rapports avec la RTLM[571] afin de tester sa crédibilité alors que, d'une part, ce dernier avait été préalablement autorisé à présenter des éléments de preuve relatifs à d'autres médias et que, d'autre part, le Juge Président s'est contenté d'affirmer que la crédibilité de Ntagerura n'était pas en jeu pour refuser le contre-interrogatoire[572].

289. Ntagerura objecte en réponse que même si le Procureur entendait démontrer son intention délictueuse en apportant la preuve de ses rapports avec la RTLM, la *mens rea* doit être considérée comme un élément essentiel des crimes reprochés et que, comme telle, elle aurait dû faire l'objet d'une allégation claire dans l'acte d'accusation[573]. Il conteste de surcroît la pertinence de la preuve de sa prétendue implication dans la RTLM car « aucune des accusations contre [lui] n'était de loin ou de près reliée aux activités de la RTLM »[574].

290. La Chambre d'appel remarque que l'objet de l'erreur alléguée sous ce motif d'appel est circonscrit à deux occurrences. Elle est invitée à déterminer, dans un premier temps, si la Chambre de première instance a, à tort, privé le Procureur de la possibilité d'administrer la preuve de l'intention délictueuse de Ntagerura lors de l'interrogatoire du Témoin expert Guichaoua. Elle est appelée à évaluer, dans un second temps, si l'exclusion de la ligne de questions engagée par le Procureur lors du contre-interrogatoire de Ntagerura a indûment empêché le Procureur de tester la crédibilité de Ntagerura.

291. La Chambre d'appel constate que, lors de l'audition du Témoin expert Guichaoua le 19 septembre 2001, la Chambre de première instance – faisant sienne semble-t-il l'affirmation du Conseil de Ntagerura selon laquelle le témoignage de l'expert devait porter sur les allégations contenues dans l'acte d'accusation[575] – a décidé de ne pas prendre en compte les questions du Procureur faisant référence à la RTLM, « c'est-à-dire les rapports avec la RTLM »[576]. Il ressort clairement du compte rendu d'audience que c'est uniquement en rapport avec les chefs d'entente en vue de commettre le

[569] Mémoire d'appel du Procureur, par. 324 et 328.
[570] Mémoire d'appel du Procureur, par. 325.
[571] Mémoire d'appel du Procureur, par. 337.
[572] Mémoire d'appel du Procureur, par. 338 et 339.
[573] Réponse de Ntagerura, par. 189, 193, 196 et 199 à 201.
[574] Réponse de Ntagerura, par. 195. Voir aussi par. 202 et 203.
[575] Témoin expert Guichaoua, CRA du 19 septembre 2001, p. 109 à 116.
[576] Témoin expert Guichaoua, CRA du 19 septembre 2001, p. 115, 116.

crime de génocide et de complicité de génocide que l'implication supposée de Ntagerura dans la RTLM a été invoquée la première fois par le Procureur[577]. C'est donc au regard de ces deux chefs d'accusation que la Chambre de première instance a refusé de prendre en considération l'implication prétendue de Ntagerura dans la RTLM.

292. Lors de l'audience du 1er octobre 2002, c'est cette fois en vue de tester la crédibilité de Ntagerura que le Procureur a évoqué ses rapports supposés avec la RTLM[578]. La Chambre de première instance semble alors avoir admis, sur la base de l'argumentation du Conseil de Ntagerura[579], que par le biais du contre-interrogatoire de Ntagerura, le Procureur cherchait en réalité à réintroduire des éléments de preuve se rapportant à des faits qui n'étaient pas contenus dans l'acte d'accusation. Elle a exclu du contre-interrogatoire les questions du Procureur portant sur l'implication supposée de Ntagerura dans la RTLM[580]. Dans le Mémoire d'appel du Procureur, c'est au sujet des « divers crimes poursuivis, y compris celui de génocide »[581] que les rapports supposés de Ntagerura avec la RTLM sont évoqués par le Procureur.

293. C'est toutefois au regard des chefs d'entente en vue de commettre le crime de génocide et de complicité de génocide que la Chambre d'appel bornera son examen puisque ce sont ces deux chefs d'accusation qui ont justifié l'évocation des liens entre Ntagerura et la RTLM par le Procureur au procès et son rejet à deux reprises par la Chambre de première instance. La Chambre d'appel rappelle que l'Acte d'accusation Ntagerura allègue comme second chef d'accusation le crime d'entente en vue de commettre le génocide en raison des actes décrits aux paragraphes 9, 13, 14.3, 16 et 19. Les troisième et sixième chefs d'accusation figurant dans l'Acte d'accusation Ntagerura correspondant à la complicité de génocide se fondent tous deux sur les actes décrits aux paragraphes 9 à 19[582]. Aux fins de trancher le présent motif d'appel, la Chambre d'appel examinera ci-après le traitement par la Chambre de première instance de ces trois chefs d'accusation.

294. La Chambre d'appel observe que la Chambre de première instance a rejeté le chef d'entente en vue de commettre le génocide en avançant plusieurs conclusions. La Chambre de première instance a d'abord précisé que le paragraphe 10 de l'Acte d'accusation Ntagerura correspondait à une « allégation générale »[583], ne permettant pas d'appuyer à ce titre un chef d'accusation. S'agissant ensuite des paragraphes 12.2, 14.2, 15.1 et 15.2 de l'Acte d'accusation Ntagerura, elle a estimé qu'aucun élément de preuve n'avait été présenté à l'appui des allégations contenues dans ces paragraphes[584]. Elle a en outre considéré, au terme d'une étude minutieuse[585], que les paragraphes 11, 12.1, 13 et 16 de l'Acte d'accusation Ntagerura

> « non seulement sont vagues, mais ne font état d'aucun comportement criminel identifiable de la part de l'accusé »[586].

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[577] T. du 19 septembre 2001, p. 88, 89 :
Notwithstanding, however, Your Honours, the evidence is nonetheless admissible in support of the count of conspiracy. Membership of RTLM, in itself, indeed may not be a chargeable offence or crime. It does, however, go to show the mens rea of the Accused with regard to the counts of conspiracy and complicity, and on that basis, Your Honours, it is admissible even though no specific reference is made in the factual allegations.
La Chambre d'appel fait référence à la version anglaise du compte rendu d'audience dans la mesure où la version française reflète imparfaitement les propos tenus en anglais par le substitut du Procureur lors de l'audience.
[578] André Ntagerura, CRA du 1er octobre 2002, p. 132.
[579] André Ntagerura, CRA du 1er octobre 2002, p. 130.
[580] Voir André Ntagerura, CRA du 1er octobre 2002, p. 136, 141.
[581] Mémoire d'appel du Procureur, par. 332.
[582] L'Acte d'accusation Ntagerura précise, en ce qui concerne le troisième chef d'accusation « et notamment 12.1 et 12.2 » et pour le sixième « et notamment 11 ».
[583] Jugement, par. 40.
[584] Jugement, par. 40 et 69.
[585] Jugement, par. 42 à 44 et 46.
[586] Jugement, par. 69.

Elle a donc retenu les seuls paragraphes 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 et 19 pour dégager ses conclusions factuelles tout en relevant les nombreuses imprécisions et lacunes que présentaient ces paragraphes[587]. La Chambre de première instance a en conséquence rejeté le chef d'entente en vue de commettre le génocide :

> […] car les allégations étayant ces chefs, même si elles étaient prouvées, ne pourraient constituer les éléments essentiels du crime d'entente. En particulier, les exposés succincts des faits caractérisant ces crimes n'allèguent pas l'élément matériel de l'entente, à savoir que deux personnes ou plus se sont entendues en vue de commettre le génocide.[588]

295. La Chambre d'appel rappelle que la Chambre de première instance a examiné les moyens de preuve présentés au soutien des allégations exposées aux paragraphes 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 et 19 de l'Acte d'accusation Ntagerura et qu'elle a constaté que les allégations en question n'avaient pas été prouvées au-delà de tout doute raisonnable[589]. Lorsqu'elle a examiné le quatrième motif d'appel du Procureur, la Chambre d'appel a conclu que le Procureur n'avait pas démontré que la Chambre de première instance avait versé dans l'erreur en estimant que les paragraphes 11, 12.1, 13 et 16 de l'Acte d'accusation Ntagerura étaient entachés de vices qui n'avaient pas été purgés[590].

296. Ayant estimé que la Chambre de première instance avait à bon droit constaté les vices des paragraphes 11, 12.1, 13 et 16 de l'Acte d'accusation Ntagerura, et puisque le Procureur a admis qu'aucun moyen de preuve ne venait étayer les allégations portées aux paragraphes 12.2, 14.2, 15.1 et 15.2 de l'Acte d'accusation Ntagerura, la Chambre d'appel considère que la Chambre de première instance a dûment tiré la conclusion qui s'imposait en rejetant le chef d'entente en vue de commettre le génocide puisque celui-ci reposait sur les faits décrits dans ces paragraphes. Dans la mesure où l'entente en vue de commettre le génocide n'a pas été correctement plaidée, la Chambre d'appel conclut que la question de l'intention de Ntagerura est rendue sans objet.

297. Passant aux chefs de complicité de génocide, la Chambre d'appel note que la Chambre de première instance a rejeté les chefs trois et six sur la base de plusieurs considérations. Réitérant les conclusions qu'elle avait tirée relativement aux paragraphes 11, 12.1, 12.2, 13, 14.2, 15.1, 15.2 et 16 de l'Acte d'accusation Ntagerura[591], la Chambre de première instance n'a retenu, pour formuler ses conclusions juridiques, que les paragraphes 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 et 19[592]. Elle a ensuite considéré que les faits décrits dans les paragraphes 17 et 18 ne reprochaient aucun comportement criminel à Ntagerura[593]. Elle a en outre estimé que les faits allégués dans les paragraphes 9.1, 9.2, 9.3, 14.1, 14.3 et 19 n'avaient pas été prouvés au-delà de tout doute raisonnable[594].

298. La Chambre d'appel remarque que par son cinquième motif d'appel, le Procureur conteste notamment l'appréciation par la Chambre de première instance des éléments de preuve permettant d'établir les faits ainsi que la culpabilité de Ntagerura[595]. À cet égard, le Procureur, bien qu'il ait fait référence à de nombreuses conclusions[596], n'a développé son argumentation qu'au regard de certains exemples choisis[597]. Il a spécifiquement contesté le refus par la Chambre de première instance d'examiner les allégations contenues aux paragraphes 14.1, 14.3, 17, 18 et 19 de l'Acte d'accusation Ntagerura au vu des éléments de preuve se rapportant aux allégations suivantes, relevant des

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[587] Jugement, par. 41, 45 et 47.
[588] Jugement, par. 70 (note de bas de page non reproduite).
[589] Jugement, par. 69 et 667.
[590] Voir *supra*, par. 70 à 83.
[591] Jugement, par. 666.
[592] Jugement, par. 667.
[593] Jugement, par. 667.
[594] Jugement, par. 667.
[595] Mémoire d'appel du Procureur, par. 193 à 258.
[596] Mémoire d'appel du Procureur, par. 193, se référant notamment – mais pas uniquement – au Jugement, par. 92, 95, 103, 113, 118, 132, 141, 145, 149, 178 et 667.
[597] Mémoire d'appel du Procureur, par. 212.

paragraphes 9.1, 9.2 et 9.3 de l'Acte d'accusation Ntagerura : la réunion tenue en février 1993 au marché de Bushenge, la réunion du mois de juin 1993 à l'hôtel Ituze, la réunion du mois d'octobre 1993 à Gatare, la visite effectuée à la cimenterie de Cimerwa à Bugarama en décembre 1993 et la visite à Bugarama en janvier 1994. La Chambre d'appel relève que certaines autres conclusions relatives aux paragraphes 9.1, 9.2 et 9.3 de l'Acte d'accusation Ntagerura n'ont fait l'objet d'aucune constatation du Procureur.

299. La Chambre d'appel a précédemment analysé l'appréciation des éléments de preuve effectuée par la Chambre de première instance pour chacun des faits spécifiques contestés par le Procureur sous le cinquième motif d'appel. Elle n'a décelé aucune erreur de la Chambre de première instance dans l'appréciation des éléments de preuves relatifs auxdits faits se rapportant aux paragraphes 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 et 19 de l'Acte d'accusation Ntagerura[598]. Au surplus, la Chambre d'appel estime qu'elle n'est pas tenue de se prononcer sur les autres conclusions relatives aux paragraphes 9.1, 9.2 et 9.3 de l'Acte d'accusation Ntagerura puisque ces dernières n'ont pas été contestées par le Procureur.

300. Partant, la Chambre d'appel estime que c'est à raison que la Chambre de première instance a conclu que les faits allégués aux paragraphes 9.1, 9.2, 9.3, 14.1, 14.3 et 19 n'ont pas été prouvés au-delà de tout doute raisonnable et qu'ils ne permettent donc pas d'entrer en voie de condamnation contre Ntagerura pour les chefs 3 et 6 de complicité de génocide[599]. La Chambre d'appel considère que, puisque le Procureur n'est pas parvenu à établir que la Chambre de première instance avait versé dans l'erreur en ne concluant pas que les éléments matériels de la responsabilité pour complicité de génocide étaient prouvés, la question de l'intention de Ntagerura sous ce chef est sans objet.

301. Cette conclusion n'épuise pas l'examen de ce motif d'appel. Il reste à la Chambre d'appel à apprécier si l'exclusion de la ligne de questions engagée par le Procureur à propos des liens entre Ntagerura et la RTLM lors du contre-interrogatoire de Ntagerura a indûment empêché le Procureur de tester la crédibilité de Ntagerura.

302. La Chambre d'appel note que Ntagerura a effectivement fait admettre comme moyen de preuve une série de transcriptions d'émissions diffusées par Radio Rwanda et la BBC, établissant, selon lui, des faits et discours gouvernementaux précis. Lors du contre-interrogatoire de Ntagerura, le Procureur a interrogé celui-ci sur sa qualité de membre fondateur et actionnaire de la RTLM[600], ce à quoi le Conseil de Ntagerura a objecté. Lorsqu'elle a fait droit à cette objection, la Chambre de première instance a précisé :

> Ce que le Témoin a fait, c'est déclarer que le Gouvernement a fait certaines déclarations pendant certaines réunions qui ont été rapportées par la presse, et la presse a diffusé cette information. Mais cela ne veut pas dire qu'il faut qu'on s'intéresse maintenant à ce que d'autres stations de radio auraient diffusé.[601]

303. Le Procureur n'a pas expliqué en quoi la question relative à sa qualité de membre fondateur et d'actionnaire de la RTLM permettait de tester la crédibilité de Ntagerura quant à des faits et propos gouvernementaux rapportés par d'autres médias radiophoniques. S'il était ouvert au Procureur de démontrer que les faits et propos en question étaient rapportés différemment selon les radios[602], celui-ci n'a cependant pas convaincu la Chambre de première instance qu'un questionnement sur la qualité de membre fondateur et d'actionnaire de la RTLM de Ntagerura lui permettrait de le faire. La Chambre d'appel considère que c'est à bon droit que la Chambre de première instance a exclu du contre-interrogatoire les questions liées à l'implication de Ntagerura dans la RTLM.

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[598] Voir *supra*, par. 188 à 197.
[599] Jugement, par. 667.
[600] André Ntagerura, CRA du 1er octobre 2002, p. 128.
[601] André Ntagerura, CRA du 1er octobre 2002, p. 141.
[602] Voir André Ntagerura, CRA du 1er octobre 2002, p. 132 et 133.

304. Au vu de ce qui précède, la Chambre d'appel conclut que la Chambre de première instance n'a pas commis d'erreur de droit en écartant de l'interrogatoire du Témoin expert Guichaoua puis du contre-interrogatoire de Ntagerura la question des rapports de ce dernier avec la RTLM. Ce motif d'appel est rejeté.

E. PARTICIPATION D'EMMANUEL BAGAMBIKI AUX CRIMES (1ER ET 2ÈME MOTIFS D'APPEL)

305. Le Procureur fait valoir que la Chambre de première instance a commis une erreur sur un point de droit ainsi qu'une erreur de fait en acquittant Bagambiki. L'erreur de droit tient à ce que la Chambre de première instance impose au Procureur une charge de la preuve dont il était impossible de s'acquitter (2ème motif d'appel)[603] ; l'erreur de fait tient à ce que la Chambre n'a pas tiré des faits établis la seule déduction raisonnable (1er motif d'appel)[604].

Mauvaise application de la charge de la preuve (2ème motif d'appel)

306. Le Procureur fait grief à la Chambre de première instance de lui avoir imposé une charge de la preuve impossible à assumer. Selon lui, la majorité des juges de la Chambre de première instance « semble » avoir exigé la preuve directe de la participation de Bagambiki aux crimes. Le Procureur se fonde sur certains passages de l'Opinion dissidente du Juge Williams, de l'Opinion individuelle et dissidente du Juge Ostrovsky et du libellé du Jugement[605]. Partant du principe que les éléments de preuve circonstancielle peuvent suffire à soutenir une condamnation, le Procureur estime que si la Chambre de première instance a jugé que la participation criminelle de Bagambiki ne pouvait être établie que par des moyens de preuve directe, elle s'est méprise sur les principes applicables à l'administration de la preuve en matière pénale[606].

307. Bagambiki relève que le Procureur n'identifie pas les éléments de preuve circonstancielle qui auraient dû, selon lui, emporter déclaration de culpabilité[607]. Il fait valoir que les arguments du Procureur procèdent d'erreurs d'interprétation, fruit de déductions hâtives, des opinions exprimées par les Juges Williams et Ostrovsky et des conclusions dégagées par la Chambre de première instance[608]. S'il est vrai, fait valoir Bagambiki, que la Chambre de première instance a rejeté certains éléments de preuve circonstancielle, rien dans le Jugement ne permet de déduire qu'elle avait pris le parti de ne considérer que les éléments de preuve directe[609].

308. La Chambre d'appel note que dans son Opinion dissidente, le Juge Williams présente sa position relative au massacre du terrain de football de Gashirabwoba comme étant la « seule conclusion logique »[610] ou la « seule conclusion raisonnable »[611] qui puisse être dégagée des éléments de preuve présentés. Dans son Opinion individuelle et dissidente, le Juge Ostrovsky estime quant à lui que les éléments de preuve se rapportant à la conduite de Bagambiki au terrain de football de Gashirabwoba et au stade Kamarampaka soulèvent une « vague présomption » qui ne saurait valoir preuve au-delà de tout doute raisonnable[612]. Le Juge Ostrovsky conclut son opinion individuelle en ces termes :

> Ce témoignage et d'autres sont de nature à établir que Bagambiki était soucieux d'assurer le bien-être des réfugiés et à faire naître en moi un doute raisonnable relativement à l'assertion

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[603] Acte d'appel du Procureur, par. 9, et Mémoire d'appel du Procureur, par. 32.
[604] Acte d'appel du Procureur, par. 2, et Mémoire d'appel du Procureur, par. 16.
[605] Mémoire d'appel du Procureur, par. 32 et 33.
[606] Mémoire d'appel du Procureur, par. 37.
[607] Mémoire en réponse de Bagambiki, par. 60.
[608] Mémoire en réponse de Bagambiki, par. 61.
[609] Mémoire en réponse de Bagambiki, par. 70 et 71.
[610] Opinion du Juge Williams, par. 7.
[611] Opinion du Juge Williams, par. 8.
[612] Opinion du Juge Ostrovsky, par. 15.

> selon laquelle Bagambiki était animé de l'intention de voir massacrer les réfugiés de la préfecture de Cyangugu ou qu'il était non seulement instruit de la perpétration de tels massacres mais qu'en plus il les approuvait. [...] Après avoir pris en compte l'ensemble des éléments de preuve dignes de foi et crédibles produits en l'espèce, force m'est de dire que je ne suis pas convaincu qu'avec les forces dont il disposait, Bagambiki aurait pu assurer une meilleure protection aux personnes réfugiées à la préfecture de Cyangugu.[613]

309. La majorité des juges de la Chambre de première instance a estimé qu'elle « ne dispos[ait] pas de suffisamment de moyens de preuve fiables pour déterminer » si Bagambiki avait joué un rôle dans le meurtre des réfugiés sélectionnés et emmenés du stade Kamarampaka et de la cathédrale de Cyangugu, et dans la mort de Côme Simugomwa[614]. De l'avis de la Chambre d'appel, il ressort du Jugement que la Chambre de première instance s'est effectivement posée la question de savoir si l'ensemble des éléments de preuve produits permettait de conclure au-delà de tout doute raisonnable que les crimes visés engageaient la responsabilité de Bagambiki, et qu'elle a décidé, à la majorité de ses membres, que tel n'était pas le cas[615].

310. Rien dans le Jugement ne permet de supposer que lorsque la majorité des juges de la Chambre de première instance a déclaré ne pas disposer « de suffisamment de moyens de preuve fiables pour déterminer » si Bagambiki avait été impliqué dans les crimes visés, elle se référait à l'insuffisance des moyens de preuve *directe* fiables, comme le prétend le Procureur[616]. À aucun moment il ne ressort du Jugement que la majorité des juges ait rejeté un élément de preuve en raison de son caractère circonstanciel. Du reste, le Procureur reconnaît que, s'agissant d'Imanishimwe, la Chambre de première instance

> « s'est appuyée sur une preuve de nature essentiellement circonstancielle pour établir sa responsabilité pénale individuelle »[617].

Ce faisant, il n'y a pas lieu de retenir, comme le voudrait le Procureur, que la Chambre de première instance « semble » avoir eu pour règle générale d'exiger, à tort, la preuve directe de la conduite criminelle alléguée[618]. La question de savoir si la Chambre de première instance a commis une erreur de fait pour ne pas avoir tiré des éléments de preuve circonstancielle la seule déduction raisonnable sera examinée dans la section suivante.

2. La Chambre de première instance n'a pas tiré la seule déduction raisonnable (1er motif d'appel)

311. Le Procureur soutient que la Chambre de première instance a commis une erreur de fait en ce qu'elle n'a pas retenu la responsabilité pénale de Bagambiki pour le massacre des réfugiés tutsis au terrain de football de Gashirabwoba et le meurtre de seize réfugiés tutsis sélectionnés à la cathédrale de Cyangugu et au stade Kamarampaka, alors que cette déduction était la seule raisonnable au vu des faits établis par la Chambre elle-même[619]. Le Procureur étaye cet argument en présentant une paraphrase détaillée des conclusions factuelles dégagées en première instance[620], suivie d'une récapitulation des « faits culminants » qui fondent selon lui la « conclusion inéluctable de la culpabilité »[621] de Bagambiki. Il ajoute qu'il suffisait, pour retenir la responsabilité de Bagambiki pour

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[613] Opinion du Juge Ostrovsky, par. 16 et 17.
[614] Jugement, par. 337 et 442.
[615] Voir Jugement, par. 337.
[616] Mémoire d'appel du Procureur, par. 36.
[617] Mémoire en réplique du Procureur, par. 10.
[618] Le Procureur utilise expressément le verbe « *appear* » aux paragraphes 32 et 36 de la version originale de son Mémoire d'appel. Quand bien même la formulation du Jugement donnerait prise à une telle interprétation, l'« apparence » d'une erreur ne saurait justifier l'intervention de la Chambre d'appel.
[619] Mémoire d'appel du Procureur, par. 16.
[620] Mémoire d'appel du Procureur, par. 18.
[621] Mémoire en réplique du Procureur, par. 3.

avoir aidé et encouragé le génocide et les autres crimes, de conclure que Bagambiki avait connaissance de l'intention génocidaire qui animait d'autres participants et qu'il avait lui-même contribué de façon substantielle à la commission des crimes. Le Procureur fait valoir que les circonstances de l'espèce – en particulier, la position de Bagambiki, son implication dans les faits et la proximité de ses actes avec les crimes – étaient telles que la seule déduction raisonnable qui pouvait être dégagée des moyens de preuve était qu'il avait aidé et encouragé la commission des crimes[622].

312. S'appuyant sur l'Opinion dissidente du Juge Williams selon laquelle Bagambiki aurait dû être condamné, le Procureur fait valoir qu'aucun juge des faits raisonnable n'aurait pu apprécier autrement les éléments de preuve dont il disposait. Le Procureur soutient qu'il ne voit pas de lien logique entre les éléments de preuve produits et les doutes exprimés par la majorité des juges de la Chambre de première instance, ni ne comprend en quoi ces doutes seraient « fondé[s] sur la raison ou le sens commun »[623].

Principes applicables aux éléments de preuve circonstancielle

313. Dans l'Arrêt *Čelebići*, la Chambre d'appel du TPIY a énoncé les principes applicables aux moyens de preuve circonstancielle :

> Un faisceau de présomptions est constitué d'un certain nombre d'indices qui, pris ensemble, porteraient à conclure à la culpabilité de l'accusé, parce qu'ils ne sont habituellement réunis que lorsque ce dernier a fait ce qui lui est reproché [...]. Pareille conclusion doit être établie au-delà de tout doute raisonnable. Il ne suffit pas que les moyens de preuve permettent raisonnablement de conclure ainsi. Cette conclusion doit être la *seule* raisonnable possible. Si une autre conclusion peut être raisonnablement tirée des éléments de preuve et qu'elle n'exclut pas l'innocence de l'accusé, celui-ci doit être acquitté.[624]

Les mêmes principes ont été suivis dans les Arrêts *Vasiljević*, *Krstić* et *Kvočka et consorts* lorsqu'il a été question d'établir par déduction l'état d'esprit de l'accusé[625] et, plus récemment, dans l'Arrêt *Stakić*[626].

314. Comme la Chambre d'appel du TPIY l'a souligné dans l'affaire *Kordić et Čerkez*, les principes applicables aux éléments de preuve circonstancielle dégagés dans l'affaire *Čelebići* doivent être distingués des critères régissant l'examen en appel[627]. Il est en effet

> « de règle au Tribunal de se demander en appel si 'aucun juge du fait raisonnable n'aurait pu conclure à la culpabilité au-delà de tout doute raisonnable'»

et il est possible de confirmer une conclusion en appel

> « même lorsque d'autres conclusions touchant la culpabilité auraient pu raisonnablement être tirées au procès en première instance »[628].

315. Il est de jurisprudence constante qu'un accusé ne peut être déclaré coupable sur la base d'éléments de preuve circonstancielle que si sa culpabilité est la seule déduction raisonnable qui s'impose au vu de l'élément de preuve produit. Qu'elle décide de déduire l'existence d'un fait particulier emportant la culpabilité de l'accusé sur la base d'éléments de preuve directe ou circonstancielle, la Chambre de première instance doit démontrer que cette déduction s'impose à elle au-delà de tout doute raisonnable. Si une autre déduction autorisant à penser que le fait visé a pu ne

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[622] Mémoire d'appel du Procureur, par. 26 et 27.
[623] Mémoire d'appel du Procureur, par. 21.
[624] Arrêt *Čelebići*, par. 458.
[625] Arrêt *Vasiljević* par. 120 ; Arrêt *Krstić*, par. 41 ; Arrêt *Kvocka et consorts*, par. 237.
[626] Arrêt *Stakić*, par. 219.
[627] Arrêt *Kordić et Čerkez*, par. 289 et 290.
[628] Voir Arrêt *Kordić et Čerkez*, par. 288.

pas exister pouvait être raisonnablement tirée des éléments de preuve, la culpabilité de l'accusé au-delà de tout doute raisonnable ne peut être prononcée.

(b) Terrain de football de Gashirabwoba

316. La Chambre d'appel est d'avis que les fonctions qu'occupait Bagambiki en tant que préfet et que sa « participation active aux faits qui se produisaient sur le terrain »[629] ne permettent pas de conclure sans équivoque à sa culpabilité. La Chambre d'appel relève en particulier plusieurs cas où la Chambre de première instance a estimé que Bagambiki était activement intervenu pour protéger des réfugiés[630]. En outre, la Chambre de première instance a considéré qu'à plusieurs reprises, les autorités préfectorales avaient tenté de venir en aide aux réfugiés, par exemple en envoyant des gendarmes ou des vivres[631]. La Chambre d'appel note que, d'après les constatations de la Chambre de première instance, Bagambiki n'a jamais pris part en personne à une attaque lancée contre des réfugiés, ni donné des ordres aux assaillants. S'il avait ordonné (ou cautionné) l'attaque lancée contre le terrain de football de Gashirabwoba, comme l'affirme le Procureur[632], il s'agirait du seul exemple du soutien qu'il aurait apporté à une telle opération.

317. Le Procureur invoque les « rapports étroits » que Bagambiki entretenait avec Imanishimwe, lequel a été déclaré pénalement responsable du massacre perpétré au terrain de football de Gashirabwoba. Bagambiki nie de son côté avoir entretenu de tels rapports et affirme qu'aucun élément de preuve ne vient étayer une telle conclusion[633].

318. Le Procureur ne fournit pas d'explications quant au sens à donner aux « rapports étroits » qui auraient uni Bagambiki et Imanishimwe. De l'avis de la Chambre d'appel, le fait qu'Imanishimwe aurait eu connaissance des activités criminelles de ses militaires ne signifie pas pour autant que Bagambiki en avait conscience ou qu'il était au fait de l'implication d'Imanishimwe dans les crimes.

319. La Chambre d'appel note en outre que la Chambre de première instance n'a pas acquis la conviction que Bagambiki exerçait une autorité *de jure* ou *de facto* sur les soldats stationnés au camp militaire de Karambo. Elle a conclu qu'il n'y avait pas de lien de subordination entre la préfecture et le camp militaire de Karambo et qu'aucun élément de preuve fiable n'attestait que Bagambiki avait donné un ordre quelconque aux militaires[634].

320. Enfin, le Procureur invoque la grande proximité, dans le temps et dans l'espace, entre les actes de Bagambiki et les crimes visés pour étayer la thèse selon laquelle la culpabilité de l'accusé était la seule déduction raisonnable que la Chambre de première instance pouvait tirer[635]. Il note en particulier que, lorsqu'il s'était rendu au terrain de football de Gashirabwoba, Bagambiki était accompagné du directeur de l'usine à thé de Shagasha, usine dont les gardes allaient par la suite participer à l'attaque contre le terrain de football[636].

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[629] Mémoire d'appel du Procureur, par. 20.
[630] Jugement, par. 311, 581, 313 et 316.
[631] Jugement, par. 309, 313, 480, 482, 534, 538, 580 et 611.
[632] Mémoire d'appel du Procureur, par. 24, citant l'Opinion du Juge Williams, par. 7 et 8.
[633] Mémoire en réponse de Bagambiki, par. 28 et 29.
[634] Jugement, par. 641 et 642. Dans son acte d'appel, le Procureur fait valoir que la Chambre de première instance a commis une erreur de droit lorsqu'elle a conclu que Bagambiki n'exerçait pas un contrôle effectif sur les militaires (Acte d'appel du Procureur, par. 59). Dans son Mémoire d'appel, le Procureur met l'accent sur la position de Bagambiki vis-à-vis des gendarmes et ne fait que des allusions passagères aux militaires (Mémoire d'appel du Procureur, par. 361 et 372 à 381 ; le paragraphe 371 contient la seule référence expresse aux militaires). La question est examinée plus loin, voir *infra*, par. 340.
[635] Mémoire d'appel du Procureur, par. 27.
[636] Mémoire d'appel du Procureur, par. 20.

321. Malgré ces circonstances, la Chambre de première instance n'a pas conclu qu'avant le massacre du terrain de football de Gashirabwoba, les militaires avaient lancé des attaques aveugles et à grande échelle contre les réfugiés. En définitive, la Chambre de première instance n'a constaté pour seule attaque à grande échelle à laquelle des militaires avaient pris part que le massacre perpétré au terrain de football de Gashirabwoba[637]. Le 11 avril 1994, un jour avant l'attaque, des militaires avaient exercé des sévices sur des personnes détenues au camp militaire de Karambo, tuant deux d'entre elles[638]. Aucun élément de preuve particulier ne permet cependant de conclure que Bagambiki était au courant de ces incidents.

322. Considérant que la Chambre de première instance a relevé plusieurs occasions où Bagambiki avait agi dans le souci de protéger les réfugiés ou d'empêcher que des attaques ne soient lancées contre eux[639], la Chambre d'appel conclut qu'il n'était pas déraisonnable pour la majorité des juges de la Chambre de première instance de rejeter la thèse selon laquelle Bagambiki avait ordonné l'attaque lancée sur le terrain de football de Gashirabwoba le 12 avril 1994. De même, considérant que la Chambre de première instance n'a constaté que cette seule attaque à grande échelle lancée contre des réfugiés dans la préfecture à laquelle des militaires aient participé, la Chambre d'appel conclut qu'un juge des faits raisonnable pouvait également ne pas déduire que Bagambiki avait agi en sachant que les militaires attaqueraient les réfugiés et en y consentant.

(c) Le meurtre de seize réfugiés tutsis

323. La Chambre de première instance s'est prononcée comme suit quant au meurtre des seize réfugiés tutsis sélectionnés à la cathédrale de Cyangugu et au stade Kamarampaka :

> […] le 16 avril 1994, Bagambiki, Imanishimwe et d'autres personnes ont sélectionné 12 Tutsis et un Hutu parmi les réfugiés du stade sur la base d'une liste préétablie. La Chambre estime que les 12 réfugiés tutsis ont été exécutés avec quatre autres Tutsis qui avaient été sélectionnés et extraits de la cathédrale de Cyangugu par les mêmes autorités peu de temps auparavant. La Chambre ne dispose pas de suffisamment de moyens de preuve fiables pour déterminer si les 16 Tutsis ont été exécutés à Gatandara. La Chambre à la majorité, le juge Williams ayant exprimé son désaccord, estime ne pas disposer d'éléments de preuve suffisants pour déterminer si Bagambiki ou Imanishimwe ont participé à l'exécution de ces 16 réfugiés en les tuant eux-mêmes, en ordonnant à des soldats de les tuer ou en les remettant aux *Interahamwe* pour qu'ils les tuent.[640]

324. Bagambiki a déclaré que les 16 et 17 avril 1994, des assaillants de plus en plus nombreux avaient tenté à plusieurs reprises d'attaquer les réfugiés du stade Kamarampaka[641]. Toujours selon sa déposition, il affirme que le 17 avril, le commandant de la gendarmerie chargé de la garde du stade l'avait informé que les assaillants lui avaient remis une liste de personnes suspectées d'être en contact avec le FPR[642]. Le commandant lui avait également dit qu'il n'était pas sûr de pouvoir empêcher le massacre des réfugiés, étant donné le nombre croissant d'assaillants et le peu de gendarmes disponibles[643].

325. Bagambiki a dit avoir consulté à ce sujet ceux des membres du conseil de sécurité préfectoral qu'il avait pu joindre. Le Procureur de la République avait, en réponse, proposé d'interroger, sous la protection de la gendarmerie, les personnes figurant sur la liste à l'effet de vérifier qu'elles n'avaient

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[637] *Cf.* Jugement, par. 640.
[638] Jugement, par. 310, 311 et 408.
[639] Voir *supra,* par. 307.
[640] Jugement, par. 337.
[641] Emmanuel Bagambiki, CRA du 1er avril 2003, p. 28.
[642] Emmanuel Bagambiki, CRA du 1er avril 2003, p. 28.
[643] Emmanuel Bagambiki, CRA du 1er avril 2003, p. 29.

ni armes ni radios pour prendre contact avec le FPR[644]. Bagambiki a rappelé qu'il avait décidé qu'il s'agissait là de l'unique solution[645]. Bagambiki a déclaré qu'il n'avait pas le pouvoir de demander l'aide des militaires, ceci étant du ressort du commandant de la gendarmerie. Il a ajouté qu'il avait tenu compte, au moment de prendre sa décision, de ce qui s'était passé à Nyamasheke où les assaillants avaient abandonné leur projet d'attaque après avoir exigé et obtenu qu'un certain prêtre quitte la paroisse[646].

326. Bagambiki a déclaré avoir été informé, le lendemain matin, que ces personnes avaient été conduites à la brigade judiciaire de Rusizi pour y être interrogées le jour suivant, mais que l'immeuble, protégé par quelques gendarmes, avait été pris d'assaut par une foule d'assaillants et que les détenus avaient été tués[647]. Selon Bagambiki, se trouvaient dans cet immeuble les bureaux et les cellules de détention des inspecteurs de la police judiciaire, ainsi que les personnes qui devaient être interrogées par le Procureur de la République[648].

327. Bagambiki soutient en appel qu'il n'avait pas eu d'autre choix : les assaillants, qui avaient déjà attaqué la cathédrale à plusieurs reprises, menaçaient de s'en prendre au stade si les réfugiés figurant sur la liste n'étaient pas emmenés hors de ce lieu. Il avance en outre qu'il savait qu'il était risqué d'emmener ces personnes, mais qu'il s'y était résolu, ce déplacement étant, selon lui, la seule façon de garantir à la fois la sécurité des réfugiés du stade et de ceux d'entre eux qui figuraient sur la liste[649].

328. Aucun élément de preuve directe fiable ne permet d'établir que Bagambiki était effectivement présent lors du meurtre des seize réfugiés ou qu'il avait donné l'ordre de les tuer. Seul le Témoin LAP a déposé dans ce sens[650]. La Chambre de première instance a cependant relevé de « nombreux indices de l'absence de crédibilité ou de fiabilité du témoin LAP », notamment le fait que plusieurs de ses affirmations contredisaient les dépositions d'autres témoins, que sa propre déposition présentait des incohérences et qu'il avait demandé à être payé pour témoigner[651]. Bien que le Procureur conteste la décision de la Chambre de première instance de ne pas admettre certains moyens de preuve en réfutation relatifs à la déposition du Témoin LAP[652], tout porte à croire qu'il accepte la conclusion de la Chambre qu'il n'y a pas de preuve fiable de la participation directe de Bagambiki dans les meurtres visés. La thèse du Procureur est d'ailleurs que Bagambiki a « contribué sensiblement » à la commission du crime tout en connaissant l'intention génocidaire de ses auteurs, et qu'il s'est donc rendu coupable d'aide et encouragement[653].

329. De façon générale, le Procureur reprend les mêmes éléments de fait pour étayer sa conclusion selon laquelle Bagambiki aurait « à tout le moins » aidé et encouragé le meurtre des seize réfugiés, à savoir la position de Bagambiki en tant que préfet et sa « participation active aux faits qui se produisaient sur le terrain »[654].

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[644] Emmanuel Bagambiki, CRA du 1er avril 2003, p. 30.
[645] Emmanuel Bagambiki, CRA du 1er avril 2003, p. 30 :
Il est vrai que, après les faits, la décision était risquée, même si elle a permis de protéger… donc d'écarter l'attaque contre les réfugiés — les milliers de réfugiés — qui étaient au stade et qui sont aujourd'hui en vie. Mais quand j'y réfléchis, je me demande si je pouvais prendre une décision autre que celle-là. Donc, à ce moment-là, nous ne voyions aucune autre décision à prendre ; c'était la seule qui garantissait la sécurité des personnes sur la liste et la sécurité des personnes au stade… qui restaient au stade. Donc, c'était la seule que nous avions jugée utile et opportune.
[646] Emmanuel Bagambiki, CRA du 1er avril 2003, p. 31.
[647] Emmanuel Bagambiki, CRA du 1er avril 2003, p. 33.
[648] Emmanuel Bagambiki, CRA du 1er avril 2003, p. 33.
[649] Mémoire en réponse de Bagambiki, par. 34.
[650] Jugement, par. 257 ; Témoin LAP, CRA du 10 septembre 2001, p. 42 à 49.
[651] Jugement, par. 321 et 322.
[652] Voir *supra*, par. 265 à 268.
[653] Mémoire d'appel du Procureur, par. 27.
[654] Mémoire d'appel du Procureur, par. 20.

330. La Chambre d'appel constate que Bagambiki savait que la décision d'emmener les réfugiés sélectionnés était « risquée »[655]. Ceci n'emporte pas nécessairement engagement de sa responsabilité pénale. Bagambiki a déclaré dans le prétoire qu'au moment où elle avait été prise, cette décision était la seule qui pût assurer la sécurité à la fois des réfugiés sélectionnés et des autres qui resteraient au stade[656]. La Chambre d'appel considère que pour retenir la responsabilité pénale de Bagambiki pour le meurtre des seize réfugiés, une Chambre de première instance raisonnable devait être convaincue au-delà de tout doute raisonnable qu'il savait que les réfugiés seraient tués et qu'il avait, par ses actes, contribué de façon substantielle à leur meurtre. Ce scénario n'est pas compatible avec la conclusion selon laquelle, tout en étant conscient du risque qu'il faisait courir aux personnes concernées, Bagambiki entendait faire sortir du stade les réfugiés pour les protéger.

331. Le Témoin LCJ, dont la déposition a été invoquée dans l'Opinion dissidente du Juge Williams, a déclaré ce qui suit :

> [Bagambiki] a dit que les personnes qu'il allait citer étaient des personnes qui troublaient la sécurité des Hutus qui se trouvaient hors du stade, donc de la population hutue. Et, il a ajouté que les gens disaient que ces personnes avaient des armes, ainsi que des uniformes militaires, et que, par conséquent, on allait les emmener pour les interroger, et, si nécessaire, décider de leur sort.[657]

Étant donné que Bagambiki ne faisait apparemment que répéter les raisons données par les assaillants pour obliger les réfugiés figurant sur la liste à quitter le stade, la Chambre d'appel estime que pour un juge des faits raisonnable, l'allocution de Bagambiki n'allait pas nécessairement exposer les réfugiés concernés à un danger plus grand que celui auquel ils faisaient déjà face.

332. Le fait que le seul Hutu qui se trouvait parmi les dix-sept réfugiés sélectionnés ait survécu ne permet pas en soi de conclure que Bagambiki savait ou avait des raisons de savoir le sort qui attendait les autres. En premier lieu, il n'est pas certain qu'il savait que cette personne avait été séparée des seize réfugiés tutsis. En second lieu, il a déclaré avoir été informé après les événements que celle-ci avait été conduite au domicile du commandant de la gendarmerie, la brigade de Rusizi ne comptant pas assez de cellules et cette personne étant la seule femme parmi les dix-sept personnes sélectionnées[658].

333. Certains faits étayent également la thèse de Bagambiki. Les personnes qui ont assisté à la sélection des réfugiés n'y ont pas toutes vu un procédé de sinistre augure. Ainsi, lorsque quatre des réfugiés figurant sur la liste ont dû quitter la cathédrale de Cyangugu, les autorités ecclésiastiques ont cru qu'il s'agissait effectivement de les emmener pour les interroger et qu'il ne leur serait fait aucun mal[659].

334. Dans sa déposition, Bagambiki a insisté sur le fait que sa décision de consentir à l'extraction des dix-sept réfugiés avait été prise en tenant compte de ce qui s'était passé à Nyamasheke[660]. La Chambre de première instance a en effet conclu que Bagambiki était intervenu à la paroisse de Nyamasheke le 13 avril 1994, avait négocié avec les assaillants et soustrait le prêtre en question, le père Ubald. Aucune attaque n'avait plus eu lieu les 13 et 14 avril, mais la paroisse avait été la cible

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[655] Emmanuel Bagambiki, CRA du 1er avril 2003, p. 30.
[656] Emmanuel Bagambiki, CRA du 1er avril 2003, p. 30.
[657] Témoin LCJ, CRA du 22 mai 2001, p. 12, 13 (huis clos).
[658] Emmanuel Bagambiki, CRA du 1er avril 2003, p. 33.
[659] Jugement, par. 318.
[660] Emmanuel Bagambiki, CRA du 1er avril 2003, p. 31 :
[…] compte tenu de ce qui s'était passé à Nyamasheke, si nous retirions, comme nous l'avions fait… — concernant le prêtre Ubald dont les assaillants disaient qu'ils ne voulaient pas de lui à Nyamasheke, nous l'avions transféré à Cyangugu ; les assaillants s'étaient retirés, ils n'avaient plus… ils n'ont plus attaqué les réfugiés —, nous pensions que, de la même manière, si ces personnes-là ne restaient pas parmi les autres réfugiés, les assaillants ne reviendraient plus attaquer la cathédrale.

d'un assaut massif le 15 avril, au cours duquel la plupart des réfugiés qui s'y trouvaient avaient été massacrés[661]. Bagambiki avait été informé de ces faits le jour même, de sorte que l'on pourrait faire valoir qu'au moment où il avait pris sa décision, le 16 avril, d'emmener dix-sept réfugiés de la cathédrale de Cyangugu et du stade Kamarampaka, il était pour le moins incertain qu'une telle mesure pût effectivement préserver les personnes réfugiées au stade. Néanmoins, l'espoir nourri par Bagambiki – si tel était bien le motif de sa décision – que le transfert des dix-sept réfugiés préviendrait d'autres attaques s'est apparemment avéré fondé : selon la Chambre de première instance, il n'y a pas eu d'attaques à grande échelle contre les réfugiés rassemblés au stade Kamarampaka après le 16 avril 1994[662].

335. La Chambre d'appel constate que les faits survenus à la paroisse de Shangi démontrent que la sélection de certains réfugiés pour satisfaire les exigences des assaillants ne signifiait pas nécessairement que les personnes emmenées seraient tuées. Selon les conclusions de la Chambre de première instance, Bagambiki avait envoyé Théodore Munyangabe à la paroisse de Shangi le 26 avril 1994, après avoir été informé d'une attaque imminente. Munyangabe y avait négocié avec les assaillants, acceptant d'emmener un certain nombre de réfugiés à condition que ceux qui resteraient à la paroisse ne soient pas attaqués. Les assaillants avaient remis à Munyangabe une liste où figuraient les noms de personnes qui selon eux « causaient de l'insécurité »[663]. Munyangabe avait ensuite sélectionné une quarantaine de réfugiés, qui avaient été emmenés à la préfecture et au camp de la gendarmerie. L'un d'entre eux avait été tué en route, lorsque la population locale s'en était prise au groupe, et certains d'entre eux avaient subi des sévices au camp de la gendarmerie avant d'être emmenés au stade Kamarampaka[664].

336. En résumé, la Chambre d'appel conclut que les éléments de preuve ne sont pas aussi dénués d'équivoque que l'avance le Procureur. Bon nombre des conclusions factuelles se prêtent à différentes interprétations. S'il est vrai que la conclusion selon laquelle Bagambiki savait que sa participation à la sélection des réfugiés conduirait à la mort de ceux-ci trouve appui dans certains faits, elle ne saurait en aucun cas constituer la seule déduction raisonnable. La Chambre d'appel considère qu'un juge des faits raisonnable pouvait conclure que la défense de Bagambiki n'était pas réfutée par les moyens de preuve produits et déclarer que ce dernier n'était pas pénalement responsable de la mort des seize réfugiés.

3. Conclusion

337. Pour ces raisons, les premier et deuxième motifs d'appel du Procureur sont rejetés dans leur intégralité.

F. ENGAGEMENT DE LA RESPONSABILITÉ PÉNALE D'EMMANUEL BAGAMBIKI (9ÈME MOTIF D'APPEL)

338. En son neuvième motif d'appel, le Procureur fait valoir que la Chambre de première instance a commis une erreur sur un point de droit en exonérant Bagambiki de sa responsabilité pénale individuelle au titre des articles 6 (1) et 6 (3) du Statut[665]. Bien que le Procureur présente son argumentation sous l'intitulé « Application erronée du droit rwandais », la Chambre d'appel comprend qu'il soulève en fait plusieurs questions d'ordre plus général :

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[661] Jugement, par. 584.
[662] Jugement, par. 331. Il y a eu plusieurs cas de réfugiés emmenés du stade, et l'un d'entre eux au moins, un certain George Nkusi, a été tué (Jugement, par. 325). Le Témoin LBH a rapporté le massacre à grande échelle de réfugiés du stade Kamarampaka, mais la Chambre de première instance a rejeté ce témoignage dont elle a noté qu'il était contredit par d'autres moyens de preuve (Jugement, par. 327).
[663] Jugement, par. 468 et 482.
[664] Jugement, par. 482.
[665] Mémoire d'appel du Procureur, par. 360.

Contrairement à ce qu'a conclu la Chambre de première instance, Bagambiki engageait sa responsabilité pénale du fait d'« omission ou négligence criminelle grave » et pour avoir aidé et encouragé la commission de crimes par consentement ou tacite approbation[666] ;

La Chambre de première instance a conclu à tort qu'il n'existait pas de lien de subordination entre Bagambiki et les gendarmes[667] ;

La Chambre de première instance a mal appliqué l'article 6 (3) du Statut en ne retenant pas contre Bagambiki le massacre de Tutsis commis par la police communale de Kagano[668].

1. Responsabilité pénale pour omissions en vertu de l'article 6 (1) du Statut

339. S'agissant de la responsabilité de Bagambiki en vertu de l'article 6 (1) du Statut, le Procureur fait valoir dans son Acte d'appel que la Chambre de première instance a versé dans l'erreur en constatant que la législation rwandaise ne prévoyait que des sanctions civiles, excluant ainsi toute sanction pénale, à l'encontre d'un préfet qui ne s'acquitte pas de son obligation d'assurer la protection et la sécurité de la population civile[669]. Dans son Mémoire d'appel, le Procureur étend cet argument et fait valoir que non seulement Bagambiki était responsable du fait d'omissions coupables, mais que son inaction ou son silence, alors qu'il avait connaissance des crimes d'une telle envergure, constituait un comportement équivalant à encourager tacitement la commission de ces crimes ou à y consentir[670].

Omission coupable

340. En ce qui concerne la responsabilité pénale pour omissions ou négligence criminelle grave, le Procureur soutient que la Chambre de première instance a versé dans l'erreur en se fondant exclusivement sur la loi rwandaise. S'appuyant sur la jurisprudence du Tribunal, il affirme qu'un principe de droit bien établi veut que la responsabilité pénale d'un accusé puisse être engagée pour omission coupable sous l'empire de l'article 6 (1). Il ajoute que ce principe est également consacré par le Code pénal rwandais[671]. Il en conclut que Bagambiki était pénalement responsable, parce qu'il « n'a rien fait pour empêcher les auteurs des crimes d'agir ou pour les punir » à raison des tueries et des actes de violence, malgré la connaissance qu'il avait ou aurait dû avoir des crimes[672].

341. Bagambiki répond que la Chambre de première instance a établi une distinction entre l'obligation générale qui était la sienne d'assurer la protection de la population de sa préfecture et son obligation d'aider des personnes en danger qui lui avaient expressément demandé assistance[673]. Selon lui, le raisonnement de la Chambre de première instance au regard de la législation rwandaise ne faisait écho qu'à la première allégation d'omission de la part de Bagambiki relative à son obligation d'agir imposée par sa fonction de préfet[674]. À cet égard, Bagambiki soutient que le Jugement était conforme à la jurisprudence et au Statut du Tribunal[675].

342. Le Procureur conteste les conclusions dégagées par la Chambre de première instance aux paragraphes 658 à 660 du Jugement. D'emblée, celle-ci a défini les conditions auxquelles la responsabilité pénale d'un accusé pouvait être engagée à raison d'une omission, en tant qu'auteur principal, à savoir :

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[666] Mémoire d'appel du Procureur, par. 364.
[667] Mémoire d'appel du Procureur, par. 372 à 381.
[668] Mémoire d'appel du Procureur, par. 362.
[669] Acte d'appel du Procureur, par. 59 (a).
[670] Mémoire d'appel du Procureur, par. 364 et 370.
[671] Mémoire d'appel du Procureur, par. 367.
[672] Mémoire d'appel du Procureur, par. 369.
[673] Mémoire en réponse de Bagambiki, par. 290.
[674] Mémoire en réponse de Bagambiki, par. 293.
[675] Mémoire en réponse de Bagambiki, par. 294.

(a) l'accusé doit avoir eu une obligation d'agir en vertu d'une règle de droit pénal ; (b) l'accusé doit avoir eu la capacité d'agir ; (c) l'accusé a omis d'agir car il voulait les conséquences pénalement sanctionnées ou il savait et acceptait que ces conséquences adviennent ; et (d) l'omission d'agir a eu pour résultat la perpétration du crime.[676]

La Chambre de première instance a ensuite constaté que la loi rwandaise imposait à Bagambiki l'obligation d'assurer la protection de la population de sa préfecture. Elle a poursuivi en examinant si Bagambiki avait la possibilité d'agir. Elle a estimé qu'il pouvait, en sa qualité de préfet, requérir l'intervention des forces armées mais n'avait cependant pas le pouvoir de décider comment les forces armées devaient exécuter une opération ou d'exercer un droit de regard à ce sujet. Au surplus, elle a constaté « qu'il ne ressort[ait] pas des preuves produites que d'autres solutions concrètes s'offraient au préfet »[677]. Elle a cependant conclu que :

> « cette obligation légale n'était pas imposée par une règle de droit pénal. En conséquence, tout manquement à cette obligation découlant de la loi rwandaise, même s'il était prouvé, n'aurait pas pour résultat d'engager la responsabilité pénale en application de l'article 6 (1) du Statut »[678].

343. Les parties ne contestent pas le fait qu'un accusé puisse être tenu pénalement responsable d'une omission sur la base de l'article 6 (1) du Statut[679], pas plus qu'elles ne contestent que toute responsabilité pénale pour omission suppose l'existence d'une obligation d'agir. La question est plutôt de savoir si cette obligation d'agir doit découler d'une règle de droit pénal ou si, comme le Procureur semble le soutenir, il suffit qu'elle dérive d'une obligation légale quelconque. La Chambre d'appel relève que l'Arrêt *Blaskić*, sur lequel le Procureur se fonde dans son Mémoire en réplique[680], n'aborde pas cette question[681].

344. En l'espèce, point n'est besoin d'examiner cette question. La Chambre de première instance a fondé sa conclusion sur les deux arguments suivants : l'obligation faite au préfet n'était pas prescrite par une règle de droit pénal et il n'était pas clair que Bagambiki disposait des moyens pour s'acquitter de cette obligation. La Chambre d'appel prend également acte de l'opinion individuelle du Juge Ostrovsky ainsi exprimée :

> J'estime au demeurant que le Procureur n'a simplement pas produit des preuves suffisantes pour démontrer que la préfecture disposait d'un surcroît d'effectifs suffisant pour lui permettre d'endiguer la vague de violence qui avait déferlé sur Cyangugu et de mieux assurer la protection des réfugiés. Après avoir pris en compte l'ensemble des éléments de preuve dignes de foi et crédibles produits en l'espèce, force m'est de dire que je ne suis pas convaincu qu'avec les forces dont il disposait, Bagambiki aurait pu assurer une meilleure protection aux personnes réfugiées à la préfecture de Cyangugu.[682]

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[676] Jugement, par. 659 (note de bas de page non reproduite).
[677] Jugement, par. 660.
[678] Jugement, par. 660.
[679] Voir, par exemple, Arrêt *Blaskić*, par. 663 (pour ce qui est de l'article 7 (1) du Statut du TPIY).
[680] Mémoire en réplique du Procureur, par. 75.
[681] Arrêt *Blaskić*, note de bas de page 1385 du paragraphe 663, qui cite l'article 86 (1) du Protocole additionnel I : « Les Hautes Parties contractantes et les Parties au conflit doivent réprimer les infractions graves et prendre les mesures nécessaires pour faire cesser toutes les autres infractions aux Conventions ou au présent Protocole qui résultent d'une omission contraire à un devoir d'agir », indiquant que toute omission à l'obligation d'agir n'engageait pas forcément la responsabilité pénale. Dans *Blaskić*, l'obligation d'agir a été qualifiée de devoir imposé par « les lois ou coutumes de la guerre » (Arrêt *Blaskić*, par. 668). *Cf.* également Arrêt *Bagilishema*, par. 36 : « La distinction entre les formes de responsabilité qui sont susceptibles, en droit international, d'engager la responsabilité pénale du supérieur et celles qui ne le sont pas, ne peut être définie dans l'abstrait qu'avec difficulté » et A. Cassese, *International Criminal Law*, Oxford university Press, 2003, p. 202 : « *It should be noted that serious violations of many of the above positive obligations* […] *amount to a war crime* ».
[682] Opinion du Juge Ostrovsky, par. 17.

Le Procureur n'a pas indiqué les possibilités dont disposait Bagambiki pour s'acquitter de ses obligations dans le cadre de la législation nationale rwandaise. Ainsi donc, même si le fait de ne pas s'être acquitté de l'obligation incombant à un préfet rwandais d'assurer la protection de la population dans sa préfecture était susceptible d'engager sa responsabilité en droit pénal international, le Procureur n'a pas établi que l'erreur qu'aurait commise la Chambre de première instance a invalidé sa décision.

345. Par ailleurs, la Chambre d'appel relève que le Procureur n'identifie aucune occasion précise, au titre du présent motif d'appel, où Bagambiki aurait failli à son obligation d'agir.

Aide et encouragement par approbation tacite

346. Le Procureur fait valoir que

> « la connaissance [que Bagambiki] avait de crimes d'une telle envergure et son inaction ou son silence constituent une omission blâmable, une négligence grave ou un comportement équivalant à encourager tacitement, à aider et à encourager la commission de ces crimes ou à y consentir »[683].

Citant le Jugement *Aleksovski*, le Procureur soutient que lorsqu'un supérieur hiérarchique est au fait des crimes commis par ses subordonnés, son silence ne peut être interprété que comme valant approbation, même s'il n'était pas présent en personne sur le lieu du crime[684].

347. De l'avis de la Chambre d'appel, la distinction doit être faite entre la responsabilité pénale pour omission, qui emporte condamnation en tant qu'auteur principal du crime, et l'aide et l'encouragement à la commission d'un crime par incitation, approbation tacite ou omission, équivalant à une contribution substantielle à la commission du crime. Dans son Acte d'appel, les arguments du Procureur se rapportent exclusivement à la question de la responsabilité pénale pour omission. La question de la responsabilité de Bagambiki pour avoir aidé et encouragé la commission des crimes par approbation tacite n'est soulevée que dans le Mémoire d'appel, sans que le Procureur n'ait sollicité au préalable l'autorisation de modifier ses moyens d'appel[685]. En conséquence, la Chambre d'appel décide de ne pas poursuivre l'examen de cette question.

2. Responsabilité du supérieur hiérarchique en vertu de l'article 6 (3) du Statut

Lien de subordination entre Bagambiki et les gendarmes

348. Le Procureur s'élève contre la conclusion de la Chambre de première instance selon laquelle Bagambiki n'exerçait ni en droit ni en fait une autorité sur les gendarmes. Le Procureur fait valoir que la Chambre de première instance a adopté une définition erronée de la notion de supérieur hiérarchique au sens de l'article 6 (3) du Statut[686].

349. Dans son Acte d'appel, le Procureur fait valoir que la Chambre de première instance a versé dans l'erreur en concluant que « [Bagambiki] n'exerçait aucun contrôle effectif sur les gendarmes *et les militaires* »[687]. Dans son Mémoire d'appel, le Procureur axe son argumentation sur le fait que Bagambiki exerçait un contrôle effectif sur les gendarmes et il en déduit qu'il avait

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[683] Mémoire d'appel du Procureur, par. 370.
[684] Mémoire d'appel du Procureur, par. 370, citant le Jugement *Aleksovski*, par. 87 et 88.
[685] *Cf.* Directive pratique relative aux conditions formelles applicables au recours en appel contre un jugement, 4 juillet 2005, par. 2.
[686] Mémoire d'appel du Procureur, par. 372 et 373.
[687] Acte d'appel du Procureur, par. 59 (b) (non souligné dans l'original).

« le *pouvoir matériel* requis pour empêcher ou punir les crimes commis par les *gendarmes* qu'il avait réquisitionnés »[688].

La Chambre d'appel va donc se pencher sur la question de la responsabilité de Bagambiki pour les crimes commis par les gendarmes.

350. Le Procureur affirme que

> « la Chambre de première instance a limité la définition de la notion de supérieur à une structure de type militaire, dans laquelle le supérieur peut donner des ordres ou punir ou empêcher des transgressions en délivrant des ordres ou en prenant des mesures disciplinaires »[689].

Le paragraphe du Jugement auquel se réfère le Procureur se lit comme suit :

> Après examen des dispositions applicables de la loi rwandaise, la Chambre n'est pas convaincue que la capacité de Bagambiki de réquisitionner des gendarmes lui donnait *de jure* le pouvoir de leur donner des ordres pendant l'exécution d'une opération. [...] La loi ne contient aucune disposition indiquant qu'un préfet ait l'autorité légale d'un supérieur hiérarchique d'empêcher un gendarme de commettre un crime en donnant un ordre durant l'exécution d'une opération ou de punir un gendarme qui a commis un crime durant l'exécution d'une opération.[690]

Au paragraphe suivant, la Chambre de première instance s'est attachée à déterminer si Bagambiki exerçait une autorité de fait sur les gendarmes, et a conclu comme suit :

> Bien qu'il y ait de nombreuses preuves que Bagambiki a réquisitionné des gendarmes pour assurer la sécurité d'un certain nombre de sites, il n'est pas établi à suffisance qu'il a maintenu un contrôle quelconque sur la manière dont ces gendarmes menaient leur mission après leur intervention.[691]

Dans ce paragraphe, la Chambre de première instance n'a pas explicitement fait état de la capacité de Bagambiki d'empêcher la commission des crimes ou d'en punir les auteurs, mais sa conclusion doit se lire dans le contexte de la définition générale qu'elle a donnée de la responsabilité du supérieur hiérarchique, à savoir :

> [U]n lien de subordination est établi par la démonstration de l'existence d'un rapport hiérarchique officiel ou non. Le supérieur doit avoir eu le pouvoir ou l'autorité, *de jure* ou *de facto*, d'empêcher ou de punir l'infraction commise par ses subordonnés. Le supérieur doit avoir exercé un contrôle effectif sur les subordonnés au moment des faits. Par « contrôle effectif » on entend la capacité matérielle d'empêcher la commission de l'infraction ou d'en punir les auteurs principaux.[692]

Cette définition est conforme aussi bien à la jurisprudence constante du Tribunal de céans qu'à celle du TPIY[693]. En particulier, la Chambre d'appel rappelle la conclusion de la Chambre d'appel du TPIY dans l'affaire *Blaškić* :

> Les marques d'un contrôle effectif sont davantage une affaire de preuve que de droit substantiel et elles servent seulement à montrer que l'accusé avait le pouvoir de prévenir les crimes, d'en punir les auteurs ou, lorsqu'il convient, de prendre l'initiative d'une action pénale à leur encontre.[694]

351. La définition donnée par la Chambre de première instance et le paragraphe 637 du Jugement indiquent clairement que la Chambre de première instance avait bien considéré que le critère du

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[688] Mémoire d'appel du Procureur, par. 379 (non souligné dans l'original).
[689] Mémoire d'appel du Procureur, par. 376.
[690] Jugement, par. 636.
[691] Jugement, par. 637.
[692] Jugement, par. 628 (notes de bas de page non reproduites).
[693] Arrêt *Bagilishema*, par. 50 et 55 ; Arrêt *Kajelijeli*, par. 87 ; Arrêt *Čelebići*, par. 196 à 198 ; Arrêt *Blaškić*, par. 67 à 69.
[694] Arrêt *Blaškić*, par. 69 (notes de bas de page non reproduites).

« contrôle effectif » en tant que préalable pour établir la responsabilité du supérieur hiérarchique équivalait à la capacité matérielle d'empêcher ou punir une conduite criminelle[695]. En conséquence, la Chambre d'appel estime que la Chambre de première instance n'a pas commis d'erreur dans sa définition du lien de subordination.

352. La Chambre d'appel ne considère pas que la Chambre de première instance ait « subordonné une loi à des instructions ministérielles relatives à la gendarmerie »[696] lorsqu'elle a examiné la question de la position *de jure* de Bagambiki. L'analyse de la Chambre de première instance englobait non seulement l'instruction ministérielle rwandaise relative au maintien et rétablissement de l'ordre[697], mais aussi le Décret-loi portant création de la gendarmerie[698]. Le Procureur soutient que la Chambre de première instance aurait également dû prendre en considération la législation rwandaise relative à l'organisation et au fonctionnement de la préfecture, laquelle disposerait que les préfets « ont le devoir général d'assurer la tranquillité, l'ordre et la sécurité des personnes et des biens »[699]. Il ne fait état d'aucune disposition particulière de cette législation à l'appui de son allégation. La Chambre d'appel relève toutefois que l'article 8 (2) de la Loi relative à l'organisation et au fonctionnement de la préfecture fait obligation au préfet d'« assurer la tranquillité, l'ordre et la sécurité des personnes et des biens »[700]. Pour permettre au préfet de s'acquitter de cette obligation, la loi l'habilite à requérir l'intervention des forces armées « conformément à la procédure prévue par le Décret-loi portant création de la gendarmerie »[701]. En d'autres termes, le décret-loi en question a concrétisé les obligations du préfet en faisant état de la loi rwandaise portant création de la gendarmerie, loi que la Chambre de première instance a dûment prise en considération.

353. Le Procureur invoque par ailleurs le paragraphe 78 du Jugement *Aleksovski* :

> La simple possibilité de transmettre des rapports aux autorités suffit, dès lors que l'autorité civile, de par sa position dans la structure hiérarchique, est supposée agir de la sorte lorsque des exactions sont commises et que, compte tenu de cette position, la probabilité que ces rapports déclenchent l'ouverture d'une enquête ou l'imposition de mesures disciplinaires, voire pénales, est élevée.[702]

En réponse, Bagambiki se réfère à la déposition du témoin expert à charge André Guichaoua, lequel affirme qu'en 1994, les magistrats, à Cyangugu, n'étaient pas en mesure d'assurer correctement les tâches qui leur incombaient : ces personnes

> « ne se sont jamais fait une grande réputation pour avoir arrêté ou empêché un assassinat quelconque »[703].

Et Bagambiki d'ajouter :

> « Peut-on également reprocher à [Bagambiki] de ne pas avoir fait rapport au gouvernement intérimaire, dont les membres sont aujourd'hui jugés devant votre Haute juridiction ? »[704].

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[695] Arrêt *Kajelijeli*, par. 86.
[696] Mémoire d'appel du Procureur, par. 375.
[697] Pièce à conviction D-EBA 3 (ii) « Instruction ministérielle n°01/02 du 15 septembre 1978 – Maintien et rétablissement de l'ordre ». Voir Jugement, par. 635.
[698] Pièce à conviction D-EBA 3 (iii) « Décret-loi du 23 Janvier 1974 – Création de la Gendarmerie ». Voir Jugement, par. 635.
[699] Mémoire d'appel du Procureur, par. 375.
[700] Pièce à conviction D-EBA 3 (i), « Décret-loi n°10/75 du 11 mars 1975 – Organisation et fonctionnement de la préfecture ».
[701] Pièce à conviction D-EBA 3 (i), « Décret-loi n°10/75 du 11 mars 1975 – Organisation et fonctionnement de la préfecture », art. 11 : « Le préfet peut […] requérir l'intervention des forces armées pour le rétablissement de l'ordre public, et ce, conformément à la procédure prévue par les lois en vigueur et, notamment, par le Décret-loi du 23 janvier 1974 portant création de la gendarmerie ».
[702] Mémoire d'appel du Procureur, par. 378, citant le Jugement *Aleksovski*, par. 78.
[703] Témoin expert André Guichaoua, CRA du 24 septembre 2001, p. 233 et 234.
[704] Mémoire en réponse de Bagambiki, par. 329.

354. Il appartenait au Procureur de préciser les autorités auxquelles, selon lui, Bagambiki aurait dû faire rapport afin d'empêcher les crimes ou d'en punir les auteurs, ce qu'il n'a pas fait. De l'avis de la Chambre d'appel, la possibilité théorique de signaler les crimes commis à l'encontre des réfugiés tutsis à des autorités qui, elles-mêmes, comme le Procureur l'affirme dans d'autres affaires, ordonnaient et organisaient activement des massacres de Tutsis de par le Rwanda ne suffit pas à établir la responsabilité pénale de Bagambiki.

355. Le Procureur lui-même affirme qu'en avril 1994, les préfets détenaient le monopole du pouvoir[705], argument qui est difficilement conciliable avec l'idée que Bagambiki aurait dû rendre compte des actes criminels aux « autorités compétentes » afin d'empêcher les crimes ou d'en punir les auteurs. S'agissant de l'argument selon lequel les préfets détenaient le monopole du pouvoir, la Chambre d'appel fait observer que les déclarations d'ordre général sur la situation au Rwanda en avril 1994 peuvent servir de toile de fond quant à l'historique de la cause, mais qu'elles ne peuvent nullement servir à établir la culpabilité individuelle de l'accusé.

356. Pour démontrer que Bagambiki exerçait un « contrôle effectif » sur les gendarmes, le Procureur devait rapporter la preuve qu'il avait la capacité matérielle requise pour empêcher ou punir les crimes, ce qu'il n'a pas fait. La Chambre d'appel constate que le Procureur n'a établi l'existence d'aucune erreur dans le raisonnement de la Chambre de première instance quant à la position d'autorité de Bagambiki, *de jure* ou *de facto*, vis-à-vis des gendarmes.

Responsabilité de Bagambiki pour les crimes commis par la police communale de Kagano

357. Le Procureur fait valoir que la Chambre de première instance a versé dans l'erreur en ne jugeant pas Bagambiki responsable du massacre de réfugiés civils tutsis à la paroisse de Nyamasheke le 15 avril 1994, massacre auquel avaient participé des membres de la police communale de Kagano[706]. Le Procureur affirme que bien que la Chambre de première instance ait jugé que Bagambiki possédait la qualité de supérieur hiérarchique et exerçait un contrôle effectif sur la police communale de Kagano, elle l'a néanmoins acquitté au motif qu'il n'existait aucune preuve démontrant qu'il était informé de l'attaque[707]. Selon le Procureur, cela « est difficilement conciliable » avec la conclusion de la Chambre de première instance indiquant que Bagambiki, du fait de sa fonction, aurait dû avoir connaissance des différentes attaques[708]. De surcroît, le Procureur fait valoir que la Chambre de première instance a mal interprété le critère « savait ou avait des raisons de savoir » requis par l'article 6 (3) du Statut[709].

358. La Chambre d'appel relève tout d'abord que l'argument selon lequel la Chambre de première instance aurait mal interprété le critère « savait ou avait des raisons de savoir » énoncé à l'article 6 (3) du Statut est soulevé pour la première fois dans le Mémoire d'appel du Procureur. Cet argument n'est du reste pas lié à l'allégation selon laquelle la Chambre de première instance aurait mal interprété la législation rwandaise[710]. Le Procureur n'ayant pas demandé l'autorisation de modifier ses motifs d'appel à l'effet d'inclure cette nouvelle allégation d'erreur[711], la Chambre d'appel décide de ne pas l'examiner.

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[705] Mémoire d'appel du Procureur, par. 380.
[706] Mémoire d'appel du Procureur, par. 382 à 384, renvoyant au Jugement, par. 645 à 649.
[707] Mémoire d'appel du Procureur, par. 382 (souligné dans l'original).
[708] Mémoire d'appel du Procureur, par. 382.
[709] Mémoire d'appel du Procureur, par. 383.
[710] Acte d'appel du Procureur, par. 58 à 60.
[711] *Cf.* Directive pratique relative aux conditions formelles applicables au recours en appel contre un jugement, 4 juillet 2005, par. 2.

359. En ce qui concerne la connaissance qu'avait Bagambiki de la participation de ses subordonnés au massacre de la paroisse de Nyamasheke, la Chambre de première instance a constaté ce qui suit :

> Rien n'indique à la Chambre que Bagambiki ait été informé, alors qu'il visitait la paroisse de Nyamasheke avec Kamana et d'autres le 13 avril 1994, que la police de la commune de Kagano participait à l'attaque à cette date. Rien n'indique non plus que Bagambiki ait été informé de l'attaque du 15 avril 1994 à Nyamasheke avant qu'elle n'ait pris fin[.][712]

Elle a poursuivi en soulignant que Bagambiki aurait dû savoir que Kamana, le bourgmestre de Kagano, avait participé à cette attaque. S'agissant de la police communale de Kagano, elle a conclu comme suit :

> La Chambre manque d'éléments de preuve fiables pour déterminer si Bagambiki aurait dû être au courant de la participation de la police de Kagano à l'attaque du 15 avril 1994, vu le nombre limité de témoignages concernant la participation de celle-ci aux attaques contre la paroisse de Nyamasheke et d'attaques auxquelles elle a participé et vu le fait qu'elle n'avait à rendre compte directement au préfet que si ce dernier l'avait spécialement réquisitionnée.[713]

360. La Chambre d'appel estime que le Procureur interprète mal le Jugement lorsqu'il déclare que la Chambre de première instance a conclu qu'« il n'existait aucune preuve démontrant [que Bagambiki] était *informé* de l'attaque »[714]. En fait, la Chambre de première instance a estimé que Bagambiki était informé de l'attaque, et qu'il avait en conséquence suspendu de ses fonctions le bourgmestre Kamana[715]. Elle n'a pas jugé Bagambiki responsable de l'attaque parce qu'elle manquait d'éléments de preuve fiables indiquant que Bagambiki aurait dû être au courant de la *participation* de la police communale de Kagano à l'attaque. Le Procureur n'a pas démontré que cette conclusion était déraisonnable.

3. Conclusion

361. Le neuvième motif d'appel du Procureur est rejeté dans son intégralité.

G. NATURE DE LA RESPONSABILITÉ PÉNALE DE SAMUEL IMANISHIMWE POUR LES ÉVÉNEMENTS DE GASHIRABWOBA (10ÈME MOTIF D'APPEL)

362. La Chambre de première instance a reconnu Imanishimwe coupable de génocide (Chef 7 de l'Acte d'accusation Bagambiki/Imanishimwe), extermination constitutive de crime contre l'humanité (Chef 10) et violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II (Chef 13) en vertu de l'article 6 (3) du Statut pour les actes commis par ses subordonnés au terrain de football de Gashirabwoba le 12 avril 1994.

363. Le Procureur soutient que l'engagement de la responsabilité pénale d'Imanishimwe sur le seul fondement de l'article 6 (3) du Statut

> « ne reflète pas la véritable nature du rôle et de la participation de celui-ci dans le massacre commis au terrain de football de Gashirabwoba »[716].

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[712] Jugement, par. 649.
[713] Jugement, par. 649.
[714] Mémoire d'appel du Procureur, par. 382.
[715] Jugement, par. 581 et 586. La Chambre de première instance n'a pas conclu explicitement que Bagambiki était informé de la seconde attaque le 15 avril 1994, mais elle a accepté la déclaration de Bagambiki selon laquelle il avait été informé de l'attaque par le Bourgmestre Kamana et l'avait suspendu parce qu'il n'avait pas été convaincu par ses explications. Jugement, par. 568 et 586.
[716] Mémoire d'appel du Procureur, par. 392.

D'après lui, la seule conclusion qu'un juge des faits raisonnable aurait pu tirer des faits établis était qu'Imanishimwe était directement responsable pour avoir ordonné ou, au minimum, pour avoir aidé et encouragé les crimes commis le 12 avril 1994 à Gashirabwoba[717]. Le Procureur soumet également qu'Imanishimwe aurait dû être trouvé responsable au titre de sa participation « à une entreprise criminelle commune à titre de co-auteur en position de donner des ordres »[718]. En somme, le Procureur prétend que la Chambre de première instance a versé dans l'erreur en ne retenant pas la responsabilité pénale d'Imanishimwe sur le fondement de l'article 6 (1) du Statut.

364. En réponse au grief du Procureur, Imanishimwe fait valoir qu'il ne pouvait être condamné pour les faits survenus à Gashirabwoba. D'une part, il soutient que les faits prétendument commis par des militaires à Gashirabwoba le 12 avril 1994 ne sont pas visés dans l'acte d'accusation. D'autre part, il prétend que le Procureur n'a pas apporté la preuve que les militaires qui auraient commis le massacre des réfugiés étaient ses subordonnés[719]. Imanishimwe répète en fait ici les arguments qu'il développe au soutien de ses premier et deuxième motifs d'appel. S'agissant de l'engagement de sa responsabilité pénale sur le fondement de l'article 6 (1), Imanishimwe se contente de déclarer que les arguments développés par le Procureur

> « n'ont aucun intérêt, car ils ne présentent aucune preuve de la présence de Samuel Imanishimwe au cours de ce massacre de Gashirabwoba le 12 avril 1994 »[720].

1. Constatations de la Chambre de première instance

365. À l'issue de l'examen des moyens de preuve présentés par les parties sur les événements survenus à Gashirabwoba, la Chambre de première instance est parvenue aux constatations factuelles suivantes :

> 435. […] La Chambre à la majorité, le juge Ostrovsky ayant exprimé son désaccord, estime que le 11 avril 1994, après que les réfugiés eurent repoussé une attaque, Bagambiki, Imanishimwe et des soldats se sont rendus au terrain de football [de Gashirabwoba] entre 14 h 30 et 15 heures et que les réfugiés ont déclaré à Bagambiki subir les attaques d'assaillants des secteurs de Bumazi et Gashirabwoba. […] Vers 19 heures le même jour, des soldats sont retournés au terrain de football et ont demandé aux réfugiés s'ils étaient tous tutsis.
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> […]
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> 437. Sur la base de la déposition du témoin LAC, la Chambre estime de plus que, le 12 avril 1994, la population réfugiée au terrain de football avait presque atteint 3 000 personnes. Ce matin-là, des milliers d'assaillants des zones avoisinantes et de l'usine à thé de Shagasha ont commencé à attaquer les réfugiés au terrain de football. La Chambre à la majorité, le juge Ostrovsky ayant exprimé son désaccord, estime que Bagambiki et Nsabimana, le directeur de l'usine à thé de Shagasha, se sont rendus au terrain de football pendant environ 30 minutes. Sur la base de la déposition du témoin LAC, la majorité considère que Bagambiki a promis d'envoyer des soldats pour protéger les réfugiés. Une heure plus tard, des gardes armés de l'usine à thé et au moins 15 soldats ont encerclé les réfugiés et, après que ceux-ci eurent levé les mains et déclaré vouloir la paix, tiré et jeté des grenades sur ces derniers pendant 30 minutes. Les *Interahamwe* ont alors achevé les survivants et pillé leurs affaires personnelles.
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> […]

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[717] Acte d'appel du Procureur, par. 63. Mémoire d'appel du Procureur, par. 389.
[718] Mémoire d'appel du Procureur, titre (ii), p. 120. Le Procureur renvoie à ce titre à ses développements sous son 3ème motif d'appel.
[719] Mémoire en réponse d'Imanishimwe, par. 170 à 194.
[720] Mémoire en réponse d'Imanishimwe, par. 195. Voir aussi CRA(A) du 6 février 2006, p. 106.

> 439. […] La Chambre relève que le témoin LAC, dont elle a accepté la déposition, n'a pas vu Bagambiki ou Imanishimwe au terrain de football juste avant que les soldats n'attaquent.

366. La Chambre d'appel note que la Chambre de première instance indique au paragraphe 624 du Jugement qu'elle examinera la responsabilité pénale individuelle d'Imanishimwe

> « soit en tant que supérieur hiérarchique sur la base de l'article 6 (3) du Statut, soit pour avoir 'ordonné' la commission de crimes sur la base de l'article 6 (1) du Statut ».

Quelques paragraphes plus loin, la Chambre de première instance semble étendre le champ de l'analyse en déclarant vouloir apprécier la nature et la forme de responsabilité pénale et de participation de chacun des accusés « au regard des articles 2 (3) et 6 (1)du Statut »[721].

367. Sur la base de ses constatations factuelles, la Chambre de première instance a retenu les conclusions juridiques suivantes s'agissant de la responsabilité pénale d'Imanishimwe :

> 653. La Chambre a constaté que, le 12 avril 1994, des militaires ont participé à l'attaque de réfugiés au terrain de football de Gashirabwoba. La Chambre ne dispose pas de preuves fiables suffisantes pour conclure qu'Imanishimwe a ordonné aux soldats placés sous ses ordres de prendre part à l'attaque au sens de l'article 6 (1) du statut. [non souligné dans l'original]
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> 654. La Chambre considère cependant qu'Imanishimwe était au courant ou aurait dû être au courant de la participation des militaires placés sous ses ordres à l'attaque au terrain de football de Gashirabwoba. Pour conclure ainsi, la Chambre rappelle qu'Imanishimwe se trouvait au terrain de football de Gashirabwoba le 11 avril 1994 et qu'en conséquence il avait parfaitement conscience de la présence de réfugiés et de la situation difficile qui était la leur. Les militaires placés sous ses ordres revinrent plus tard dans la soirée pour vérifier si les réfugiés étaient tous tutsis. Le 12 avril 1994, au moins 15 militaires ont encerclé les réfugiés et les ont tués après que ceux-ci eurent déclaré vouloir la paix. Compte tenu de la taille relativement petite du camp, du contrôle exercé par Imanishimwe sur ses soldats et des contacts réguliers qu'il avait avec les militaires placés sous ses ordres, stationnés en dehors du camp, la Chambre ne peut accepter que 15 militaires ou plus aient participé à une telle attaque systématique et de grande échelle sans que leur commandant ne le sache. La Chambre relève que rien n'indique qu'Imanishimwe ait pris quelque mesure que ce soit afin d'empêcher l'attaque ou de punir tout militaire du camp de Karambo pour y avoir participé. Dès lors, la Chambre considère qu'Imanishimwe peut être reconnu pénalement responsable, au regard de l'article 6 (3) du Statut, des actes de ses subordonnés au terrain de football de Gashirabwoba.[722]
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> […]
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> 695. La majorité ayant décidé qu'Imanishimwe a engagé sa responsabilité pénale pour génocide en sa qualité de supérieur hiérarchique en vertu de l'article 6 (3) du Statut, la Chambre conclut qu'il n'est pas coupable du chef 8 de l'acte d'accusation établi à son encontre pour complicité dans le génocide, qui est fondé sur les mêmes faits que le chef 7, et ne le considère pas comme pénalement responsable au regard de l'article 6 (3) du Statut.[723]

368. La Chambre d'appel note que, pour ce qui est de Gashirabwoba, la Chambre de première instance ne se prononce explicitement que sur la responsabilité d'Imanishimwe en tant que supérieur

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[721] Jugement, par. 626.

[722] Voir aussi Jugement, par. 691 : « la Chambre considère Imanishimwe comme pénalement responsable, au regard de l'article 6 (3) du Statut, des actes commis par ses subordonnés au terrain de football de Gashirabwoba car il n'a pas empêché la perpétration du crime. La Chambre rappelle aussi qu'Imanishimwe n'a puni aucun militaire pour cette attaque, ce qui démontre d'autant plus qu'il approuvait la participation des militaires au massacre. » ; par. 694 : « La Chambre est convaincue au-delà de tout doute raisonnable qu'Imanishimwe voit sa responsabilité pénale engagée au regard de l'article 6 (3) du Statut pour génocide car il n'a pas empêché le meurtre de membres du groupe ethnique tutsi par ses subordonnés lors des faits survenus au terrain de football de Gashirabwoba le 12 avril 1994 ».

[723] Voir aussi, pour les autres chefs, par. 744, 749 et 794.

hiérarchique et pour avoir ordonné les crimes. Toutefois, il ressort de ses conclusions sur l'ensemble des allégations portées contre Imanishimwe que la Chambre de première instance n'a pas limité le champ de son examen à ces deux seules formes de responsabilité pénale. Force est par exemple de constater la déclaration de culpabilité prononcée contre Imanishimwe pour avoir aidé et encouragé les actes de torture et de traitements cruels perpétrés au camp de Karambo[724]. De l'avis de la Chambre d'appel, le silence de la Chambre de première instance s'agissant de Gashirabwoba sur les autres formes de responsabilité pénale s'explique par la nature même de ses constatations factuelles : de toute évidence, la Chambre de première instance considérait qu'aucune autre forme de responsabilité pénale que celles envisagées dans le corps du Jugement n'était à même de décrire le comportement criminel de l'accusé.

369. Il s'agit à présent pour la Chambre d'appel de déterminer si, à la lumière des constatations factuelles de la Chambre de première instance, cette dernière a versé dans l'erreur en retenant la responsabilité pénale d'Imanishimwe pour les événements de Gashirabwoba sur le seul fondement de l'article 6 (3) du Statut.

2. Responsabilité pour participation à une entreprise criminelle commune

370. Le Procureur avance qu'Imanishimwe aurait dû être trouvé coupable en tant que « co-auteur en position de donner des ordres »[725] des crimes commis à Gashirabwoba du fait de sa participation à une entreprise criminelle commune.

371. La Chambre d'appel rappelle avoir conclu plus haut que la Chambre de première instance n'a pas commis d'erreur en décidant d'écarter de son examen la responsabilité pour participation à une entreprise criminelle commune au motif que le Procureur n'avait pas plaidé ladite forme de responsabilité dans l'acte d'accusation[726]. Partant, la Chambre d'appel considère que le Procureur n'est pas fondé à invoquer ici cette forme de responsabilité. La Chambre d'appel n'examinera donc pas plus avant les arguments du Procureur développés à cet égard.

3. Responsabilité pour avoir ordonné la commission des crimes

372. Le Procureur soutient qu'Imanishimwe aurait dû voir sa responsabilité pénale engagée en vertu de l'article 6 (1) du Statut pour avoir ordonné la tuerie perpétrée au terrain de football de Gashirabwoba. Le Procureur affirme que la Chambre de première instance aurait dû déduire de l'ensemble des éléments de preuve qu'Imanishimwe n'avait pas « simplement *approuvé* » la participation de ses soldats à la tuerie mais avait au contraire « ordonné celle-ci »[727]. Il rappelle, à l'appui de sa thèse, que « [l]e fait qu'un ordre ait été donné peut être établi par des éléments de preuve conjecturaux » et que

> « [t]outes les formes de responsabilité pénale peuvent être établies au moyen de preuves directes ou indirectes »[728].

Or, selon lui, il ressort clairement de l'ensemble des conclusions factuelles de la Chambre de première instance que les soldats n'auraient pas participé au massacre de Gashirabwoba

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[724] Jugement, par. 763 et 802.
[725] Mémoire d'appel du Procureur, titre (ii), p. 120.
[726] Voir *supra*, par. 45.
[727] Mémoire d'appel du Procureur, par. 403. Le Procureur cite le passage suivant du Jugement *Galić*, par. 170 : « Lorsqu'une personne en situation d'autorité est tenue de réprimer le comportement illégal de ses subordonnés alors qu'elle en a connaissance, et qu'elle ne fait rien pour mettre un terme à leurs agissements, on est en droit de conclure que cette personne a, par ses actes positifs ou ses omissions coupables, directement pris part, suivant les modalités envisagées à l'article 7 (1) du Statut, à la perpétration des crimes en question ».
[728] Mémoire d'appel du Procureur, par. 402, citant Jugement *Galić*, par. 171, et Jugement *Blaškić*, par. 281.

« sans en avoir reçu l'ordre exprès d'Imanishimwe ou, à tout le moins, sans une quelconque forme d'assistance de sa part »[729],

la Chambre ayant notamment établi qu'Imanishimwe exerçait un contrôle effectif sur les soldats du camp de Karambo, qu'il leur avait donné des ordres illégaux ayant entraîné sa condamnation sur la base de l'article 6 (1) pour d'autres crimes commis au cours de la même période que celle du massacre, et qu'un massacre d'une telle envergure n'aurait pas pu se produire sans qu'il n'en ait eu connaissance[730].

373. Sur cette question, la Chambre de première instance a considéré ne pas disposer de preuves fiables suffisantes pour conclure qu'Imanishimwe avait ordonné aux soldats placés sous ces ordres de prendre part à l'attaque au sens de l'article 6 (1) du Statut[731].

374. La Chambre d'appel a plusieurs fois eu l'occasion de rappeler les éléments constitutifs de cette forme de responsabilité :

l'élément matériel (ou *actus reus*) est constitué quand une personne, usant de sa position d'autorité, donne l'ordre[732] à une autre personne de commettre un crime ;

l'élément moral (ou *mens rea*) requis est établi lorsque cette personne a agi avec l'intention directe de donner l'ordre[733].

375. En appliquant ces critères juridiques aux conclusions factuelles de la Chambre de première instance, la Chambre d'appel ne considère pas que la Chambre de première instance a commis une erreur dans ses conclusions juridiques. Les éléments de preuve présentés à la Chambre de première instance n'établissent pas qu'Imanishimwe ait, d'une façon ou d'une autre, explicitement ou implicitement, donné instruction à ses subordonnés d'attaquer les tutsis réfugiés au terrain de football de Gashirabwoba. Partant, la Chambre de première instance était fondée à conclure que la responsabilité d'Imanishimwe ne pouvait être engagée pour avoir « ordonné » les crimes commis le 12 avril 1994 à Gashirabwoba. Ce moyen d'appel est rejeté.

4. Responsabilité pour avoir aidé et encouragé la commission des crimes

376. Enfin, le Procureur allègue que la Chambre de première instance a commis une erreur en omettant de considérer la question de savoir si Imanishimwe était pénalement responsable en application de l'article 6 (1) du Statut pour avoir aidé et encouragé la tuerie perpétrée à Gashirabwoba le 12 avril 1994[734]. Un tribunal raisonnable, prétend-il,

« aurait, au minimum, jugé que Imanishimwe avait aidé et encouragé le massacre des réfugiés tutsis au terrain de football de Gashirabwoba le 12 avril 1994 en sachant que ses soldats allaient participer à cette attaque et en les autorisant à le faire »[735].

Le Procureur soutient que l'élément matériel de l'aide et encouragement est en l'espèce constitué par l'omission d'Imanishimwe d'empêcher ses soldats de se rendre à Gashirabwoba, omission qui a eu un effet décisif sur leur capacité à participer à l'attaque[736]. Il prétend en outre qu'Imanishimwe

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[729] Mémoire d'appel du Procureur, par. 405. Voir aussi CRA(A) du 6 février 2006, p. 55.
[730] Mémoire d'appel du Procureur, par. 393 à 405.
[731] Jugement, par. 653.
[732] Arrêt *Semanza*, par. 360 et 361, se référant à l'Arrêt *Kordić et Cerkez*, par. 28.
[733] Arrêt *Kordić et Cerkez*, par. 29. La Chambre d'appel note que, dans l'Arrêt *Blaskić*, la Chambre d'appel du TPIY est parvenue à la conclusion qu'un type d'élément moral autre que l'intention directe pouvait être retenu, à savoir le fait d'ordonner « un acte ou une omission en ayant conscience de la réelle probabilité qu'un crime soit commis au cours de l'exécution de cet ordre » : Arrêt *Blaskić*, par. 42.
[734] Mémoire d'appel du Procureur, par. 406.
[735] Mémoire d'appel du Procureur, par. 407.
[736] Mémoire d'appel du Procureur, par. 408. Au soutien de son raisonnement, le Procureur cite le Jugement *Blaškić*, par. 284 : « l'élément matériel de la complicité par aide ou encouragement peut être commis par omission, à condition que cette

possédait la connaissance requise pour être considéré comme ayant aidé et encouragé la tuerie de Gashirabwoba[737], la Chambre de première instance ayant jugé qu'il avait connaissance ou aurait dû avoir connaissance de la participation de ses militaires à l'attaque[738].

377. La Chambre d'appel observe que la Chambre de première instance ne s'est pas explicitement prononcée sur la question de savoir si la responsabilité pénale d'Imanishimwe pouvait être engagée pour avoir aidé et encouragé les crimes commis au terrain de football de Gashirabwoba le 12 avril 1994. Pour autant, la Chambre d'appel n'en conclut pas que la Chambre de première instance a omis d'examiner cette forme de responsabilité. Il ressort en effet de l'ensemble des conclusions juridiques dégagées par la Chambre de première instance que cette forme de responsabilité a été considérée, et même retenue lorsque les faits s'y prêtaient. La Chambre d'appel interprète le silence de la Chambre de première instance comme indication de ce qu'il n'était pas établi que la conduite de l'accusé pouvait être qualifiée d'aide et encouragement en l'espèce[739].

378. Partant, il s'agit pour la Chambre d'appel de se demander si cette conclusion est de celles auxquelles un juge raisonnable des faits pouvait parvenir.

379. Pour établir l'élément matériel (ou *actus reus*) de l'aide et encouragement envisagé à l'article 6 (1) du Statut, il faut prouver que l'accusé a commis des actes qui visent spécifiquement à assister, favoriser ou fournir un soutien moral[740] à la perpétration d'un crime spécifique et que ce soutien a eu un effet important sur la perpétration du crime. La Chambre d'appel ajoute que cet élément matériel peut, dans certaines circonstances, être constitué par une omission[741]. L'élément moral (ou *mens rea*) requis est le fait pour l'accusé de savoir que ses actes contribuent à la perpétration d'un crime précis par l'auteur principal[742].

380. En l'espèce, la Chambre de première instance a estimé qu'il n'était pas établi que l'accusé ait ordonné, ni n'ait été présent lors de l'attaque lancée à Gashirabwoba le 12 avril 1994[743]. En revanche, elle a conclu que les militaires responsables de l'attaque ne pouvaient y avoir participé sans que leur supérieur, Samuel Imanishimwe, ne le sache[744]. Le fait qu'il n'ait puni aucun des militaires incriminés démontrait, pour la Chambre de première instance, qu'Imanishimwe « approuvait la participation des militaires au massacre »[745].

381. Au préalable, la Chambre d'appel souhaite préciser que la preuve de la présence d'Imanishimwe au cours du massacre n'était pas nécessaire en l'espèce, contrairement à ce que prétend ce dernier[746]. La Chambre d'appel du TPIY a été amenée à préciser que celui qui aide et encourage peut apporter sa contribution, avant, pendant ou après la perpétration du crime, et à une certaine distance du lieu du crime[747]. La Chambre d'appel fait siennes ces conclusions et considère que l'argument d'Imanishimwe est dénué de pertinence.

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omission ait eu effet décisif sur la perpétration du crime et qu'elle se soit accompagnée de l'élément intentionnel requis » (notes de bas de page non reproduites).

[737] Mémoire d'appel du Procureur, par. 409 et 410, se référant aux Arrêts *Tadić*, par. 229, et *Krstić,* par. 140.

[738] Mémoire d'appel du Procureur, par. 410, citant Jugement, par. 654.

[739] Voir *supra*, par. 359.

[740] La Chambre d'appel note que les termes « *assist, encourage or lend moral support* » employés originellement par la Chambre d'appel dans les Arrêts *Tadić* (par. 229), *Aleksovski* (par. 163), *Vasiljević* (par. 102) et *Blaskić* (par. 45) ont été traduits par « aider, encourager ou fournir un soutien moral » dans les versions françaises desdits arrêts. La Chambre d'appel estime que cette traduction est susceptible d'induire le lecteur en erreur vu que l'expression « *aiding and abetting* » est traduite dans la version française du Statut par « aidé et encouragé ».

[741] Voir Arrêt *Blaskić*, par. 47.

[742] Arrêt *Vasiljević,* par. 102 ; Arrêt *Blaskić*, par. 45 ; Arrêt *Kvočka et consorts*, par. 89, 90 et 188.

[743] Jugement, par. 439 et 653.

[744] Jugement, par. 654.

[745] Jugement, par. 691. Voir aussi Jugement, par. 744 et 795.

[746] Voir *supra*, par. 355.

[747] Arrêt *Blaskić*, par. 48.

382. La Chambre d'appel estime que les faits tels que constatés par la Chambre de première instance n'obligaient pas un juge raisonnable des faits à retenir la responsabilité pénale d'Imanishimwe pour aide et encouragement à la commission des crimes de génocide, extermination et meurtres perpétrés à Gashirabwoba.

383. Si la Chambre de première instance conclut qu'Imanishimwe a « approuvé » la participation de ses militaires au massacre, elle n'établit pas que cette approbation a eu un quelconque effet, a fortiori un effet important, sur la perpétration du crime. En effet, un juge des faits raisonnable n'aurait pu conclure sur la base des éléments de preuve que l'approbation dont il est question avait été perçue par les militaires impliqués dans le massacre, tout comme il n'aurait pu établir dans quelle mesure elle avait pu influer sur lesdits militaires. Dans ces circonstances, il ne peut être fait grief à la Chambre de première instance de ne pas avoir retenu la responsabilité d'Imanishimwe pour avoir aidé ou encouragé les auteurs du massacre.

384. Le Procureur avance que l'omission d'Imanishimwe d'empêcher ses soldats de se rendre à Gashirabwoba a eu un effet décisif sur leur capacité à participer à l'attaque. La Chambre d'appel considère que les constatations de la Chambre de première instance ne permettent pas d'établir que l'omission d'Imanishimwe visait spécifiquement à offrir à ses soldats la possibilité d'aller perpétrer le massacre, ni qu'il avait connaissance de l'assistance qu'il leur apportait. Par ailleurs, le Procureur ne démontre pas qu'aucun juge du fait raisonnable n'aurait pu manquer de parvenir à de telles conclusions sur la base des éléments de preuve admis par la Chambre de première instance.

385. La Chambre d'appel considère que le Procureur n'est pas parvenu à démontrer que la Chambre de première instance avait commis une erreur en refusant de conclure que Samuel Imanishimwe avait agi ou omis d'agir – par exemple, en ne retenant pas ses soldats – en connaissance de ce que son acte ou omission assisterait, favoriserait ou fournirait un soutien moral[748] à la perpétration de crimes contre les personnes réfugiées au terrain de football de Gashirabwoba. La Chambre d'appel conclut par conséquent qu'il n'a pas démontré que la Chambre de première instance avait versé dans l'erreur en rejetant cette forme de responsabilité pour qualifier la participation d'Imanishimwe au massacre du 12 avril 1994.

5. Conclusion

386. Au vu de ce qui précède, la Chambre d'appel conclut que le Procureur n'est pas parvenu à démontrer que la Chambre de première instance avait versé dans l'erreur en refusant d'engager sur la base de ses constatations factuelles la responsabilité individuelle pénale de Samuel Imanishimwe sur le fondement de l'article 6 (1) du Statut pour avoir ordonné ou aidé et encouragé la perpétration du massacre de Gashirabwoba. La Chambre d'appel a décliné de considérer la question de la responsabilité d'Imanishimwe pour participation à une entreprise criminelle commune dans la mesure où Imanishimwe n'était pas informé de ce que le Procureur entendait plaider cette forme de responsabilité à son encontre. La Chambre d'appel rejette toutes les branches de ce motif d'appel.

IV. L'Appel de Samuel Imanishimwe

A. Responsabilité du supérieur hiérarchique au titre de l'article 6 (3) du Statut (2ème motif d'appel)

387. Au titre de ce deuxième motif d'appel, Imanishimwe allègue que la Chambre de première instance a versé dans l'erreur en retenant sa responsabilité de supérieur hiérarchique aux termes de

[748] Voir *supra*, note 740.

l'article 6 (3) du Statut sans que ne soit établi que les militaires qui auraient perpétré le massacre des réfugiés au terrain de football de Gashirabwoba relevaient de son autorité[749].

388. La Chambre d'appel ayant fait droit au premier motif d'appel de Samuel Imanishimwe et ayant, en conséquence, décidé d'annuler les déclarations de culpabilité prononcées contre Imanishimwe en vertu de l'article 6 (3) du Statut pour les faits survenus au terrain de football de Gashirabwoba, le présent motif d'appel devient sans objet et, comme tel, ne requiert pas l'examen de la Chambre d'appel.

B. CONDAMNATION SUR LA BASE DE L'ARTICLE 4 DU STATUT (4ÈME MOTIF D'APPEL)

389. La Chambre de première instance a reconnu Imanishimwe coupable de violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II au titre des articles 6 (1) et 6 (3) du Statut (Chef 13 de l'Acte d'accusation Bagambiki/Imanishimwe) pour des faits perpétrés au camp de Karambo et au terrain de football de Gashirabwoba. Pour quatrième motif d'appel, Imanishimwe demande à la Chambre d'appel d'infirmer la condamnation prononcée au titre de l'article 4 (a) du Statut pour les faits commis à Gashirabwoba[750]. Il prétend que la Chambre de première instance « a brillé par sa partialité et sa complaisance »[751] en fondant sa « culpabilité s'agissant des événements de Gashirabwoba sur une relation parcellaire des faits »[752]. Il soutient aussi que la Chambre de première instance n'a pas démontré l'existence du lien de connexité entre les faits allégués et le conflit armé[753].

390. La Chambre d'appel ayant fait droit au premier motif d'appel de Samuel Imanishimwe et ayant, en conséquence, décidé d'annuler les déclarations de culpabilité prononcées contre Imanishimwe en vertu de l'article 6 (3) du Statut pour les faits survenus au terrain de football de Gashirabwoba, le présent motif d'appel devient sans objet et, comme tel, ne requiert pas l'examen de la Chambre d'appel.

C. APPRÉCIATION DES ÉLÉMENTS DE PREUVE RELATIFS AU CAMP MILITAIRE DE KARAMBO (5ÈME MOTIF D'APPEL)

391. Dans son cinquième motif d'appel, Imanishimwe soulève deux erreurs, de droit et de fait, se rapportant à des éléments de preuve relatifs aux faits survenus au camp de Karambo. Imanishimwe avance, d'une part, que la Chambre de première instance a versé dans l'erreur dans l'appréciation, partiale selon lui, de la crédibilité des témoins entendus. Il soutient, d'autre part, que la Chambre de première instance s'est contentée de spéculations et de déductions pour conclure à sa responsabilité, lui niant ainsi le bénéfice de la présomption d'innocence.

1. Crédibilité des témoins

392. Imanishimwe fait grief à la Chambre de première instance d'avoir refusé d'accorder tout crédit aux témoins militaires à décharge[754]. Il dénonce l'insuffisance du motif invoqué par la Chambre de première instance pour écarter le témoignage de ces témoins oculaires dont les déclarations ont été

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[749] Acte d'appel d'Imanishimwe, par. 13 et 14 ; Mémoire d'appel d'Imanishimwe, par. 69 à 106.
[750] Acte d'appel d'Imanishimwe, par. 21, tel qu'explicité par le Mémoire d'appel d'Imanishimwe, par. 142 à 164.
[751] Mémoire d'appel d'Imanishimwe, par. 153.
[752] Mémoire d'appel d'Imanishimwe, titre 4.1, p. 63.
[753] Mémoire d'appel d'Imanishimwe, titre 4.2, p. 64. La Chambre d'appel relève incidemment qu'Imanishimwe ne développe aucun argument pertinent au soutien de ce moyen d'appel pour se contenter de répéter ses arguments relatifs à l'absence de tout lien de subordination l'unissant aux militaires directement responsables du massacre de Gashirabwoba, objet de son second motif d'appel.
[754] Bien qu'ils ne soient pas spécifiquement désignés dans le Mémoire d'appel d'Imanishimwe, la Chambre d'appel considère qu'Imanishimwe vise particulièrement ici les témoins PNC, PNE, PKB, PCC, PCD et PCE.

corroborées par quatre autres témoins – PNF, PBA, PNB et Essono –, qui eux, ne sont pas militaires[755]. Il soumet que l'argument de la Chambre de première instance selon lequel les témoins militaires sont biaisés parce qu'intéressés aurait également dû, s'il était opérant, s'appliquer aux Témoins LI, MG, MA, LCJ et LAC présentés par le Procureur comme les victimes des actes dont la responsabilité est attribuée à Imanishimwe[756].

393. Imanishimwe reproche corrélativement à la Chambre de première instance d'avoir accordé trop de crédit aux Témoins LI et MG[757]. S'agissant du Témoin LI, Imanishimwe soumet que le caractère invraisemblable de sa déclaration jette un doute sur sa présence au camp de Karambo au moment des faits qu'il prétendait décrire et il reproche à la Chambre de première instance d'avoir ignoré le témoignage apporté par le témoin à décharge Essono, établissant selon lui « la grossièreté du récit de LI »[758]. S'agissant du Témoin MG, Imanishimwe soutient que plusieurs de ses allégations ont été contredites par le témoin à décharge PNB et que la Chambre de première instance a toutefois indûment ignoré cette déposition[759].

394. Dans son Mémoire en réponse, le Procureur fait valoir que les allégations d'Imanishimwe sont mal fondées et qu'il n'a pas démontré qu'aucun juge des faits raisonnable n'aurait pu parvenir à des conclusions similaires[760]. Il ajoute qu'Imanishimwe s'est plutôt contenté de proposer des variantes de conclusions auxquelles la Chambre de première instance aurait pu parvenir[761]. Le Procureur répond en outre que la Chambre n'a pas écarté les témoignages des témoins à décharge en bloc ou du fait de leur statut de complice mais qu'elle a procédé à un examen équilibré des témoignages à charge et à décharge, selon une démarche équitable et rationnelle[762]. Le Procureur allègue par ailleurs qu'Imanishimwe a manqué d'établir que la Chambre de première instance n'avait pas tenu compte des dépositions des Témoins PFN, PBA, PNG et Essono[763]; il prétend qu'au contraire la Chambre de première instance a pris en considération l'ensemble des éléments de preuve de manière explicite[764] alors qu'elle n'était pas tenue d'exposer dans le détail les raisons qui l'avaient conduite à admettre ou à rejeter un témoignage[765].

395. En réplique, Imanishimwe allègue que la Chambre de première instance a appliqué un traitement plus favorable aux témoins à charge qu'aux témoins à décharge (1) en ne déclarant pas « intéressés » les Témoins LI, MA et MG alors que l'origine tutsie de ces témoins et « la nécessité de se venger contre les accusés d'origine Hutu […] rendaient intéressés leur[s] témoignages »[766] ; (2) en rejetant abusivement les témoignages à décharge et en particulier celui d'Essono au motif que le temps écoulé discréditait ce témoin[767].

396. La Chambre d'appel rappelle que l'admissibilité des éléments de preuve est régie par l'article 89 (C) du Règlement qui dispose que

> « [l]a Chambre peut recevoir tout élément de preuve pertinent dont elle estime qu'il a valeur probante ».

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[755] Mémoire d'appel d'Imanishimwe, par. 165 et 166, citant le paragraphe 399 du Jugement.
[756] Mémoire d'appel d'Imanishimwe, par. 168.
[757] Mémoire d'appel d'Imanishimwe, par. 169.
[758] Mémoire d'appel d'Imanishimwe, par. 170.
[759] Mémoire d'appel d'Imanishimwe, par. 177.
[760] Mémoire en réponse du Procureur, par. 192 et 198.
[761] Mémoire en réponse du Procureur, par. 199.
[762] Mémoire en réponse du Procureur, par. 194.
[763] Mémoire en réponse du Procureur, par. 202 et 203.
[764] Mémoire en réponse du Procureur, par. 206, 207, 209 et 212.
[765] Mémoire en réponse du procureur, par. 210, citant l'Arrêt *Musema*, par. 20, citant lui-même l'Arrêt *Celebići*, par. 483.
[766] Réplique d'Imanishimwe, par. 128.
[767] Réplique d'Imanishimwe, par. 125.

Par ailleurs, au fil de leur jurisprudence, le Tribunal et le TPIY ont dégagé un certain nombre de principes directeurs relatifs à l'appréciation des éléments de preuve en fonction de leur nature.

397. Concernant les éléments de preuve directe prenant la forme de déclarations faites par des témoins à l'audience, leur crédibilité doit être présumée au moment de leur admission ; le fait que ces déclarations soient recueillies sous serment et que leurs auteurs puissent être contre interrogés constituant à ce stade des indices suffisants de fiabilité. La décision de leur admissibilité ne préjuge néanmoins aucunement du poids et de la crédibilité que la Chambre de première instance attribuera ultérieurement à ce moyen de preuve, selon son appréciation souveraine. En ce sens, la Chambre d'appel du TPIY a récemment eu l'occasion de rappeler que :

> Determinations as to the credibility of witnesses are bound up in the weight afforded to their evidence, as is readily apparent from any Trial Judgement.[768]

398. La Chambre d'appel relève qu'en l'espèce, la Chambre de première instance a examiné l'ensemble des témoignages à charge et à décharge portant sur les faits survenus au camp de Karambo, et qu'elle en a exposé les principaux éléments dans les paragraphes 341 à 385 du Jugement. Dans les paragraphes 386 à 400, elle a subséquemment formulé les conclusions factuelles relatives à ces faits en précisant de manière systématique les éléments de preuve sur lesquels elle s'appuyait ainsi que la crédibilité qu'elle accordait à ces éléments. La Chambre d'appel analysera ci-après l'appréciation faite par la Chambre de première instance de la crédibilité des témoins à décharge d'une part et des témoins à charge d'autre part.

399. Il ressort de la lecture des comptes rendus d'audience que la crédibilité des témoins militaires à décharge a été testée lors de leur contre-interrogatoire par le Procureur[769]. La crédibilité de ces témoins n'a pas été appréciée de manière fragmentaire par la Chambre de première instance. Celle-ci, ayant entendu l'ensemble des témoins à charge et à décharge, a retenu certaines parties des dépositions des témoins militaires cités par Imanishimwe – nommément les Témoins PNC, PNE, PKB, PCE et Essono – portant notamment sur l'agencement du camp de Karambo[770]. Elle n'a toutefois pas estimé crédibles celles des déclarations de ces mêmes témoins « selon lesquelles aucun soldat n'a jamais été amené ni maltraité (*sic*) au camp »[771]. Ce faisant, elle a spécifié qu'elle estimait que ces témoins n'étaient « pas crédibles *sur ce point* »[772] et en a exposé la justification :

> […] les déclarations des témoins à décharge cités par Imanishimwe sont teintées de parti pris et intéressées puisque ceux-ci ont antérieurement servi en tant que soldats sous les ordres d'Imanishimwe et que reconnaître que des civils ont été amenés au camp reviendrait à admettre leur implication ou celle de leurs collègues dans les mauvais traitements infligés aux premiers.[773]

400. Concernant plus spécifiquement le reproche fait par Imanishimwe à la Chambre de première instance d'avoir ignoré le témoignage apporté par le Témoin à décharge Essono établissant, selon lui,

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[768] Arrêt *Kvocka et consorts*, par. 659 (non disponible en langue française). Voir aussi, s'agissant de l'évaluation de la crédibilité d'un témoin : Arrêt *Musema*, par. 20 ; Arrêt *Kvocka et consorts*, par. 23 ; Arrêt *Ntakirutimana*, par. 215 et 254 ; Arrêt *Kamuhanda*, par. 248.

[769] Voir notamment : pour le Témoin PNC, voir CRA du 7 octobre 2002, p. 65 à 72, 79 à 93, 109, 120 (huis clos) ; pour le Témoin PNE, voir CRA du 10 octobre 2002, p. 28, 29 ; pour le Témoin PKB, voir CRA du 17 octobre 2002, p. 9, 10 ; pour le Témoin PCD, voir CRA du 29 octobre 2002, p. 89, 91, 109 ; pour le Témoin PCE, voir CRA du 30 octobre 2002, p. 73. Par ailleurs, il a été établi que le Témoin PCC était en poste à l'aéroport et qu'il ne s'était pas rendu au camp de Karambo ; voir CRA du 29 octobre 2002, p. 12 (huis clos) et p. 19.

[770] Jugement, par. 400.

[771] Jugement, par. 399. (Il ressort de la lecture de l'ensemble du paragraphe que la Chambre de première instance se réfère dans cette phrase aux déclarations d'Imanishimwe et de ses témoins à décharge selon lesquelles aucun *civil* n'a jamais été amené ni maltraité au camp).

[772] Jugement, par. 399 (non souligné dans l'original).

[773] Jugement, par. 399.

« la grossièreté du récit de LI », la Chambre d'appel remarque que le Procureur a eu l'occasion de tester la crédibilité du Témoin LI[774]. La Chambre de première instance a néanmoins retenu en les estimant crédibles, les allégations du Témoin LI relatives à l'incarcération et aux mauvais traitements infligés aux civils par les militaires au camp de Karambo à différents moments entre avril et juillet 1994[775], ainsi qu'à son évasion[776]. Elle a estimé que la version des faits rapportée par LI corroborait celle des Témoins MA et MG puisque les dépositions de ces trois témoins fournissaient « des informations de première main et détaillées semblables »[777]. C'est en raison de cette concordance que la Chambre de première instance a conclu que des militaires avaient incarcéré et interrogé des civils, et maltraité les Témoins LI et MG.

401. S'agissant du Témoin PNB, la Chambre d'appel observe que la Chambre de première instance n'a pas négligé de prendre en compte sa déposition ; elle a plutôt mis en balance les dépositions des Témoins MG et PNB et a estimé que celle de MG était plus probante, ainsi qu'il ressort clairement du Jugement[778].

402. La Chambre d'appel est d'avis que la Chambre de première instance a appliqué le même traitement aux témoins à décharge et aux témoins à charge LI et MG en appréciant leur crédibilité. C'est au terme d'un examen pondéré, à l'aune de l'ensemble des déclarations à charge et à décharge, et parce que les témoignages de LI et MG se corroboraient[779] que la Chambre de première instance a retenu leur crédibilité sur les points spécifiques de l'incarcération et des mauvais traitements infligés à des civils à différents moments entre avril et juillet 1994 par les militaires au camp de Karambo.

403. Pour les raisons susmentionnées, la Chambre d'appel considère que la Chambre de première instance n'a pas appliqué un traitement différent dans l'appréciation de la crédibilité des témoins, et qu'elle n'a dès lors pas commis d'erreur à ce titre.

2. Violation de la présomption d'innocence

404. Dans son Mémoire d'appel, Imanishimwe conteste la démarche déductive adoptée par la Chambre de première instance, qui équivaut selon lui à appliquer à Imanishimwe une présomption de culpabilité[780]. Il relève pour étayer cet argument plusieurs conclusions auxquelles la Chambre de première instance serait parvenue « par spéculation » et sans preuves suffisantes ou en dépit de preuves contradictoires : (1) la présence d'Imanishimwe lors de la rafle du 6 juin 1994 à Kamembe[781]; (2) l'ordre donné par Imanishimwe à ses militaires de tuer MG et sa famille[782] ; et (3) la responsabilité d'Imanishimwe pour le meurtre prétendu du frère du Témoin LI et un ancien camarade de classe, ainsi que la sœur du Témoin MG et de sa compagne de cellule Mbembe[783].

405. Imanishimwe dénonce « l'absurdité » des deux conclusions à laquelle la Chambre de première instance est parvenue en appliquant cette démarche déductive et selon lesquelles : (1) les militaires auraient tenté de faire assassiner MG et sa famille par des *Interahamwe* alors qu'ils auraient

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[774] Voir, notamment, CRA du 30 janvier 2001, p. 63 (huis clos) ; CRA du 30 janvier 2001, p. 99.
[775] Jugement, par. 392.
[776] Jugement, par. 692 et 799.
[777] Jugement, par. 398.
[778] Jugement, par. 393.
[779] Jugement, par. 398.
[780] Mémoire d'appel d'Imanishimwe, par. 171 (se référant au par. 394 du Jugement), par. 172 (se référant aux par. 656, 685 et 735 du Jugement), par. 173 (se référant aux par. 685 et 735 du Jugement), par. 174 (se référant aux par. 656, 685 et 735 du Jugement), par. 175 (se référant aux par. 655, 656, 687, 736, 739, 740 à 743, 746, 754 à 756, 761, 798, 801 et 824 du Jugement) et par. 176.
[781] Mémoire d'appel d'Imanishimwe, par. 173.
[782] Mémoire d'appel d'Imanishimwe, par. 171 à 173.
[783] Mémoire d'appel d'Imanishimwe, par. 175.

pu le faire eux-mêmes[784] ; (2) les militaires du camp de Karambo, moins nombreux et affaiblis physiquement, commandés par le lieutenant Imanishimwe, seraient allés extraire des personnes se trouvant à la gendarmerie commandée par un Lieutenant-colonel et dotée d'hommes en meilleure forme physique et bénéficiant d'une meilleure logistique[785].

406. Le Procureur répond que la Chambre de première instance avait

> « toute latitude pour faire fond sur des preuves circonstancielles ou pour tirer des déductions raisonnables à partir de circonstances données »[786].

Il prétend qu'Imanishimwe n'a pas démontré que la Chambre de première instance avait tiré des conclusions déraisonnables, ni en quoi la démarche déductive adoptée par elle équivalait à une violation du principe de la présomption d'innocence. Il ajoute qu'Imanishimwe a procédé à tort à une lecture fragmentée du Jugement[787] alors que la Chambre de première instance a dûment appliqué une démarche conforme à la jurisprudence constante du Tribunal et consistant à examiner d'abord la preuve à charge, à en apprécier la fiabilité, puis à examiner la preuve à décharge ; cette dernière n'ayant pas suffi à faire naître un doute raisonnable dans les circonstances de l'espèce[788].

407. La Chambre d'appel rappelle que la Chambre de première instance dispose d'un pouvoir discrétionnaire dans le choix de la méthode d'évaluation des éléments de preuve qu'elle estime la plus adéquate dans les circonstances de l'espèce[789]. Ce n'est que

> « lorsque cette méthode aboutit à une évaluation déraisonnable des faits de la cause, [qu']il convient d'examiner avec attention si la Chambre de première instance n'a pas commis une erreur de fait dans le choix de la méthode d'évaluation ou dans l'application de cette méthode d'où résulterait un déni de justice »[790].

408. La Chambre d'appel rappelle ses conclusions relatives à la méthode d'évaluation des éléments de preuve circonstancielle[791]. S'agissant de la démarche déductive comme méthode d'évaluation des éléments de preuve circonstancielle, elle renvoie à ses développements précédents selon lesquels le niveau de preuve requis – la preuve au-delà de tout doute raisonnable – exige que l'on ne puisse conclure à la culpabilité de l'accusé à partir d'éléments de preuve circonstancielle que s'il s'agit de la seule déduction raisonnable possible vu les éléments de preuve disponibles. La même exigence doit s'appliquer pour déduire des éléments de preuve disponibles l'existence d'un fait dont dépend la culpabilité de l'accusé ainsi que pour déduire une conclusion dont dépend la culpabilité de l'accusé, à partir de plusieurs conclusions factuelles distinctes[792].

409. La Chambre d'appel va à présent examiner les conclusions spécifiques contestées par Imanishimwe.

La présence d'Imanishimwe lors de l'opération de ratissage au marché de Kamembe

410. La Chambre de première instance a conclu à la présence d'Imanishimwe lors de l'opération de ratissage du 6 juin 1994 à Kamembe sur la base du témoignage de MG[793], qu'elle a estimé crédible. La Chambre d'appel relève que pour contester cette conclusion, Imanishimwe avance que la Chambre

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[784] Mémoire d'appel d'Imanishimwe, par. 172.
[785] Mémoire d'appel d'Imanishimwe, par. 173.
[786] Mémoire en réponse du Procureur, par. 189 et 214, citant l'Arrêt *Rutaganda*, par. 577 à 581.
[787] Mémoire en réponse du Procureur, par. 215 et 216.
[788] Mémoire en réponse du Procureur, par. 185 à 187, se référant à l'Arrêt *Rutaganda*, par. 177 et 178.
[789] Arrêt *Rutaganda*, par. 28.
[790] Arrêt Kayishema et Runzindana, par. 119.
[791] Voir *supra*, par. 304 à 306.
[792] Voir *supra*, par. 306.
[793] Jugement, par. 394, 405, 686, 735 et 789. Voir Témoin MG, CRA du 12 février 2001, p. 17 à 19, 21, 22.

n'a pas pris en considération (1) la description donnée par les témoins à décharge, dont Bagambiki, selon laquelle la rafle a été organisée par les autorités civiles compétentes avec l'appui de la gendarmerie et (2) le Décret-loi portant création de la Gendarmerie Nationale du Rwanda du 23 janvier 1974[794]. Sur ce second point, Imanishimwe soutient plus particulièrement que la rafle du 6 juin 1994 s'est déroulée conformément audit décret-loi, c'est-à-dire, selon lui, sous la direction du Commandant du groupement de gendarmerie de Cyangugu[795].

411. La Chambre d'appel observe en premier lieu qu'Imanishimwe ne cite que Bagambiki comme témoin à décharge dont la description infirmerait la conclusion de la présence d'Imanishimwe lors de l'opération de ratissage au marché de Kamembe, sans spécifier la portion du témoignage venant au soutien de sa contestation. La Chambre d'appel note au surplus qu'Imanishimwe ne précise pas en quoi la description des témoins à décharge prouverait que la présence d'Imanishimwe lors de la rafle du 6 juin 1994 n'était pas établie au-delà de tout doute raisonnable. Elle relève par ailleurs qu'Imanishimwe ne démontre pas non plus, par sa référence abstraite au décret-loi de 1974 et en l'absence d'allégation développée, que la Chambre de première instance aurait pu raisonnablement parvenir à une conclusion différente lorsqu'elle a estimé qu'Imanishimwe était présent lors de la rafle du 6 juin 1994.

412. Le défaut de précision et de clarté de cet argument et des références aux parties du dossier d'appel évoquées par Imanishimwe ne permettent pas à la Chambre d'appel d'établir que la Chambre de première instance aurait pu raisonnablement parvenir à une autre conclusion que celle de la présence d'Imanishimwe lors de l'opération de ratissage sur le marché de Kamembe le 6 juin 1994.

L'ordre donné par Imanishimwe à ses militaires de tuer MG et sa famille lors du trajet vers la gendarmerie

413. Afin d'apprécier si la conclusion de la Chambre de première instance selon laquelle Imanishimwe avait donné l'ordre à ses militaires de tuer MG et sa famille devait être établie au-delà de tout doute raisonnable, il convient de déterminer préalablement si l'ordre en question est un « fait dont dépend la culpabilité de l'accusé ». Dans cette optique, la Chambre d'appel constate que, par cet argument, Imanishimwe conteste les déclarations de culpabilité prononcées à son encontre sur la base de l'article 6 (1) du Statut pour assassinat, torture, emprisonnement, tous trois constitutifs de crimes contre l'humanité et pour violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II.

414. Une lecture attentive de la partie du Jugement consacrée aux conclusions juridiques retenues par la Chambre de première instance permet de repérer plusieurs mentions de l'ordre – déduit par la Chambre de première instance – donné par Imanishimwe de tuer MG et sa famille sur le trajet vers la gendarmerie. Une première mention apparaît au paragraphe 656 du Jugement, dans le cadre de l'analyse de la responsabilité d'Imanishimwe : elle participe, avec d'autres constatations, à la conclusion de la Chambre de première instance selon laquelle

> « la Chambre considère qu'il peut être tenu pour pénalement responsable, en vertu de l'article 6 (1) du Statut, d'avoir ordonné à ses subordonnés de commettre ces actes »[796].

Une seconde mention ressort du paragraphe 686 du Jugement lors de l'examen par la Chambre des faits constitutifs de génocide. Il est encore fait mention de l'ordre contesté aux paragraphes 735 et 789 du Jugement, dans le cadre de l'analyse des faits constitutifs de crimes contre l'humanité et de violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II, respectivement.

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[794] Mémoire d'appel d'Imanishimwe, par. 173, se référant à la pièce à conviction D-IS12.
[795] Mémoire d'appel d'Imanishimwe, par. 173.
[796] Jugement, par. 656.

415. La Chambre d'appel relève d'emblée que la Chambre de première instance mentionne l'ordre contesté par Imanishimwe dans ce qui peut être considéré comme un récapitulatif liminaire[797], avant analyse des actes spécifiques constitutifs de crimes contre l'humanité.

416. La Chambre d'appel constate que, pour déclarer Imanishimwe coupable de crime contre l'humanité prenant la forme d'assassinats en vertu de l'article 6 (1) du Statut, la Chambre de première instance s'est précisément fondée sur le meurtre du frère du Témoin LI et d'un de ses anciens camarades de classe, de la sœur du Témoin MG et de sa compagne de cellule Mbembe[798]. Elle ne s'est pas appuyée sur l'attaque du Témoin MG et de sa famille lors de leur transfert de la place du marché de Kamembe vers la gendarmerie, d'où il ressort que l'ordre prétendument donné par Imanishimwe ne constituait pas un fait dont dépendait sa culpabilité pour ce chef. Partant, la Chambre d'appel considère que la Chambre de première instance n'était pas tenue d'établir ce fait au-delà de tout doute raisonnable.

417. S'agissant de la déclaration de culpabilité pour crimes contre l'humanité prenant la forme d'emprisonnement en vertu de l'article 6 (1) du Statut, la Chambre d'appel est d'avis qu'un ordre visant l'incarcération doit être distingué d'un ordre visant l'assassinat. Si le premier est clairement prohibé sous le chef d'emprisonnement constitutif de crime contre l'humanité, le second ne saurait être considéré à ce titre et relève bien plutôt de l'assassinat en tant que crime contre l'humanité. La Chambre de première instance a reconnu Imanishimwe coupable du chef d'emprisonnement constitutif de crime contre l'humanité en constatant

> « l'incarcération du témoin LI et de six réfugiés arrêtés avec lui, du témoin MG, de son père et de deux de ses sœurs ainsi que du témoin MA »[799].

Cette conclusion, sans rapport avec l'attaque de MG et sa famille par les militaires juste après la rafle du marché de Kamembe, n'a pas été tirée sur la base de l'ordre contesté par Imanishimwe et la culpabilité d'Imanishimwe pour le crime d'emprisonnement ne reposait pas sur cet ordre.

418. Pour conclure à la culpabilité d'Imanishimwe pour le chef de crimes contre l'humanité prenant la forme de torture, la Chambre de première instance a tenu pour établi que des militaires qui se trouvaient sous le contrôle effectif d'Imanishimwe avaient « maltraité parfois en sa présence sept réfugiés placés sous leur garde après leur arrestation près de la cathédrale de Cyangugu le 11 avril 1994 »[800] et qu'ils « avaient sévèrement battu en sa présence le témoin MG et un autre détenu »[801], se référant ainsi explicitement à des mauvais traitements infligés dans l'enceinte du camp de Karambo. En outre, là encore, les mauvais traitements infligés constituent un acte distinct d'assassinat. Pour le chef de torture constitutive de crime contre l'humanité, comme pour ceux précédemment évoqués, la Chambre d'appel ne peut considérer l'ordre intimé par Imanishimwe de tuer MG et sa famille comme un fait dont dépendait la culpabilité d'Imanishimwe.

419. La Chambre d'appel estime que le même raisonnement doit s'appliquer à la déclaration de culpabilité prononcée à l'encontre d'Imanishimwe pour violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II. En effet, la Chambre de première instance mentionne l'ordre contesté par Imanishimwe dans ce qui doit être tenu pour un récapitulatif liminaire[802], avant analyse des actes spécifiques constitutifs de violations graves sous l'article 4 (a) du Statut (meurtre, torture, traitements cruels). À aucun de ces trois titres, elle n'a toutefois considéré

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[797] Jugement, par. 730 à 737.
[798] Jugement, par. 739, 740 et 743.
[799] Jugement, par. 756.
[800] Jugement, par. 758.
[801] Jugement, par. 759.
[802] Jugement, par. 784 à 791.

l'attaque de MG et sa famille lors de leur transfert depuis la place du marché de Kamembe vers la gendarmerie.

420. Dès lors, la Chambre d'appel ne peut considérer que l'ordre donné par Imanishimwe de tuer MG et sa famille lors de leur transfert vers la gendarmerie constitue un fait dont dépendait la culpabilité d'Imanishimwe pour violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II et auquel le critère de la seule déduction raisonnable aurait dû s'appliquer. Partant, la Chambre d'appel rejette cet argument et considère que la Chambre de première instance n'était pas tenue d'établir ce fait au-delà de tout doute raisonnable puisque la déclaration de culpabilité prononcée reposait sur d'autres éléments de preuve.

L'ordre donné par Imanishimwe de tuer le frère du Témoin LI, un ancien camarade de classe, ainsi que la sœur du Témoin MG et sa compagne de cellule Mbembe

421. La Chambre d'appel observe en premier lieu qu'Imanishimwe ne conteste, dans son Mémoire d'appel, que la conclusion de la Chambre de première instance selon laquelle Imanishimwe aurait donné l'ordre à ses militaires de tuer le frère du Témoin LI, d'un ancien camarade de classe, ainsi que de la sœur du Témoin MG et de sa compagne de cellule Mbembe[803]. Il ne conteste pas la conclusion correspondant à l'ordre d'Imanishimwe visant l'incarcération des personnes sus identifiées.

422. La Chambre d'appel doit considérer si l'ordre contesté visant le meurtre du frère du Témoin LI, d'un ancien camarade de classe, ainsi que de la sœur du Témoin MG et de sa compagne de cellule Mbembe est un « fait dont dépend la culpabilité de l'accusé ». La Chambre d'appel procède ci-après à l'analyse des déclarations de culpabilité prononcées à l'encontre d'Imanishimwe sur la base de l'article 6 (1) du Statut afin de déterminer le niveau de preuve requis pour établir l'ordre d'Imanishimwe pour le meurtre de ces personnes.

423. La Chambre d'appel a déjà pu noter que la Chambre de première instance a explicitement fondé les déclarations de culpabilité pour crime contre l'humanité prenant la forme d'assassinat sur l'ordre donné par Imanishimwe aux militaires de tuer le frère du Témoin LI et son ancien camarade de classe, la sœur du Témoin MG et sa compagne de cellule Mbembe[804]. Cet ordre doit donc être considéré comme un fait dont dépendait la culpabilité d'Imanishimwe pour ce chef. Une telle conclusion s'impose avec force dans la mesure également où – au contraire de ce qui a été remarqué plus tôt au sujet de l'ordre de tuer MG et sa famille sur le trajet vers la gendarmerie – l'ordre donné par Imanishimwe de tuer le frère du Témoin LI, l'un de ses ancien camarade de classe, ainsi que la sœur du Témoin MG et sa compagne de cellule Mbembe figure tout à la fois dans le récapitulatif liminaire[805], avant analyse des actes constitutifs de crimes contre l'humanité, et dans l'analyse même de l'assassinat constitutif de crime contre l'humanité[806].

424. En l'espèce, la Chambre de première instance a conclu à l'existence d'un ordre d'Imanishimwe de tuer le frère du Témoin LI et un ancien camarade de classe, ainsi que la sœur du Témoin MG et sa compagne de cellule Mbembe sur le fondement de la déposition du Témoin LI[807]. L'on peut raisonnablement penser que plusieurs des constatations factuelles de la Chambre établies sur le fondement des dépositions de plusieurs témoins venaient étayer cette conclusion :

la sœur de MG a été emmenée avec MG, son autre sœur et son père par des militaires au camp de Karambo le 7 juin 1994[808] ;

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[803] Mémoire d'appel d'Imanishimwe, par. 175.
[804] Voir Jugement, par. 743.
[805] Jugement, par. 736.
[806] Jugement, par. 739, 740 et 743.
[807] Jugement, par. 392, 411 et 743.
[808] Jugement, par. 395 ; CRA du 12 février 2001, p. 40.

LI a été arrêté en même temps que son frère et un ancien camarade de classe par des militaires le 11 avril 1994[809] ;

ils ont été emmenés au camp de Karambo où ils se sont trouvés en captivité ensemble[810] ;

à leur arrivée au camp de Karambo, Imanishimwe était présent alors que des militaires les maltraitaient[811] ;

lors des mauvais traitements infligés à LI par les militaires, ceux-ci l'ont menacé de mort[812] ;

lors des mauvais traitements infligés à LI par les militaires, des militaires ont emmenés certains réfugiés qui ne sont pas revenus[813] ;

la sœur de MG était détenue au camp de Karambo dans la même cellule que Mbembe[814] ;

le nom de la sœur de MG ainsi que celui de Mbembe ont été appelés une nuit pendant leur incarcération au camp de Karambo à la suite de quoi les deux femmes ont été emmenées[815] ;

depuis lors, la sœur de MG a été portée disparue et le corps de Mbembe a été retrouvé à Kadasomwa[816] ;

le frère de LI et l'ancien camarade de classe de LI sont morts[817] ;

les militaires du camp de Karambo étaient sous le commandement d'Imanishimwe[818].

425. Ayant conclu que le frère de LI et son ancien camarade de classe[819], ainsi que la sœur du Témoin MG et sa compagne de cellule Mbembe[820], avaient été tués au camp de Karambo la seule déduction opérée par la Chambre de première instance à partir des constatations exposées a été de considérer que les militaires ne pouvaient pas participer au meurtre de ces personnes « sans qu'Imanishimwe le sache et l'approuve ou l'ordonne »[821]. En dépit du caractère ambigu, voire équivoque, de cette formulation, la Chambre d'appel relève qu'elle doit être lue au regard du paragraphe 410 du Jugement qui la clarifie dans les termes suivants :

> « la Chambre ne peut accepter l'idée que des soldats présents au camp de Karambo aient agi de la sorte, surtout à une telle échelle, sans instructions d'Imanishimwe, le commandant du camp ».

426. Au demeurant, la Chambre d'appel souligne que pour parvenir à la conclusion

> « qu'Imanishimwe a donné des ordres autorisant des militaires à arrêter, à détenir des civils soupçonnés d'entretenir des liens avec le FPR, à leur infliger des mauvais traitements et à les exécuter »[822],

la Chambre de première instance a pris également en considération « le caractère répétitif et la fréquence des arrestations de civils et de leur transfert au camp », la présence d'Imanishimwe « au cours de la détention de certains civils et des mauvais traitements qui leur ont été infligés » ainsi que

> « la nature de la structure de commandement et de la hiérarchie militaire, la taille relativement petite du camp, la présence d'Imanishimwe au camp, la reconnaissance par ce dernier du contrôle qu'il exerçait sur les soldats du camp de Karambo, l'absence de tout moyen de preuve

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[809] Jugement, par. 310 et 392 ; CRA du 30 janvier 2001, p. 14, 15 à 17, 108 ; CRA du 30 janvier 2001, p. 52, 53 (huis clos).
[810] Jugement, par. 392 ; CRA du 30 janvier 2001, p. 24 ; CRA du 31 janvier 2001, p. 13.
[811] Jugement, par. 395 ; CRA du 30 janvier 2001, p. 14, 17, 19, 20, 110.
[812] Jugement, par. 392.
[813] Jugement, par. 395 ; CRA du 30 janvier 2001, p. 22.
[814] Jugement, par. 395 ; CRA du 13 février 2001, p. 83, 84.
[815] Jugement, par. 395 ; CRA du 13 février 2001, p. 84 ; CRA du 13 février 2001, p. 76.
[816] Jugement, par. 395 et 396 ; CRA du 13 février 2001, p. 76, 84, 85.
[817] Jugement, par. 392 ; CRA du 30 janvier 2001, p. 24.
[818] Jugement, par. 652 : voir, notamment, CRA du 30 janvier 2001, p. 17.
[819] Jugement, par. 392.
[820] Jugement, par. 396.
[821] Jugement, par. 655. Voir aussi par. 656.
[822] Jugement, par. 410. Voir aussi par. 687.

donnant à penser qu'il ne les contrôlait pas et qu'il les avait empêchés de maltraiter des civils ou qu'ils les avait punis à ce titre »[823].

427. Pour les raisons qui précèdent, la Chambre d'appel considère qu'un juge des faits raisonnable pouvait conclure que la seule déduction raisonnable sur la base des éléments de preuve était qu'Imanishimwe avait donné l'ordre aux militaires de tuer le frère du Témoin LI et un ancien camarade de classe, ainsi que la sœur du Témoin MG et sa compagne de cellule Mbembe.

428. Cette conclusion en rapport avec la reconnaissance de culpabilité d'Imanishimwe pour le crime contre l'humanité d'assassinat s'étend également aux autres déclarations de culpabilité établies sur la base de l'article 6 (1) du Statut et rend obsolète la question de savoir si l'ordre de tuer le frère du Témoin LI et un ancien camarade de classe, ainsi que la sœur du Témoin MG et de sa compagne de cellule Mbembe a également été déterminant pour déclarer Imanishimwe coupable pour torture et emprisonnement constitutifs de crimes contre l'humanité et pour violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II.

429. La Chambre d'appel considère donc qu'un tribunal raisonnable des faits pouvait parvenir par déduction aux conclusions contestées ici par Imanishimwe sans violer la présomption d'innocence dont il bénéficiait. La Chambre d'appel rejette en conséquence le cinquième motif d'appel d'Imanishimwe.

D. CUMUL DE DÉCLARATIONS DE CULPABILITÉ (3ÈME MOTIF D'APPEL)

430. Imanishimwe soutient que la Chambre de première instance a versé dans l'erreur en cumulant des déclarations de culpabilité prononcées au titre des articles 2, 3 et 4 du Statut[824]. Il avance que, pour être concurrentes, les déclarations de culpabilité ne doivent avoir aucun lien entre elles : l'une ne doit pas être « spéciale » par rapport à l'autre, ni ne doit être le moyen de perpétration de l'autre ou la « conséquence logique ou naturelle » de l'autre[825].

431. Imanishimwe reproche tout d'abord à la Chambre de première instance de l'avoir déclaré coupable à raison des mêmes faits à la fois de génocide en vertu de l'article 2 du Statut (Chef 7) et d'extermination constitutive de crime contre l'humanité en vertu de l'article 3 (b) du Statut (Chef 10). Il soutient que les deux qualifications ne sont pas concurrentes dans la mesure où l'extermination est le moyen de perpétration du génocide, l'extermination étant le « crime-moyen » et le génocide le « crime-fin »[826]. Il ajoute que les deux infractions assurent le respect d'une seule et même valeur : le « caractère sacré et inviolable de la vie et sa protection contre l'extermination »[827]. Enfin, il prétend que l'infraction spécifique – le génocide de par sa *mens rea* – aurait dû être retenue au détriment de l'infraction générale – en l'espèce, l'extermination[828]. Il soutient également que la Chambre de première instance a commis une erreur en le condamnant à raison des mêmes faits pour assassinat et torture constitutifs de crimes contre l'humanité en vertu des articles 3 (a) et 3 (f) du Statut (Chefs 9 et 12) et pour violations graves de l'article 3 commun aux Conventions de Genève et du Protocole II en vertu de l'article 4 (a) du Statut (Chef 13). Il soutient que les articles 3 et 4 du Statut tendent à assurer

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[823] Jugement, par. 410.
[824] Acte d'appel d'Imanishimwe, par. 17 à 20.
[825] Mémoire d'appel d'Imanishimwe, par. 110.
[826] Mémoire d'appel d'Imanishimwe, par. 111 à 116 et 119.
[827] Mémoire d'appel d'Imanishimwe, par. 117, se référant au Jugement *Kupreskić et consorts,* par. 694.
[828] Mémoire d'appel d'Imanishimwe, par. 118 à 120. Au soutien de son argument, Imanishimwe se réfère entre autres au Jugement *Kupreskić et consorts*, par. 707, mais cite aussi le passage suivant de l'Arrêt *Čelebići*, par. 413 : « si un ensemble de faits est régi par deux dispositions dont l'une comporte un élément supplémentaire nettement distinct, la Chambre se fondera uniquement sur cette dernière disposition pour déclarer l'accusé coupable» : Mémoire d'appel d'Imanishimwe, note 68. Voir aussi Mémoire en réplique d'Imanishimwe, par. 113 à 115.

la protection des mêmes « valeurs humaines »[829] mais aussi que les éléments constitutifs des infractions concernées sont fondamentalement les mêmes[830].

432. Pour illustrer le préjudice dont il estime être victime, Imanishimwe se réfère à l'Opinion individuelle et dissidente des Juges Hunt et Bennouna jointe à l'Arrêt *Čelebići*, laquelle fait état de la stigmatisation sociale attachée au fait d'être reconnu coupable et de l'impact d'un cumul de déclarations de culpabilité sur la longueur de la peine et sur les mesures pouvant intervenir pendant l'exécution de celle-ci comme la libération anticipée[831].

433. En réponse, le Procureur soutient que la Chambre de première instance n'a pas commis d'erreur dans l'application des principes gouvernant le cumul de déclarations de culpabilité[832]. Il fait valoir que le raisonnement emprunté par Imanishimwe procède d'une interprétation erronée de la jurisprudence de la Chambre d'appel en matière de condamnations cumulatives. S'appuyant sur les principes dégagés dans l'Arrêt *Čelebići,* le Procureur soutient qu'un cumul n'est possible, à raison d'un même fait et sur la base de différentes dispositions du Statut, que si chacune des dispositions comporte un élément constitutif matériellement distinct qui fait défaut dans l'autre[833]. Le Procureur rappelle alors que la Chambre d'appel a considéré à plusieurs reprises que le cumul de déclarations de culpabilité sur la base des articles 2 et 3 (b) du Statut à raison des mêmes faits était possible, chacun des crimes comportant un élément constitutif matériellement distinct faisant défaut à l'autre, à savoir l'intention spécifique pour le premier et l'existence d'une « attaque généralisée ou systématique contre une population civile » pour le second[834]. S'agissant des condamnations prononcées à raison des mêmes faits en vertu des articles 3 et 4 du Statut, le Procureur soutient que leur cumul est permis, chacune des dispositions comportant un élément matériellement distinct : tandis que l'article 3 exige la preuve de l'existence d'une « attaque généralisée ou systématique contre une population civile », l'article 4 exige quant à lui la preuve de l'existence d'un lien de connexité entre les actes de l'accusé et le conflit armé[835].

434. Souscrivant aux principes dégagés dans l'Arrêt *Celebici*, la Chambre d'appel a déjà établi que le cumul de déclarations de culpabilité sur la base de différentes dispositions du Statut mais à raison d'un même fait n'est possible que si chacune des dispositions comporte un élément constitutif matériellement distinct qui fait défaut dans l'autre[836]. Un élément est matériellement distinct d'un autre s'il exige la preuve d'un fait que n'exige pas l'autre[837].

435. La Chambre d'appel souligne qu'ayant fait droit au premier motif d'appel d'Imanishimwe et ayant en conséquence décidé d'annuler les déclarations de culpabilité prononcées contre Imanishimwe en vertu de l'article 6 (3) du Statut pour les faits survenus au terrain de football de Gashirabwoba, la question du cumul de déclarations de culpabilité pour génocide (article 2 du Statut) et extermination constitutive de crime contre l'humanité (article 3 (b) du Statut) ne se pose plus. La Chambre d'appel souhaite néanmoins rappeler avoir déjà établi qu'il était possible de prononcer à raison des mêmes

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[829] Mémoire d'appel d'Imanishimwe, par. 138, se référant à l'Arrêt *Čelebići*, par. 149.
[830] Mémoire d'appel d'Imanishimwe, par. 139 et 140.
[831] Mémoire d'appel d'Imanishimwe, par. 125 et 137, citant l'Opinion individuelle et dissidente des Juges David Hunt et Mohamed Bennouna, Arrêt *Čelibići*, par. 23.
[832] Mémoire en réponse du Procureur, par. 136.
[833] Mémoire en réponse du Procureur, par. 140 et 141, citant Arrêt *Čelibići*, par. 412 et 413, et se référant aussi, entre autres, à Arrêt *Musema*, par. 358 à 370 ; Arrêt *Rutaganda,* par. 582 et 583 ; Arrêt *Ntakirutimana,* par. 542 ; Arrêt *Kordić et Čerkez,* par. 1032 et 1033.
[834] Mémoire en réponse du Procureur, par. 141 et 142, se référant à Arrêt *Musema*, par. 366, 369 et 370 ; Arrêt *Krstić*, par. 219 à 227 ; Arrêt *Ntakirutimana,* par. 542.
[835] Mémoire en réponse du Procureur, par. 151, se référant à Arrêt *Rutaganda*, par. 583.
[836] Voir Arrêt *Musema,* par. 358 à 370, citant, entre autres, Arrêt *Čelebići*, par. 412 et 413. Voir aussi Arrêt *Ntakirutimana*, par. 542 ; Arrêt *Semanza*, par. 315.
[837] Arrêt *Čelebići,* par. 412. Voir aussi Arrêt *Musema*, par. 361 à 363. Voir aussi Arrêt *Krstić*, par. 218 ; Arrêt *Ntakirutimana*, par. 542. L'ensemble du test applicable a été clarifié dans l'Arrêt *Kunarac,* par. 168 à 174.

faits des condamnations multiples pour génocide et pour crime contre l'humanité, chacun de ces crimes comportant un élément constitutif matériellement distinct que n'exige pas l'autre : « l'intention de détruire, en tout ou partie, un groupe national, ethnique, racial ou religieux » pour le premier ; l'existence d'une « attaque généralisée ou systématique contre une population civile » pour le second[838].

436. S'agissant des condamnations prononcées en vertu des articles 3 et 4 du Statut à raison des mêmes faits, la Chambre d'appel observe que chacune d'entre elles requiert un élément matériellement distinct que n'exige pas l'autre. Tandis que la condamnation prononcée au titre de l'article 3 requiert la preuve de l'existence d'une attaque généralisée ou systématique contre une population civile, la condamnation au titre de l'article 4 exige quant à elle la preuve d'un lien de connexité entre les actes visés et le conflit armé.[839] La Chambre d'appel conclut que la Chambre de première instance n'a pas versé dans l'erreur en cumulant les déclarations de culpabilité prononcées en vertu des articles 3 (assassinats et torture) et 4 (meurtres et traitements cruels) du Statut à raison des mêmes faits.

437. Le troisième motif d'appel d'Imanishimwe est rejeté.

V. Motifs d'appel relatifs à la peine

A. INTRODUCTION

438. Aux termes de l'article 24 du Statut, la Chambre d'appel peut « confirmer, annuler ou réviser » une peine prononcée par une Chambre de première instance. La Chambre d'appel rappelle toutefois que les Chambres de première instance sont investies d'un large pouvoir discrétionnaire pour déterminer la peine appropriée. Cela tient à l'obligation qu'elles ont de personnaliser la peine pour tenir compte de la situation de l'accusé et de la gravité du crime[840]. En règle générale, la Chambre d'appel ne substituera sa propre peine à celle prononcée par la Chambre de première instance que s'il est démontré que la Chambre de première a commis une erreur manifeste dans l'exercice de son pouvoir discrétionnaire ou qu'elle s'est écartée du droit applicable[841].

439. Les éléments que la Chambre de première instance est tenue de prendre en compte dans la détermination de la peine d'une personne déclarée coupable sont énoncés aux articles 23 du Statut et 101 du Règlement. Aux termes de l'article 101 (B) (ii) du Règlement, elle doit, en droit, tenir compte de l'existence de toute circonstance atténuante. Toutefois, la détermination de ce qui constitue une circonstance atténuante[842] et du poids qu'il convient de lui accorder[843] est laissée à son appréciation.

440. La Chambre de première instance a condamné Imanishimwe à deux peines d'emprisonnement confondues de 15 ans pour l'avoir reconnu coupable, à raison des crimes perpétrés au terrain de football de Gashirabwoba par ses subordonnés, de génocide (Chef 7) et d'extermination constitutive de crime contre l'humanité (Chef 10), en application de l'article 6 (3) du Statut[844]. Pour les déclarations de culpabilité prononcées sur la base des chefs 9, 11, 12 et 13[845], elle a infligé des peines

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[838] Voir Arrêt *Musema,* par. 365 à 367 et 370 ; Arrêt *Ntakirutimana*, par. 542 ; Arrêt *Semanza,* par. 318. Voir aussi Arrêt *Krstić* par. 219 à 227.
[839] Arrêt *Rutaganda*, par. 583.
[840] Arrêt *Naletilić et Martinović*, par. 593, se référant à l'Arrêt *Celebići*, par. 717.
[841] Arrêt *Naletilić et Martinović*, par. 593, Voir aussi, entre autres, Arrêt *Tadić* relatif à la sentence, par. 22 ; Arrêt *Musema*, par. 379 ; Arrêt *Jokić* relatif à la sentence, par. 8.
[842] Arrêt *Musema,* par. 395.
[843] Arrêt *Kambanda*, par. 124 ; Arrêt *Celebići*, par. 775 ; Arrêt *Musema,* par. 396.
[844] Jugement, par. 821 à 823.
[845] Déclarations prononcées en vertu de l'article 6 (1) du Statut pour assassinats (Chef 9), emprisonnement (Chef 11) et torture (Chef 12) constitutifs de crimes contre l'humanité et en vertu des articles 6 (1) et 6 (3) du Statut pour violations graves de l'article 3 commun des Conventions de Genève et du Protocole additionnel II (meurtres, torture et traitements cruels ; Chef 13).

d'emprisonnement confondues de dix, trois, dix et douze ans respectivement[846] résultant en une condamnation à 27 ans d'emprisonnement au total[847]. Pour parvenir à cette décision, la Chambre de première instance a tenu compte des pratiques suivies en matière de détermination de la peine, de la législation rwandaise et de la situation personnelle d'Imanishimwe[848]. Elle a en outre jugé que la fonction de commandant exercée par Imanishimwe dans la préfecture de Cyangugu constituait une circonstance aggravante[849] et relevé que celui-ci n'avait invoqué

« aucun fait personnel ou médical important [ni aucun] autre élément pertinent qui pourrait influer sur le prononcé de la peine »

en sa faveur[850]. La Chambre de première instance n'a pas jugé que son parcours professionnel, tel qu'il a été présenté, constituait une circonstance atténuante[851].

B. AGGRAVATION DE LA PEINE PRONONCÉE POUR GÉNOCIDE ET EXTERMINATION (11ÈME MOTIF D'APPEL DU PROCUREUR)

441. En son onzième motif d'appel, le Procureur affirme que la Chambre de première instance a commis une erreur manifeste en condamnant Imanishimwe à quinze ans d'emprisonnement pour génocide et extermination[852].

442. La Chambre d'appel ayant fait droit au premier motif d'appel de Samuel Imanishimwe et ayant en conséquence décidé d'annuler les déclarations de culpabilité prononcées contre Imanishimwe en vertu de l'article 6 (3) du Statut pour les faits survenus au terrain de football de Gashirabwoba, à savoir les seules prononcées pour génocide et pour extermination constitutive de crime contre l'humanité, le présent motif d'appel devient sans objet et, comme tel, ne requiert pas l'examen de la Chambre d'appel.

C. IMPORTANCE ACCORDÉE AUX CIRCONSTANCES ATTÉNUANTES (6ÈME MOTIF D'APPEL DE SAMUEL IMANISHIMWE)

443. En son sixième motif d'appel, Imanishimwe fait valoir que la Chambre de première instance a commis une erreur de fait pour n'avoir pas tenu compte de toutes les circonstances atténuantes qu'il y avait en sa faveur. De l'avis d'Imanishimwe, ces circonstances atténuantes ont été écartées parce qu'elles n'avaient pas été évoquées dans sa plaidoirie finale[853]. Il relève que, la Chambre de première instance ayant demandé aux parties de faire preuve de concision parce qu'elles avaient déjà exposé des arguments détaillés dans leurs dernières conclusions écrites respectives[854], il a décidé de répondre au réquisitoire oral du Procureur plutôt que de reprendre les arguments relatifs aux circonstances atténuantes qu'il avait développés dans ses écritures[855]. Il cite les paragraphes pertinents de ses Dernières conclusions écrites dans lesquels il souligne que le fait qu'il n'a jamais été impliqué dans une activité criminelle, son jeune âge et le grade relativement bas qu'il détenait dans la hiérarchie militaire rwandaise constituent des circonstances atténuantes qui auraient dû être prises en compte dans la détermination de sa peine[856].

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[846] Jugement, par. 825.
[847] Jugement, par. 827.
[848] Jugement, par. 822.
[849] Jugement, par. 819.
[850] Jugement, par. 820.
[851] Jugement, par. 820.
[852] Mémoire d'appel du Procureur, par. 430.
[853] Mémoire d'appel d'Imanishimwe, par. 178 à 184.
[854] Mémoire d'appel d'Imanishimwe, par. 179, se référant à l'audience du 11 août 2003.
[855] Mémoire d'appel d'Imanishimwe, par. 180.
[856] Mémoire d'appel d'Imanishimwe, par. 181 à 184.

444. En réponse, le Procureur fait valoir qu'au vu des crimes commis et du rôle d'Imanishimwe dans leur commission aucune des circonstances atténuantes invoquées n'aurait pu peser[857]. Il soutient qu'à supposer même que certaines circonstances atténuantes militant en faveur d'Imanishimwe n'aient pas été prises en considération, cette omission n'aurait aucun effet

> « compte tenu de la gravité des crimes qu'il a commis, du rôle actif qu'il a joué dans leur commission, et de sa position de supérieur hiérarchique et d'autorité dont il a abusé »[858].

445. Si la Chambre de première instance doit tenir compte de toute circonstance atténuante lorsqu'elle examine la peine qu'il convient de prononcer, l'importance qui doit leur être accordée est laissée à son appréciation, cette dernière n'étant nullement tenue de préciser chacune des circonstances qu'elle retient[859]. La Chambre d'appel relève que la Chambre de première instance a néanmoins explicitement évoqué les Dernières conclusions écrites d'Imanishimwe lorsqu'elle examinait la question des circonstances atténuantes[860] et qu'il s'agit là d'un élément suffisant pour présumer que les arguments d'Imanishimwe ont été pris en compte[861].

446. La Chambre d'appel fait observer à cet égard que la Chambre de première instance a expressément fait état des paragraphes 31 et 33 des Dernières conclusions écrites d'Imanishimwe dans lesquels son parcours scolaire et professionnel est exposé. Ces paragraphes font partie de la section des Dernières conclusions écrites intitulée « Présentation de l'accusé » qui tend à présenter objectivement Imanishimwe[862] et traite du grade peu élevé qu'il aurait détenu dans l'armée rwandaise[863], de l'insignifiance du camp de Karambo[864], de son absence de casier judiciaire[865] et de sa qualité de jeune officier[866]. Ce sont les circonstances qu'Imanishimwe estime que la Chambre de première instance aurait dû prendre en considération pour atténuer sa peine[867]. Même si la Chambre de première instance n'a pas explicitement évoqué les paragraphes 1203 et 1204 des Dernières conclusions écrites d'Imanishimwe qui constituent la section intitulée « Circonstances atténuantes : Délinquant primaire », la teneur de ces paragraphes est incluse dans la section intitulée « Présentation de l'accusé »[868]. Il n'y a donc aucune raison de conclure que la Chambre de première instance n'a pas dûment tenu compte des arguments en question.

447. La Chambre d'appel estime que loin d'indiquer, comme le prétend Imanishimwe, que ses observations relatives à la détermination de la peine ont été complètement ignorées, le passage du paragraphe 820 du Jugement qui dit que

> « les conseils d'Imanishimwe n'ont pas formulé d'observations s'agissant de la détermination de la peine »

souligne tout simplement le fait qu'il n'a présenté aucun argument au sujet de la peine lors de sa plaidoirie orale.

448. Le fait que la Chambre de première instance ait décidé qu'il n'y avait pas de motifs suffisants pour conclure à l'existence de circonstances atténuantes en l'espèce s'inscrit dans les limites de son pouvoir discrétionnaire d'appréciation[869]. Les circonstances invoquées, à savoir le parcours

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[857] Mémoire en réponse du Procureur, par. 232.
[858] Mémoire en réponse du Procureur, par. 231.
[859] Arrêt Kupreškić et consorts, par. 430.
[860] Jugement, note de bas de page 1685.
[861] Voir Arrêt *Kupreškić et consorts,* par. 430 ; Arrêt *Jokić* relatif à la sentence, par. 53.
[862] Dernières conclusions écrites d'Imanishimwe, par. 30 à 42.
[863] Dernières conclusions écrites d'Imanishimwe, par. 34 à 37.
[864] Dernières conclusions écrites d'Imanishimwe, par. 38.
[865] Dernières conclusions écrites d'Imanishimwe, par. 39 et 40.
[866] Dernières conclusions écrites d'Imanishimwe, par. 41.
[867] Mémoire d'appel d'Imanishimwe, par. 182 et 183.
[868] Ce fait est souligné par Imanishimwe lui-même : voir Mémoire d'appel d'Imanishimwe, par. 181 à 183.
[869] Arrêt *Kamuhanda*, par. 354.

d'Imanishimwe, son « jeune » âge au moment de la commission des crimes, son absence de casier judiciaire et le grade peu élevé qu'il détenait dans la hiérarchie militaire rwandaise ne sont pas de nature à avoir une quelconque incidence sur la peine encourue par Imanishimwe. Le fait d'avoir un casier judiciaire vierge est un trait commun à de nombreux accusés auquel on n'accorde, dans le meilleur des cas, que peu d'importance en l'absence de circonstances exceptionnelles lorsqu'on examine la question de l'atténuation de la peine[870]. Imanishimwe avait 32 ans lorsqu'il a participé aux crimes considérés[871] et il est permis de penser que la Chambre de première instance a tenu compte du caractère relatif de sa position d'autorité quand elle insistait sur le principe de la gradation des peines[872].

449. La Chambre d'appel conclut qu'Imanishimwe n'a pas démontré que la Chambre de première instance avait ignoré ses arguments relatifs à sa situation personnelle et aux circonstances atténuantes ni abusé de son pouvoir souverain d'appréciation à tel point que sa peine doive être réduite.

450. Pour ces raisons, la Chambre d'appel rejette le sixième motif d'appel d'Imanishimwe dans son intégralité.

D. CONSÉQUENCES DES CONCLUSIONS DE LA CHAMBRE D'APPEL

451. La Chambre d'appel rappelle avoir annulé les déclarations de culpabilité prononcées contre Imanishimwe sur la base de l'article 6 (3) du Statut pour les crimes commis au terrain de football de Gashirabwoba pour génocide (Chef 7 de l'Acte d'accusation Bagambiki/Imanishimwe) et pour extermination constitutive de crime contre l'humanité (Chef 10 de l'Acte d'accusation Bagambiki/Imanishimwe)[873]. En conséquence, les peines prononcées par la Chambre de première instance sur la base des chefs 7 et 10 – deux peines confondues de quinze ans d'emprisonnement à purger consécutivement aux peines prononcées sur la base des autres chefs[874] – doivent être infirmées.

452. Ayant rejeté les motifs d'appel y relatifs[875], la Chambre d'appel confirme les déclarations de culpabilité prononcées sur la base de l'article 6 (1) du Statut pour assassinat (Chef 9 de l'Acte d'accusation Bagambiki/Imanishimwe), emprisonnement (Chef 11 de l'Acte d'accusation Bagambiki/Imanishimwe) et torture (Chef 12 de l'Acte d'accusation Bagambiki/Imanishimwe) constitutifs de crimes contre l'humanité. La Chambre d'appel confirme par conséquent les peines confondues de dix, trois, et dix ans prononcées respectivement pour ces chefs[876].

453. Pour l'avoir trouvé coupable de meurtre, torture et traitement cruel constitutifs de violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II (Chef 13 de l'Acte d'accusation Bagambiki/Imanishimwe) sur la base des articles 6 (1) et 6 (3) du Statut[877], la Chambre de première instance a condamné Imanishimwe à une peine de douze ans confondue avec les

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[870] Jugement *Furundžija*, par. 284 ; Arrêt *Babić* relatif à la sentence, par. 49 et 50 ; Jugement *Banović* relatif à la sentence, par. 75.
[871] À titre d'exemple, la jeunesse de l'accusé a été prise en compte dans le cas des personnes suivantes : Dražen Erdemović (23 ans), Jugement *Erdemović*, par. 16 (i) ; Anto Furundžija (23 ans), Jugement *Furundžija*, par. 284 ; Esad Landžo (19 ans), Jugement *Celebići*, par. 1283. Dans l'affaire *Kvočka et consorts,* la jeunesse de Milojica Kos a été prise en considération. Il avait 29 ans. La Chambre de première instance a relevé qu'il était le plus jeune des co-accusés et qu'il n'était guère expérimenté et formé comme policier au moment où il prenait ses fonctions dans le camp. Elle a aussi conclu que, ne jouissant pas d'un grand prestige au sein de sa communauté avant son affectation à Omarska, il était peu probable qu'il serve de modèle aux autres gardiens. Son silence n'impliquait donc pas le même degré de complicité par encouragement ou par approbation tacite : Jugement *Kvočka et consorts*, par. 732.
[872] Jugement, par. 815 et 816.
[873] Voir *supra,* par. 165.
[874] Jugement, par. 822, 823 et 827.
[875] Voir *supra,* par. 420 et 428.
[876] Jugement, par. 825.
[877] Pour des faits distincts.

peines prononcées pour les chefs 9, 11 et 12[878]. La Chambre d'appel rappelle avoir annulé la déclaration de culpabilité prononcée sous ce chef sur la base de l'article 6 (3) du Statut pour les crimes commis au terrain de football de Gashirabwoba[879] mais confirmé la condamnation prononcée sur la base de l'article 6 (1) du Statut[880]. Etant donnée la gravité des crimes dont Samuel Imanishimwe a été trouvé coupable sur la base de l'article 6 (1), la Chambre d'appel estime qu'il n'y a pas lieu de reconsidérer la peine de douze ans prononcée pour le chef 13 en conséquence de l'annulation de la déclaration de culpabilité prononcée sur la base de l'article 6 (3) du Statut. A l'unanimité, la Chambre d'appel est en effet d'avis que la révision partielle du verdict n'affecte pas la peine de douze ans confondue avec les peines prononcées pour les chefs 9, 11 et 12 imposée par la Chambre de première instance pour le chef 13. A la majorité des juges, le Juge Schomburg étant en désaccord, la Chambre d'appel conclut que la peine totale imposée contre Imanishimwe est de douze ans.

VI. Dispositif

Par ces motifs, LA CHAMBRE D'APPEL,

VU l'article 24 du Statut et l'article 118 du Règlement ;

VU les écritures respectives des parties et les arguments présentés aux audiences des 6 et 7 février 2006 ;

SIÉGEANT en audience public ;

RAPPELLE avoir rejeté à l'unanimité les motifs d'appel soulevés par le Procureur à l'encontre du Jugement s'agissant d'André Ntagerura et Emmanuel Bagambiki et confirmé l'acquittement de ces derniers dans le Dispositif de l'arrêt concernant l'appel du Procureur s'agissant de l'acquittement d'André Ntagerura et Emmanuel Bagambiki prononcé le 8 février 2006 ;

REJETTE, à l'unanimité, les autres motifs d'appel soulevés par le Procureur ;

ACCUEILLE, à l'unanimité, le premier motif d'appel soulevé par Samuel Imanishimwe contre les déclarations de culpabilité prononcées à son encontre sur la base de l'article 6 (3) du Statut pour les événements survenus au terrain de football de Gashirabwoba ;

ANNULE en conséquence les déclarations de culpabilité prononcées à l'encontre de Samuel Imanishimwe sur la base de l'article 6 (3) du Statut pour les crimes de génocide, extermination constitutive de crime contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II sous les chefs 7, 10 et 13 de l'Acte d'accusation Bagambiki/Imanishimwe ;

DÉCLARE sans objet les deuxième et quatrième motifs d'appel soulevés par Samuel Imanishimwe contre les déclarations de culpabilité prononcées à son encontre sur la base de l'article 6 (3) du Statut pour les événements survenus au terrain de football de Gashirabwoba ;

REJETTE, à l'unanimité, les troisième, cinquième et sixième motifs d'appel soulevés par Samuel Imanishimwe concernant le cumul de déclarations de culpabilité, l'appréciation des éléments de preuve relatifs au camp militaire de Karambo et la peine ;

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[878] Jugement, par. 825.
[879] Voir *supra,* par. 165.
[880] Voir *supra,* par. 420 et 428.

CONFIRME, à l'unanimité, les déclarations de culpabilité prononcées à l'encontre de Samuel Imanishimwe sur la base de l'article 6 (1) du Statut pour assassinat, emprisonnement et torture constitutifs de crimes contre l'humanité sous les chefs 9, 11 et 12 de l'Acte d'accusation Bagambiki/Imanishimwe et pour meurtre, torture et traitement cruel constitutifs de violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II sous le chef 13 de l'Acte d'accusation Bagambiki/Imanishimwe ;

INFIRME, à l'unanimité, les deux peines confondues de quinze ans d'emprisonnement prononcées contre Samuel Imanishimwe pour génocide et extermination constitutive de crime contre l'humanité sous les chefs 7 et 10 de l'Acte d'accusation Bagambiki/Imanishimwe à purger consécutivement aux peines prononcées sur la base des autres chefs ;

CONFIRME les quatre peines confondues de dix, trois, dix et douze ans d'emprisonnement prononcées contre Samuel Imanishimwe sur la base des chefs 9, 11, 12 et 13 de l'Acte d'accusation Bagambiki/Imanishimwe, résultant, le Juge Schomburg étant en désaccord, en une condamnation à douze ans d'emprisonnement au total ;

DÉCLARE l'Arrêt immédiatement exécutoire en vertu de l'article 119 du Règlement ;

ORDONNE en vertu des articles 103 (B) et 107 du Règlement que Samuel Imanishimwe reste sous la garde du Tribunal jusqu'à ce que soient arrêtées les dispositions nécessaires pour son transfert vers l'État dans lequel il purgera sa peine.

Fait en anglais et en français, la version en français faisant foi.

Prononcé le 7 juillet 2006 à Arusha, Tanzanie.

Le Juge Schomburg joint une Déclaration au présent Arrêt.

[Signé] : Fausto Pocar ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron ; Wolfgang Schomburg

VII. Déclaration du juge Schomburg

1. Je suis entièrement d'accord avec la décision concernant André Ntagerura et Emmanuel Bagambiki.

2. Cependant, j'estime non seulement que l'acte d'accusation établi contre André Ntagerura est imprécis mais qu'il doit être considéré comme frappé de nullité parce qu'aucun des crimes reprochés à l'accusé n'est exposé avec suffisamment de précision et que l'étendue des accusations n'est pas suffisamment circonscrite. En conséquence, l'acte d'accusation établi contre André Ntagerura ne remplit pas les deux fonctions principales de tout acte d'accusation, à savoir :

informer l'accusé des accusations portées contre lui (*fonction d'information* qui consacre le droit fondamental à être entendu) et

limiter la portée personnelle et matérielle des accusations (*fonction de délimitation*).

L'acte d'accusation établi contre Emmanuel Bagambiki et Samuel Imanishimwe ne remplit ces deux fonctions principales que pour certains chefs.

3. Par ailleurs, si l'on considère que ces documents sont entachés de nullité en tout ou en partie, il est à noter que ce n'est pas à la Chambre d'appel de déterminer si la maxime *ne bis in idem* (droit à ne pas être jugé ou puni deux fois[1]) s'applique en l'espèce. C'est au Procureur de ce Tribunal[2], en premier lieu (*Cf.* article 8 du Statut), ou à tout autre représentant du ministère public près une juridiction compétente pour juger les crimes en question, de décider de l'opportunité d'engager de nouvelles poursuites sur la base d'un nouvel acte d'accusation dans la mesure où le principe de l'autorité de la chose jugée n'interdit pas de poursuivre à nouveau André Ntagerura, Emmanuel Bagambiki et Samuel Imanishimwe[3].

4. Je tiens à rappeler qu'André Ntagerura a été acquitté exclusivement – et Emmanuel Bagambiki et Samuel Imanishimwe l'ont été principalement – pour des questions de procédure car il n'y avait pas, ne serait-ce que dans une certaine mesure, d'acte d'accusation – principal instrument des poursuites – qui puisse être purgé. Sans un tel acte d'accusation, il ne peut y avoir de procès, et en tout état de cause, pas de procès équitable, le principe d'équité prenant également en compte les intérêts des victimes et de leurs familles.

Fait en anglais et en français, la version en français faisant foi.

Prononcé le 7 juillet 2006, à Arusha, Tanzanie.

[Signé] : Wolfgang Schomburg

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[1] Cette maxime ne s'applique en principe que dans un même pays/État. Voir par exemple article 14 (7) du Pacte international relatif aux droits civils et politiques et article 4 du Protocole n°7 de la Convention (européenne) de sauvegarde des Droits de l'Homme et des Libertés fondamentales (STCE n°117). Elle est devenue applicable au plan international par le biais, entre autres, de l'article 54 de la convention d'application de l'accord de Schengen du 14 juin 1985 entre les gouvernements des États de l'Union économique Benelux, de la République fédérale d'Allemagne et de la République française relatif à la suppression graduelle des contrôles aux frontières communes, signée à Schengen le 19 juin 1990 (la « CAAS »). *Cf.* affaire C-436/04 (*Belgique c. Van Esbroeck*), Cour de justice des Communautés européennes, arrêt du 9 mars 2006 (http://www.curia.eu.int), point 2 du dispositif : « […] l'existence d'un ensemble de faits indissociablement liés entre eux, indépendamment de la qualification juridique de ces faits ou de l'intérêt juridique protégé […] ».

[2] La même juridiction/le même tribunal supranational(e) par analogie au « même pays/État » ?

[3] Pour la distinction entre les irrégularités de forme (voir *supra* par. 2, ligne 2) entraînant un acquittement pour vice de procédure, et les autres vices de forme entachant l'acte d'accusation, voir *Meyer-Goßner*, Strafprozessordnung, 49e éd., München 2006, § 200, n°26 et 27, renvoyant à la jurisprudence de la Cour suprême fédérale allemande (Bundesgerichtshof).

Annexe a : historique de La procédure en appel

1. Les principaux aspects de la procédure en appel sont récapitulés ci-après.

A. Dépôt des écritures des parties

2. La Chambre de première instance a rendu le Jugement dans la présente affaire le 25 février 2004.

1. Appel du Procureur

3. Le Procureur a déposé son Acte d'appel le 25 mars 2004 ainsi que son Mémoire d'appel le 8 juin 2004. Ayant obtenu une prorogation des délais de dépôt de leur mémoire de l'intimé le 24 juin 2004[1], Bagambiki et Ntagerura ont chacun déposé une « Réponse » à l'Acte d'appel du Procureur le 8 octobre 2004[2]. En raison de substantielles erreurs de traduction dans la version en langue française du Jugement, le Juge de la mise en état en appel a ordonné deux semaines plus tard que soient suspendus les délais de dépôt des écritures en appel jusqu'à réception par les parties d'une nouvelle version certifiée conforme du Jugement en langue française[3]. Le 10 novembre 2004, statuant à la demande du Procureur[4], le Juge de la mise en état en appel a déclaré les Réponses de Bagambiki et Ntagerura irrecevables au motif que ni le Règlement, ni les Directives pratiques applicables à la procédure d'appel ne prévoyait le dépôt d'une réponse à un acte d'appel[5]. Dans cette décision, le Juge de la mise en état en appel a rappelé à Bagambiki et Ntagerura qu'ils devaient déposer leur mémoire de l'intimé dans un délai de vingt jours à compter de la notification de la nouvelle version certifiée conforme du Jugement en langue française. Imanishimwe, Bagambiki et Ntagerura ont déposé leur mémoire de l'intimé les 14, 16 et 17 février 2005 respectivement. Le Procureur a déposé son Mémoire en réplique le 3 mars 2005.

2. Appel d'Imanishimwe

4. Le 3 mars 2004, Imanishimwe a déposé une requête aux fins de prorogation des délais de dépôt de son acte d'appel et de son mémoire d'appel, faisant valoir qu'il n'avait pas encore reçu le Jugement dans une langue que lui et son Conseil comprenaient, à savoir le français[6]. Le 24 mars 2004, le Juge de la mise en état en appel a fait droit à la requête, ordonnant à Imanishimwe de déposer son acte d'appel au plus tard dans les trente jours suivant la notification de la version française du Jugement et son

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[1] Décision relative à la Requête de André Ntagerura pour le report du délai de dépôt du Mémoire de l'Intimé, 24 juin 2004 ; Décision relative à la Requête de la Défense d'Emmanuel Bagambiki en vue du report du délai de dépôt du Mémoire de l'Intimé, 24 juin 2004. Voir aussi Décision relative à la Requête de Samuel Imanishimwe aux fins de prorogation des délais de dépôt du Mémoire de l'Intimé, 16 juillet 2004, par laquelle le Juge de la mise en état en appel a accordé à Imanishimwe la même prorogation de délai.

[2] Réponse de l'Intimé André Ntagerura à l'Acte d'appel du Procureur selon le paragraphe 2 de la Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal, 8 octobre 2004 ; Réponse de la Défense de Monsieur Emmanuel Bagambiki à l'Acte d'appel du Procureur conformément au paragraphe 2 de la Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal, 8 octobre 2004 (ensemble « Réponses »).

[3] Ordonnance, 21 octobre 2004.

[4] Requête urgente du Procureur aux fins de rejet des réponses des intimés André Ntagerura et Emmanuel Bagambiki à l'Acte d'appel du Procureur, 12 octobre 2004.

[5] Décision (Requête urgente du Procureur aux fins de rejet des réponses à l'Acte d'appel du Procureur, Requête de la Défense d'Emmanuel Bagambiki en vue du report de délai de dépôt de sa réponse), 10 novembre 2004.

[6] Requête en extrême urgence aux fins de prorogations des délais de dépôt de l'Acte d'appel et du Mémoire d'appel contre le Jugement rendu le 25 février 2004 contre Samuel Imanishimwe – Articles 3, 108 et 116 du Règlement de procédure et de preuve et 20 du Statut, 3 mars 2004.

mémoire de l'appelant dans un délai de soixante-quinze jours à compter du dépôt de son acte d'appel[7]. Imanishimwe a déposé son Acte d'appel le 2 septembre 2004. Le 21 octobre 2004, en raison de substantielles erreurs de traduction dans la version en langue française du Jugement, le Juge de la mise en état en appel a ordonné que soient suspendus les délais de dépôt des écritures en appel jusqu'à réception par les parties d'une nouvelle version certifiée conforme du Jugement en langue française[8]. Le Mémoire d'appel d'Imanishimwe a été déposé le 25 février 2005 et la Réponse du Procureur le 5 avril 2005. À la suite d'une requête aux fins de prorogation de délai[9], Imanishimwe s'est vu octroyé une prorogation de délai de quinze jours à compter de la notification à sa Défense de la version française de la Réponse du Procureur pour déposer son mémoire en réplique[10]. Imanishimwe a finalement déposé son Mémoire en réplique le 12 juillet 2005.

B. Désignation des juges

5. Le 23 mars 2004, les juges suivants ont été désignés pour connaître de l'appel d'Imanishimwe : les Juges Theodor Meron (Président), Florence Mumba, Mehmet Güney, Fausto Pocar et Inés Mónica Weinberg de Roca[11]. Le Juge Mehmet Güney a été désigné Juge de la mise en état en appel[12]. Après que l'Acte d'appel du Procureur ait été déposé, le Président de la Chambre d'appel a ordonné le 29 mars 2004 que les deux appels soient traités comme une seule et même affaire, par le même collège de juges[13]. Le 25 janvier 2005, le Juge Wolfgang Schomburg a été désigné pour remplacer le Juge Theodor Meron[14]. Le 15 juillet 2005, la Juge Andrésia Vaz a été désignée pour remplacer la Juge Inés Mónica Weinberg de Roca[15]. Le Juge Mehmet Güney est alors devenu Juge Président. Devenu Juge Président de la Chambre d'appel le 17 novembre 2005, le Juge Fausto Pocar est devenu Juge Président de l'affaire. Le 18 novembre 2005, le Juge Théodor Meron a été désigné pour remplacer la Juge Florence Mumba[16].

C. Moyens de preuve supplémentaires

6. En vertu de l'article 115 du Règlement, le Procureur a déposé une requête aux fins d'admission de deux déclarations de témoins comme moyens de preuve supplémentaires en date du 10 mai 2004[17]. Dans les décisions datées des 18 et 19 mai 2004, le Juge de la mise en état en appel a autorisé Bagambiki et Ntagerura à déposer leur réponse à ladite requête au plus tard dans les dix jours suivant la notification de la traduction française[18]. Le 2 juin 2004, le Juge de la mise en état en appel a rendu une ordonnance enjoignant au Procureur de déposer confidentiellement les versions non caviardées des déclarations des deux témoins dont il cherchait à obtenir l'admission et l'invitant également à

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[7] Décision relative à la Requête en extrême urgence aux fins de prorogation des délais de dépôt de l'Acte d'appel et du Mémoire en appel contre le Jugement rendu le 25 février 2004 contre Samuel Imanishimwe, 24 mars 2004.
[8] Ordonnance, 21 octobre 2004.
[9] Requête aux fins de suspension du délai de dépôt de la duplique [*sic*] de Samuel Imanishimwe conformément aux articles 20 du Statut, 3, 113 et 116 du Règlement de procédure et de preuve, 11 avril 2005.
[10] Décision relative à la Requête de Samuel Imanishimwe aux fins de suspension du délai de dépôt du Mémoire en réplique, 13 avril 2005.
[11] Ordonnance du Président de la Chambre d'appel portant affectation de juges et désignation du juge de la mise en état en appel, 23 mars 2004.
[12] Ordonnance du Président de la Chambre d'appel portant affectation de juges et désignation du juge de la mise en état en appel, 23 mars 2004.
[13] Ordonnance du Président de la Chambre d'appel portant affectation de juges et désignation du juge de la mis en état en appel, 29 mars 2004.
[14] Order of the Presiding Judge Replacing a Judge in a Case Before the Appeals Chamber, 25 janvier 2005.
[15] Order Replacing a Judge in a Case Before the Appeals Chamber, 15 juillet 2005.
[16] Order Replacing a Judge in a Case Before the Appeals Chamber, 18 novembre 2005.
[17] Requête du Procureur aux fins d'admission de moyens de preuve supplémentaires conformément à l'article 115 du Règlement de procédure et de preuve, 10 mai 2004.
[18] Décision relative à la requête de la Défense d'Emmanuel Bagambiki en vue du report du délai du dépôt de la réponse à une requête du Procureur, 18 mai 2004 ; Décision relative à la requête de André Ntagerura pour report du délai de réponse à la requête du Procureur, 19 mai 2004.

joindre à cette nouvelle requête les éléments actualisés d'information qui justifieraient l'octroi des mesures de protection demandées en faveur des deux témoins[19]. Conformément à cette ordonnance, le Procureur a déposé le 7 juin 2004, sous scellé, les versions non caviardées des déclarations des deux témoins[20]. Le même jour, le Procureur a déposé une requête dans laquelle il renouvelait sa demande de mesures de protection en faveur des deux témoins[21]. La Chambre d'appel a rejeté la requête aux fins d'admission de moyens de preuve supplémentaires au motif qu'elle n'était pas convaincue que, présentés au procès, les moyens de preuve offerts par les deux témoins en auraient changé l'issue[22].

D. Audiences en appel

7. Les audiences en appel se sont tenues à Arusha, Tanzanie les 6 et 7 février 2006. Le 8 février 2006, à l'issue des audiences, la Chambre d'appel a confirmé l'acquittement de Ntagerura et Bagambiki[23], rejetant ainsi les motifs d'appel du Procureur concernant ces deux personnes acquittées. En rendant son dispositif, la Chambre d'appel a indiqué que la motivation écrite de sa décision sera offerte dans l'arrêt disposant de l'ensemble des motifs d'appel du Procureur et d'Imanishimwe[24].

[19] Ordonnance, 2 juin 2004.
[20] Witness Statements Filed Confidentially in Relation to Prosecution's Motion for Additional Evidence under Rule 115, Under Seal, 7 juin 2004.
[21] Requête du Procureur aux fins de mesures de protection en faveur des témoins dont les dépositions sont envisagées en vertu de l'article 115, 7 juin 2004.
[22] Décision relative à la Requête du Procureur aux fins d'admission de moyens de preuve supplémentaires, 10 décembre 2004.
[23] Dispositif de l'Arrêt concernant l'appel du Procureur s'agissant de l'acquittement d'André Ntagerura et Emmanuel Bagambiki, 8 février 2006.
[24] Dispositif de l'Arrêt concernant l'appel du Procureur s'agissant de l'acquittement d'André Ntagerura et Emmanuel Bagambiki, 8 février 2006.

The Prosecutor v. Michel Bagaragaza

Case N° ICTR-2005-86

Case History

• Name: BAGARAGAZA

• First Name: Michel

• Date of Birth: 1945

• Sex: male

• Nationality: Rwandan

• Former Official Function: Director General of OCIR-Thé

• Date of Indictment: 28 July 2005

• Date of Indictment's Amendment: 1 December 2006

• Counts: genocide, conspiracy to commit genocide, complicity in the genocide, killing and causing violence to health and physical or mental well-being as serious violations of Article 3 Common to the Geneva Conventions of 1949 and additional protocol II of 1977 (War Crimes)

• Date and Place of Arrest: 15 August 2005, Arusha, Tanzania (surrendered)

• Date of Transfer: 15 August 2005

• Date of Initial Appearance: 16 August 2005

• Date of Further Appearance: 1 December 2006

• Pleading: not guilty

• Date Trial Began: on the 18th of August 2005 the Accused was transferred to The Hague for detention ; on the 7th of May 2005, the Case was transferred to a Dutch national jurisdiction in the Hague ; on the 20th of May 2008, the Accused was transferred back to Arusha.

• Date and content of the Sentence: 6 November 2009, sentence to 8 years imprisonment

Order for Further Submissions Concerning the Motion for Referral of the Indictment to the Kingdom of Norway 23 March 2006 (ICTR-2005-86-PT)

(Original: English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Jai Ram Reddy ; N. Joseph Asoka de Silva

Michel Bagaragaza – Referral of the Indictment to the Kingdom of Norway, Possibility for any interested party to appear or make submissions

International Instrument cited :

Rules of Procedure and Evidence, rules 11 bis (A), 11 bis (A) (iii) and 74

INTRODUCTION

1. On 15 February 2006, the Prosecutor submitted a request for referral of the Indictment in this case to the Kingdom of Norway. The Defence responded to the request and supported the Motion in principle, but also made further requests to the Chamber.[1] Pursuant to Rule 11 *bis* (A), the President designated this Trial Chamber to decide on the Motion.[2]

2. In order to fully assess the Motion, the Chamber requires additional submissions from the Parties, and from the Kingdom of Norway.

3. In view of the interest in Rule 11 *bis* that other persons, Organizations and/or States may have, the Chamber recalls the provisions of Rule 74 which states that any interested party may be granted leave to appear or make submissions on any issue specified by the Chamber.

THE CHAMBER, HEREBY

I. ORDERS the Parties to file, within 14 days from the date of the present Order, further submissions on:

(i) Whether the gravity of the crimes charged and the level of responsibility of the Accused, as enshrined in Security Council Resolution 1534 (2004) should be taken into account by the Chamber when deciding on the Motion; and

(ii) If the answer to Issue 1 is in the affirmative, how the gravity of the crimes charged and the level of responsibility should affect the Chamber's Decision on whether or not to make a Referral Order;

II. ORDERS the Parties and INVITES the Kingdom of Norway to file, within 14 days from the date of the present Order, further submissions on whether the Kingdom of Norway has jurisdiction on the crimes charged in the Indictment as confirmed against the Accused, pursuant to Rule 11 *bis* (A) (iii);

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[1] Filed on 20 February 2006

[2] Designation of Trial Chamber Under Rule 11 *bis* (President), 21 February 2006.

III. INVITES each of them to respond to the others' submissions within 21 days from the date of the present Order.

Arusha, 23 March 2006, done in English.

[Signed]: Dennis C. M. Byron ; Jai Ram Reddy ; N. Joseph Asoka de Silva

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Decision on the Prosecution Motion for Referral to the Kingdom of Norway Rule 11 bis of the Rules of Procedure and Evidence 19 May 2006 (ICTR-2005-86-R11bis)

(Original: English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Jai Ram Reddy ; N. Joseph Asoka de Silva

Michel Bagaragaza – Referral to the Kingdom of Norway, Conditions for a referral, Jurisdiction, willingness and preparedness of the Referral State : no provision against genocide in the norwegian domestic criminal law, Principle of universal jurisdiction, No jurisdiction ratione materiae over the crimes of the Indictment – Exclusion of the Republic of Rwanda and the United-Republic of Tanzania as possible Referral States – Motion denied

International Instruments cited :

The Headquarters Agreement (31 August 1995), Article XX (1) ; Rules of Procedure and Evidence, rules 11 bis (A), 11 bis (A) (i), 11 bis (A) (ii), 11 bis (A) (iii), 11 bis (C) and 74 ; Statute, art. 1, 2, 3, 4, 5, and 7

International Cases cited :

I.C.T.Y.: Referral Bench, The Prosecutor v. Radovan Stanković, Decision on Referral of Case Under Rule 11 bis – Partly Confidential and Ex Parte, 17 May 2005 (IT-96-23/2) ; Appeals Chamber, The Prosecutor v. Radovan Stanković, Decision on Rule 11 bis Referral (AC), 1 September 2005 (IT-96-23/2)

International Court of Justice, Case Concerning The Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 14 February 2002*

I. Introduction

1. On 28 July 2005, Judge Sergei Alekseevich Egorov confirmed the Indictment against Michel Bagaragaza. The Indictment contains three counts: conspiracy to commit genocide, genocide and complicity in genocide in the alternative. The Indictment alleges among other facts that: through numerous meetings, Michel Bagaragaza planned with others the extermination of all members of the Tutsi population because of their association with the *Inkotanyi*; he made hate speeches to incite others to participate in such a plan; he provided financial assistance to the *Interahamwe*, agreed to raise funds for the *Interahamwe*, and supported the idea of them receiving paramilitary training; he ordered the employees of the Rubaya tea factory to provide fuel to the *Interahamwe* and the Presidential Guard as they were on their way to attack and kill hundreds of Tutsi at Kesho hill; he ordered one of his drivers from Nyabihu tea factory to transport the *Interahamwe* to the Nyundo Cathedral for an attack on some

Tutsi; he ordered another driver to transport the *Interahamwe* to Rubaya for another attack; one of his subordinates recruited military reservists as employees, provided military training, arms and ammunition to other employees of Rubaya tea factory, and both groups of employees later took part in the killing of Tutsi.

2. Before his surrender on 16 August 2005, the Accused made an agreement to cooperate with the Prosecution and provided an extensive statement on the 1994 events in Rwanda which incriminated both himself and other Rwandans.[1] He agreed with the Prosecution to be tried before a national court, which would be determined at a later stage. On 15 February 2006, the Prosecution submitted a request for referral of the Indictment to the Kingdom of Norway pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence. The Defence responded to the request, supporting it in principle and making further requests to the Chamber.[2]

3. On 21 February 2006, pursuant to Rule 11 *bis* (A), the President designated Trial Chamber III composed of Judges Dennis C. M. Byron (presiding), Jai Ram Reddy and Joseph Asoka Nihal de Silva to consider the Motion.[3] On 23 March 2006, the Chamber ordered the Parties and invited the Kingdom of Norway to make further submissions while recalling the provisions of Rule 74 on *Amicus curiae*.[4] The Defence, the Prosecution and the Ministry of Foreign Affairs of the Kingdom of Norway filed further submissions on 30 March, 6 April and 10 April 2006, respectively. The Prosecution filed a response on 12 April 2006, while the Registrar made submissions pursuant to Rule 33 (B) on 20 April 2006. The Defence submitted a response to this later filing and a clarification of its own further submissions on 24 April 2006. No one else made submissions or sought leave to make the same. Considering all of the submissions, the Chamber will now decide the Motion.

II. Deliberations

4. On 19 May 2006, the President forwarded to the Chamber a *Note Verbale* that he received from the Rwandan Ministry of Foreign Affairs.[5] The Republic of Rwanda wishes to be heard before determination of the application if so invited pursuant to Rule 74. In its Order of 23 March 2006, the Chamber noted Rule 74 which provides that any interested party may be granted leave to appear or make submissions on any issue specified by the Chamber. It is the view of the Chamber that the Republic of Rwanda should have seized the Chamber to that effect following its Order. The Chamber declines the request for submissions by the Republic of Rwanda at this stage and notes that the right to be heard alleged in the *Note Verbale* will not be affected.

5. Pursuant to Rule 11 *bis*, three requirements have to be considered in deciding a motion for referral: (1) the jurisdiction, willingness and preparedness of the Referral State; (2) the ability of the Referral State to conduct a fair trial and; (3) the non-imposition of the death penalty in the Referral State. In their submissions, the Parties raised other conditions for the referral.[6]

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[1] The Agreement and the Statement were attached to the Referral Motion as confidential materials because their disclosure would constitute a security risk to the Accused and his family.

[2] The Defence response was filed on 20 February 2006.

[3] Designation of Trial Chamber Under Rule 11 *bis* (President), 21 February 2006.

[4] Rule 74 reads as follows: "A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to appear before it and make submissions on any issue specified by the Chamber."

[5] See the President's *Memorandum* with the reference [ICTR/PRES/026.06] and the *Note Verbale* with the reference [247/09.01/CAB/MIN/06].

[6] If referral is granted, the Prosecution requests an order relating to the detention and hand-over of the Accused no later than 18 August 2006, and that the protective measures of the witnesses in this case remain in force until a comparable order can be obtained from the Norwegian authorities. Also in the case of referral, the Defence requests that the Chamber order the safe and permanent location of the Accused outside of the African

A. Jurisdiction, Willingness and Preparedness of the Referral State

6. Pursuant to Rule 11 *bis* (A), a confirmed Indictment may be referred to a State (i) in whose territory the crime was committed, or (ii) in which the accused was arrested, or (iii) which has jurisdiction and is willing and adequately prepared to accept the referral. In the present case, the Prosecution requests that the Indictment be referred to the Kingdom of Norway under the third provision of Rule 11 *bis* (A).

7. In its Motion, the Prosecution excludes both the Republic of Rwanda and the United-Republic of Tanzania as possible Referral States. While the Republic of Rwanda is the State where the crimes were committed (Rule 11 *bis* (A) (i)), the Prosecution recalls the provisions of Rule 11 *bis* (C) containing two other requirements – the absence of the death penalty and the guarantee of a fair trial – and declares that none of those requirements can be met at the present time. The Prosecution further states that, even if those requirements are met, strong public policy reasons favour the involvement of other countries in the prosecution of the Accused because it would be a manner of educating people in other countries on the lessons to be learned from the Rwandan genocide and would promote the development of ideas to prevent future similar tragedies. As for the United-Republic of Tanzania, where the Accused was arrested (Rule 11 *bis* (A) (ii)) following his surrender on 16 August 2005, the Prosecution submits that a referral would be inconsistent with Article XX (1) of the Headquarters Agreement.[7]

8. The Prosecution, however, argues that the Kingdom of Norway meets the third criterion, being a State which has jurisdiction and is willing and adequately prepared to accept such a case (Rule 11 *bis* (A) (iii)). The Prosecution attaches to its Motion correspondence exchanged with the Norwegian authorities supporting their willingness to take over this case for trial.

9. From that exchange of correspondence and from the further submissions made by the Norwegian Ministry of Foreign Affairs, the Chamber has concluded that the Kingdom of Norway does not have any provision against genocide in its domestic criminal law. The Norwegian authorities inform the Chamber that, on the basis of the facts alleged in the Indictment, the Accused may be prosecuted as an accessory to homicide or negligent homicide, for which the maximum sentence is 21 years imprisonment. The Norwegian authorities also submit that prosecution of the case may occur under the principle of universal jurisdiction, which implies that the Indictment will be approved by the King in Council. This means that, even though there is no direct basis for jurisdiction in the Norwegian courts on the facts as pleaded in the Indictment, prosecution can still take place under certain circumstances as explained in the Norwegian submissions of 10 April 2006. Finally, the Kingdom of Norway submits that, if the case is referred, it will exercise its discretion to determine whether prosecution is warranted in view of the evidence.

10. Relying on the *Stankovic* Referral Decision, the Prosecution argues that the criterion of "having jurisdiction" does not imply that the Referral State must have the same provisions in its domestic criminal law as the Statute of the Tribunal. The Prosecution submits that the maximum penalty as included in the Norwegian General Civil Penal Code is adequate, considering the fact that the Accused is 60 years old, that he has accepted responsibility for his actions as detailed in his

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continent following the completion of his trial and potential sentence served in the Kingdom of Norway, and that the Tribunal make available the continued assistance of his ICTR designated international legal counsel.

[7] Article XX (1) of The Headquarters Agreement (31 August 1995) provides that: "The host country shall not exercise its criminal jurisdiction over any person present in its territory, who is to be or has been transferred as a suspect or an accused to the premises of the Tribunal pursuant to a request or an order of the Tribunal, in respect of acts, omissions or convictions prior to their entry into the territory of the host country."

statement, and that he has agreed to collaborate with domestic and international criminal proceedings regarding the 1994 events in Rwanda.

11. The Defence argues that nothing prevents the Kingdom of Norway from exercising universal jurisdiction in this case. The Defence relies on the Norwegian law which provides for universal jurisdiction over ordinary crimes under national law. The Defence also relies on international jurisprudence, notably the *Warrant of Arrest* Judgment.[8] The Prosecution, however, disagrees with the reference to the *Warrant of Arrest* case and argues that the only relevant legal basis for jurisdiction to be exercised by the Kingdom of Norway is Rule 11 *bis* and that there is no need to meet the requirements identified by the Defence in the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Warrant of Arrest* Judgment of 14 February 2002.

12. The Appeals Chamber has affirmed that, although the Statute of the ICTY does not contain an explicit legal basis for Rule 11 *bis*, it is clear that alternative national jurisdictions have consistently been contemplated for the "transfer" of accused persons.[9] In determining whether the Kingdom of Norway has jurisdiction under Rule 11 *bis* (A) (iii), this Chamber must be satisfied that an adequate legal framework exists which could criminalize the alleged behaviour of the Accused, and that if found guilty, an appropriate punishment could be applied based on the offences currently charged before the Tribunal.[10] The Chamber is of the view that in making such a determination, the Statute is the main legal instrument to be considered.

13. The Statute provides for a definition of jurisdiction in its Articles 1, 2, 3, 4, 5, and 7. The interpretation of Rule 11 *bis* (A) (iii) should rely on that definition which requires *ratione materiae*, *ratione personae*, *ratione loci*, *ratione temporis*. When confirming an indictment, the Confirming Judge must find that each of those requirements is satisfied in order for the Tribunal to have jurisdiction. In this case, the universal jurisdiction referred to in the submissions of the Kingdom of Norway will permit the prosecution of the Accused (*ratione personae*) for his acts allegedly committed in Rwanda (*ratione loci*) in 1994 (*ratione temporis*). The only aspect of jurisdiction which would not be covered by Norwegian law is the *ratione materiae*. The submission that Norwegian criminal law does not provide for the crime of genocide directly affects the finding of jurisdiction *ratione materiae*, where the legal qualification of the facts alleged in the confirmed Indictment is made.[11]

14. The Chamber looks to the *Stankovic* case, where the Referral Bench refused to determine, as between two laws applicable to the crimes alleged in the Indictment, which one the Referral State should apply but nonetheless gave a detailed analysis of the substantive law which could be applied if the case was referred to Bosnia and Herzegovina.[12] The Referral Bench concluded that since the Criminal Code of the Socialist Republic of Bosnia and Herzegovina ("SRBiH CC") did not contain any provisions criminalizing either violations of laws or customs of war or crimes against humanity,

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[8] International Court of Justice, Case Concerning The Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 14 February 2002.

[9] *Prosecutor v. Radovan Stankovic*, Decision on Rule 11 *bis* Referral (AC), 1 September 2005, para 14.

[10] *Prosecutor v. Radovan Stankovic*, Decision on Referral of Case Under Rule 11 *bis* – Partly Confidential and *Ex Parte* (Referral Bench), 17 May 2005, para. 32.

[11] The reference by the Parties and the Kingdom of Norway to the principle of universal jurisdiction applies only to the jurisdiction *ratione loci* or geographic jurisdiction, and not the jurisdiction *ratione materiae*. The Kingdom of Norway ratified the 1948 Genocide Convention on 22 July 1994. The assertion that Norwegian criminal law does not incriminate the crime of genocide means that the Convention has not been incorporated in its domestic law, making it impossible to prosecute anyone for its perpetration.

[12] *Prosecutor v. Radovan Stankovic*, Decision on Referral of Case Under Rule 11 *bis* – Partly Confidential and *Ex Parte* (Referral Bench), 17 May 2005, para. 32.

the crimes charged in the relevant Indictment, it should not even be considered.[13] The Bench, however, was satisfied that other criminal instruments available to the Referral State contained provisions which criminalize participation similar, if not equal, to those in the Statute and the Rules of Procedure and Evidence of the ICTY. Therefore the Bench concluded that the prosecution of some or all of the alleged criminal acts of the Accused could occur in the Referral State.[14]

15. The Chamber finds the Prosecution's argument that the Chamber does not have to determine the substantive applicable law before the domestic court misleading. The Chamber must determine whether the Referral State has jurisdiction within the definition provided by the Statute. Where several applicable laws exist within the domestic law of the Referral State, the Chamber does not have the power to determine which one should be applied, if each of the laws provides for appropriate legal qualification in accordance with the Statute.

16. In this case, it is apparent that the Kingdom of Norway does not have jurisdiction (*ratione materiae*) over the crimes as charged in the confirmed Indictment. In addition, the Chamber recalls that the crimes alleged – genocide, conspiracy to commit genocide and complicity in genocide – are significantly different in term of their elements and their gravity from the crime of homicide, the basis upon which the Kingdom of Norway states that charges may be laid against the Accused under its domestic law. The Chamber notes that the crime of genocide is distinct in that it requires the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". This specific intent is not required for the crime of homicide under Norwegian criminal law. Therefore, in the Chamber's view, the *ratione materiae* jurisdiction, or subject matter jurisdiction, for the acts alleged in the confirmed Indictment does not exist under Norwegian law. Consequently, Michel Bagaragaza's alleged criminal acts cannot be given their full legal qualification under Norwegian criminal law, and the request for the referral to the Kingdom of Norway falls to be dismissed.

B. Other Requirements

17. Having found that the Kingdom of Norway does not have jurisdiction over the alleged crimes in the Indictment against Michel Bagaragaza, there is no need for the Chamber to consider the other requirements for referral as provided in Rule 11 *bis* or in the Parties' submissions.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion in its entirety.

Arusha, 19 May 2006, done in English.

[Signed]: Dennis C. M. Byron ; Jai Ram Reddy ; Joseph Asoka Nihal de Silva

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[13] *Prosecutor v. Radovan Stankovic*, Decision on Referral of Case Under Rule 11 *bis* – Partly Confidential and *Ex Parte* (Referral Bench), 17 May 2005, para. 38.

[14] *Prosecutor v. Radovan Stankovic*, Decision on Referral of Case Under Rule 11 *bis* – Partly Confidential and *Ex Parte* (Referral Bench), 17 May 2005, para. 46.

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Decision on the Prosecution's Request for a Scheduling Order 8 June 2006 (ICTR-2005-86-AR11bis)

(Original: English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge ; Liu Daqun ; Andrésia Vaz ; Theodor Meron ; Wolfgang Schomburg

Michel Bagaragaza – Schedule, Interlocutory appeal against a Trial Chamber decision denying a request to refer the Accused to the Kingdom of Norway, No legal time frame for filing an appeal brief : same time frame of fifteen days as for the filing of a notice of appeal

International Instrument cited :

Rules of Procedure and Evidence, rule 11 bis (H)

International Cases cited :

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Radovan Stanković, Decision on Defence Application for Extension of Time to File Notice of Appeal, 9 June 2005 (IT-96-23/2) ; Appeals Chamber, The Prosecutor v. Paško Ljubičić, Decision on Motion for Extension of Time, 10 May 2006 (IT-00-41)

454. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of an interlocutory appeal filed by the Prosecution,[1] pursuant to Rule 11 *bis* (H) of the Tribunal's Rules of Procedure and Evidence ("Rules"), against a Trial Chamber decision,[2] denying its request to refer the case of Michel Bagaragaza to the Kingdom of Norway.

455. The Appeals Chamber is also presently seized of a request by the Prosecution for clarification on how to proceed in an appeal under Rule 11 *bis* and for a scheduling order for the filing of written briefs by the parties.[3] The Prosecution makes no submissions concerning a possible proper framework for appealing under the rule, and simply makes reference to the practice adopted by the Appeals Chamber for the International Criminal Tribunal for the Former Yugoslavia ("ICTY").[4]

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[1] Prosecutor's Notice of Appeal (Rule 11 *bis* (H)), 1 June 2006.

[2] *The Prosecutor v. Michel Bagaragaza*, Case N°ICTR-2005-86-R11*bis*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway, 19 May 2006.

[3] Prosecutor's Motion for a Scheduling Order (Rule 11 *bis* (H)), 1 June 2006 ("Prosecution Motion"). Mr. Bagaragaza has not yet responded to this motion. However, the Appeals Chamber does not find that Mr. Bagaragaza would be prejudiced by taking this decision prior to the expiration of the period normally allowed for a response.

[4] Prosecution Motion, para. 3 (citing *The Prosecutor v. Radovan Stankovic*, Case N°IT-96-23/2-AR11*bis*.1, Decision on Defence Application for Extension of Time to File Notice of Appeal, 9 June 2005 ("*Stankovic* Decision")).

456. Rule 11 *bis* (H) sets a time frame of fifteen days for the filing of a notice of appeal, but is silent on the period for filing an appeal brief. Under the equivalent provision of the Rules of Procedure and Evidence for the ICTY, the Appeals Chamber has followed a practice of allowing fifteen days from the filing of the notice of appeal for the filing of the appeal brief on the merits.[5] The Appeals Chamber sees no reason to depart from this practice in considering appeals under Rule 11 *bis* in this Tribunal.

457. As this is the first appeal of a decision taken under Rule 11 *bis* in this Tribunal, the Appeals Chamber will allow the Prosecution to file its appeal brief within fifteen days from filing of this decision.[6] The Appeals Chamber finds no reason to issue a detailed scheduling order as its practice directives fully cover the procedures to follow in cases under the Rules where an appeal lies as of right.[7]

458. For the foregoing reasons, the Appeals Chamber ORDERS the Prosecution to file its appeal brief within fifteen days at the latest from the date of this decision (*i.e.* by 23 June 2006).

Done in English and French, the English version being authoritative.

Done this 8th day of June 2006, At The Hague, The Netherlands.

[Signed]: Fausto Pocar

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[5] *Stankovic* Decision, paras. 17, 18. See also *The Prosecutor v. Paško Ljubičic*, Case N°IT-00-41-AR11*bis*.1, Decision on Motion for Extension of Time, 10 May 2006, p. 1.

[6] See *Stankovic* Decision, para. 18.

[7] See generally Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, 16 December 2002, paras. 1-3 ; Practice Direction on the Length of Briefs and Motions on Appeal, 16 September 2002, para. C (2). See also *Stankovic* Decision, para. 14-16, 18, which analogizes an appeal under Rule 11 *bis* to an interlocutory appeal and refers the parties to the ICTY practice directive for guidance on filing written submissions.

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Order for the Continued Detention of Michel Bagaragaza at the ICTY Detention Unit in The Hague, The Netherlands 17 August 2006 (ICTR-2005-86-I)

(Original: English)

Office of the President

Judge : Erik Møse, President

Michel Bagaragaza – Accused generally detained under the jurisdiction of the Tribunal held in the ICTR Detention Facility in Arusha (Tanzania), Possibility to detain an accused in another country, Continued detention of the Accused in The Hague in interests of justice – Application granted

International Instrument cited :

Rules of Procedure and Evidence, rules 11 bis and 64

THE PRESIDENT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

BEING SEIZED of the Prosecutor's Application of 16 August 2006 to extend the present conditions of detention of Michel Bagaragaza;

NOTING the exchange of diplomatic notes between the Tribunal and the Government of the Netherlands of 4 and 16 August 2006;

HEREBY DECIDES THE APPLICATION

Introduction

On 13 August 2005, Judge Arlette Ramaroson, in her capacity as Acting President, ordered that Michel Bagaragaza ("the Accused") be transferred to the Detention Unit of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), The Hague, Netherlands, for a period of six months. He was transferred to The Hague and arrived at the ICTY Detention Unit on 18 August 2005. On 15 February 2006, the Prosecutor requested an extension of this period of detention for a further six months. This request was granted by the President on 17 February 2006.

On 15 February 2006, the Prosecutor filed a request to transfer the case of the Accused to Norway for trial pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence. This request was denied by the Trial Chamber on 19 May 2006. The Prosecutor has appealed this decision, and the matter is currently pending before the Appeals Chamber.

Submissions

The Prosecutor requests a further order extending the detention of the Acccused at the ICTY Detention Unit in order to allow sufficient time to arrange for the removal of the Accused from The Netherlands following the disposition of its appeal. The Prosecutor observes that if this appeal is granted and the transfer of the case to Norway ordered, it will take several days thereafter to arrange for the physical transfer of the Accused to Norway. If it is denied, it will take several weeks to negotiate an alternative disposition of the case as envisaged in the agreement between the Prosecutor and the Accused dated 18-19 December 2004. According to the Prosecutor, the Appeals Chamber

decision is expected shortly. He therefore requests a relatively brief extension of the Accused's current detention in The Hague, for a period not exceeding two months from the date of the order.

The Prosecutor recalls that the Netherlands and the ICTY originally consented to the detention of the Accused at the ICTY Detention Unit for a period not exceeding one year. This period expires on 17 August 2006. The Government of the Netherlands, on 16 August 2006, agreed to permit the Accused to remain there for an additional period, until 16 October 2006, on the assumption that the Tribunal shall do its utmost to arrange a prompt transfer of the Accused to another State. According to the Prosecutor, counsel for the Accused does not object to the granting of this Application.

The Prosecutor submits that the detention of the Accused in The Hague continues to be justified due to special security reasons, and will have the incidental effect of facilitating contact between the Accused and his counsel.

Deliberations

Generally, accused detained under the jurisdiction of the Tribunal are held in the ICTR Detention Facility in Arusha, Tanzania. However, Rule 64 of the Rules of Procedure and Evidence permits an accused to be detained in a country other than in Tanzania. The detention of an accused in another country after he or she has been transferred to the custody of the Tribunal requires a modification of his or her conditions of detention. The President may order a modification of these conditions on application from either party. In the present case, this was done in the original Order and maintained in the second Decision. Although this period has now elapsed, final disposition of the Accused's case would appear to be imminent. Further, the documentation provided by the Prosecutor demonstrates that the Dutch Authorities have consented to this Application. The security concerns raised previously by the Prosecutor justify his detention at The Hague.

Consequently, the continued detention of the Accused in The Hague is in interests of justice. The Application should therefore be granted.

FOR THE REASONS MENTIONED ABOVE, THE PRESIDENT

ORDERS that Michel Bagaragaza be detained at the Detention Unit of the International Criminal Tribunal for the Former Yugoslavia, at The Hague, The Netherlands, until 16 October 2006;

REQUESTS the Registrar to transmit this order to the International Criminal Tribunal for the Former Yugoslavia and to Michel Bagaragaza.

Arusha, 17 August 2006.

[Signed]: Erik Møse

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Decision on Rule 11 bis Appeal
30 August 2006 (ICTR-2005-86-AR11bis)

(Original: English)

Appeals Chamber

Judges: Fausto Pocar, Presiding Judge ; Liu Daqun ; Andrésia Vaz ; Theodor Meron ; Wolfgang Schomburg

Michel Bagaragaza – Interlocutory appeal against a Trial Chamber decision denying a request to refer the Accused to the Kingdom of Norway, First case of the ICTR involving a referral under Rule 11 bis, Intervention of the Appeals Chamber only if the Trial Chamber's decision was based on a discernible error, Material Law of the Kingdom of Norway, Different purpose of the penalization of genocide and of the penalization of homicide – Case law of the ICTY – Motion dismissed

International Instruments cited :

Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948 ; Rome Statute of the International Court of Justice, document A/CONF.183/9 of 17 July 1998 ; Rules of Procedure and Evidence, rules 11 bis (A), 11 bis (B) and 11 bis (H) ; Statute, art. 8 and 9

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Michel Bagaragaza, Order for Special Detention Measures, 13 August 2005 (ICTR-2005-86) ; Trial Chamber, The Prosecutor v. Michel Bagaragaza, Order for the Continued Detention of Michel Bagaragaza at the ICTY Detention Unit In The Hague, The Netherlands, 17 February 2006 (ICTR-2005-86)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Radovan Stanković, Decision on Rule 11 bis Referral, 1 September 2005 (IT-96-23/2) ; Appeals Chamber, The Prosecutor v. Gojko Janković, Decision on Rule 11 bis Referral, 15 November 2005 (IT-96-23/2) ; Appeals Chamber, The Prosecutor v. Željko Mejakić et al., Decision on Joint Defence Appeal Against Decision on Referral under Rule 11 bis, 7 April 2006 (IT-02-65) ; Appeals Chamber, The Prosecutor v. Paško Ljubičić, Decision on Appeal Against Decision on Referral Under Rule 11bis, 4 July 2006 (IT-00-41)

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of an interlocutory appeal filed by the Prosecution,[1] ("Appeal") pursuant to Rule 11 *bis* (H) of the Tribunal's Rules of Procedure and Evidence ("Rules"), against a decision of Trial Chamber III,[2] denying its request to refer the case of Michel Bagaragaza to the Kingdom of Norway ("Norway").

Background

[1] Prosecutor's Notice of Appeal (Rule 11 *bis* (H)), 1 June 2006 ("Notice of Appeal"); Prosecutor's Appeal Brief (Rule 11 *bis* (H)), 23 June 2006 ("Prosecution Appeal Brief"). In addition, the Prosecution files a separate motion seeking clarification on the lengths of written briefs in appeals under Rule 11 *bis*. See Prosecutor's Motion for Clarification on the Length of a Brief on Appeal Pursuant to Rule 11 bis OR Permission to File a Brief of a Certain Length, 26 June 2006. Mr. Bagaragaza responded in Defence Response to Prosecutor's Motion for Clarification on the Length of a Brief on Appeal Pursuant to Rule 11 *bis* OR Permission to File a Brief of a Certain Length, 27 June 2006. The Appeals Chamber notes that the proper length for briefs on Appeal under Rule 11 *bis* (H) is governed by paragraph C (2) (a) of the Practice Direction on the Length of Briefs and Motions on Appeal. This provision relates to interlocutory appeals where appeals lie as of right, as stated in Rule 11 *bis* (H). The Appeals Chamber, however, grants the Prosecution leave to file its brief in excess of this requirement, as this is the first appeal under Rule 11*bis* and its request is unopposed.

[2] *The Prosecutor v. Michel Bagaragaza*, Case N°ICTR-2005-86-R11*bis*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway, 19 May 2006 ("Impugned Decision").

2. The indictment against Mr. Bagaragaza was confirmed on 28 July 2005 and charges three counts of genocide, conspiracy to commit genocide, and, in the alternative, complicity in genocide.[3] In its Appeal, the Prosecution identifies the facts underlying the charges as alleging that Mr. Bagaragaza provided fuel, transport, and financial support for *Interahamwe*.[4] The Prosecution further explains that it is not alleged that Mr. Bagaragaza directly participated in, or was present, during the killings.[5]

3. Before his surrender, Mr. Bagaragaza had agreed to cooperate with the Prosecution and knowingly and voluntarily provided it with a lengthy statement incriminating himself and others.[6] The Prosecution explains that Mr. Bagaragaza has accepted responsibility for his actions and has agreed to assist in the process of justice.[7] As part of the agreement between the Prosecution and Mr. Bagaragaza, the Prosecution undertook not to prosecute Mr. Bagaragaza before the Tribunal and to request his transfer to a national jurisdiction outside the continent of Africa.[8]

4. Mr. Bagaragaza voluntarily surrendered to the Tribunal's authorities in Arusha, Tanzania, on 16 August 2005, and pleaded not guilty to all of the charges.[9] He was then transferred immediately and extraordinarily to the Detention Unit of the International Tribunal for the Former Yugoslavia ("UNDU" and "ICTY", respectively) in The Hague for a period of one year.[10] The Prosecution requested these special measures due to the security risks Mr. Bagaragaza faced at the United Nations Detention Facilities ("UNDF") in Arusha as a result of his agreement to testify as a Prosecution witness and to assist in the investigations of other accused.[11]

5. On 15 February 2006, the Prosecution requested the referral of Mr. Bagaragaza's case to Norway for trial with the full support of the Accused.[12] The Tribunal's President referred the matter to Trial Chamber III for consideration, which in turn invited Norway to make submissions on its jurisdiction over the crimes charged against Mr. Bagaragaza.[13] After considering the submissions of the parties and of Norway, the Trial Chamber denied the Prosecution's request to refer Mr. Bagaragaza's case to the Norwegian authorities.[14] On appeal, the Prosecution requests the Appeals Chamber to reverse the Trial Chamber's decision and to refer Mr. Bagaragaza's case directly to Norway.[15]

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[3] Impugned Decision, para. 1.

[4] Prosecution Appeal Brief, para. 46; Impugned Decision, para. 1.

[5] Prosecution Appeal Brief, para. 46.

[6] Impugned Decision, para. 2; Prosecution Appeal Brief, para. 2.

[7] Prosecution Appeal Brief, para. 65.

[8] Impugned Decision, para. 2. See *The Prosecutor v. Michel Bagaragaza,* Case N°ICTR-05-86-R11*bis*, Prosecutor's Request for Referral of the Indictment to Another Court, 15 February 2006 (Annex II: Agreement between the Prosecutor and Michel Bagaragaza (confidential), p. 2). The Appeals Chamber also notes that this agreement provides for a possibility of renegotiation, in contemplation of prosecution before the Tribunal, in the event that a transfer to a national jurisdiction outside Africa is not possible. *Id*., p. 4.

[9] Impugned Decision, para. 2.

[10] *The Prosecutor v. Michel Bagaragaza*, Case N°ICTR-05-86-I, Order for Special Detention Measures, 13 August 2005 (ICTR President); *The Prosecutor v. Michel Bagaragaza*, Case N°ICTR-05-86-I, Order for the Continued Detention of Michel Bagaragaza at the ICTY Detention Unit In The Hague, The Netherlands, 17 February 2006 ("Order for Continued Detention")(ICTR President).

[11] See Order for Continued Detention, pp. 1-2. The Appeals Chamber notes that Mr. Bagaragaza chose to testify openly for the Prosecution on 13 June 2006 in *The Prosecutor v. Protais Zigiranyirazo*, Case N°ICTR-2001-73-T.

[12] Impugned Decision, para. 2.

[13] *Id*. at para. 3.

[14] *Id*. at paras 3, 16.

[15] Prosecution Appeal Brief, paras 6, 67.

459. In his response to the Appeal,[16] Mr. Bagaragaza supports generally the Prosecution's position.[17] Mr. Bagaragaza also raises additional points, which the Appeals Chamber will not address given that he has not appealed the Trial Chamber's decision.

460. In addition, in relation to this Appeal, Norway requests leave pursuant to Rule 74 to file an *Amicus Curiae* brief related to its ability to exercise of jurisdiction over Mr. Bagaragaza's case.[18] The Appeals Chamber, therefore, finds it desirable for the proper determination of the appeal to grant leave to Norway to file its brief.[19]

Discussion

461. Rule 11 *bis* allows a designated Trial Chamber to refer a case to a competent national jurisdiction for trial if it is satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.[20] Rule 11 *bis* (A) contemplates possible referral to either the state where the crimes occurred, the state of the accused's arrest, or any other state having jurisdiction and being willing and adequately prepared to accept such a case.

462. This case is the first involving a referral under Rule 11 *bis* in this Tribunal. However, the ICTY Appeals Chamber has considered referrals to national jurisdictions in cases under a similar legal framework.[21] Such case law is largely applicable in the context of this Tribunal as well. In assessing whether a state is competent within the meaning of Rule 11 *bis* to accept one of the Tribunal's cases, a designated Trial Chamber must consider whether it has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate penalty structure.[22] The Trial Chamber's decision on whether to refer a case to a national jurisdiction is a discretionary one, and the Appeals Chamber will only intervene if the Trial Chamber's decision was based on a discernible error.[23] Accordingly, an appellant must show that the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of its discretion, gave weight to irrelevant considerations, failed to give sufficient weight to relevant considerations, or made an error as to the facts upon which it has exercised its discretion; or that its decision was so unreasonable

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[16] Defence Response to Prosecutor's Appeal (Rule 11 *bis* (H)), 28 June 2006 ("Bagaragaza Response").

[17] Bagaragaza Response, paras 11, 14.

[18] See Submission for Leave to File *Amicus Curiae* Brief of the Kingdom of Norway, 26 June 2006.

[19] See *Amicus Curiae* Brief Filed by the Kingdom of Norway, 26 June 2006 ("*Amicus Curiae* Brief").

[20] Rule 11 *bis* provides in pertinent part:

(A) If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:

(i) in whose territory the crime was committed; or

(ii) in which the accused was arrested; or

(iii) having jurisdiction and being willing and adequately prepared to accept such a case,

so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

(…)

(C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.

[21] *The Prosecutor v. Radovan Stanković*, Case N°IT-96-23/2-AR11*bis*.1, Decision on Rule 11 *bis* Referral, 1 September 2005 ("Stanković Appeal Decision"); *The Prosecutor v. Gojko Janković*, Case No. IT-96-23/2-AR11*bis*.2, Decision on Rule 11*bis* Referral, 15 November 2005 ("Janković Appeal Decision"); *Prosecutor v. Mejakić et al.,* Case N°IT-02-65-AR11*bis*.1, Decision on Joint Defence Appeal Against Decision on Referral under Rule 11 *bis*, 7 April 2006, ("*Mejakić et al*. Appeal Decision"); *The Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-AR11*bis*.1, Decision on Appeal Against Decision on Referral Under Rule 11 *bis*, 4 July 2006 ("*Ljubičić* Appeal Decision").

[22] See *Mejakić et al*. Appeal Decision, para. 60.

[23] *Ljubičić* Appeal Decision, para. 6.

and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[24]

463. The Appeals Chamber notes that, pursuant to Rule 11 *bis* (B), it is the designated Trial Chamber that decides, *proprio motu* or at the request of the Prosecutor, whether a referral of a case to national authorities is appropriate in the circumstances of each particular case. In these circumstances and without prejudice to the independence of the Prosecutor as a separate body of the Tribunal, the Appeals Chamber emphasizes that the Prosecution can hardly anticipate on the certainty of such transfer prior to applying for it.

464. In the concrete case before this Appeals Chamber, the Prosecution principally argues that the Trial Chamber erred in focusing on whether Norwegian criminal law had crimes with the same legal elements as defined in the Tribunal's Statute as opposed to considering whether it adequately criminalized the underlying conduct.[25] In support of this position, the Prosecution argues that a plain meaning of Rule 11 *bis* indicates that what is being transferred is a "case", not a crime.[26] The Prosecution notes that a "case" is a broad concept, referring to the criminal conduct or behavior of the accused, as opposed to legal qualification of the criminal conduct charged.[27] The Prosecution supports this reading by alluding to the plain language of the Rule, the need for flexibility, the limited number of States specifically criminalizing genocide and willing to exercise universal jurisdiction, as well as the principle of double criminality generally applicable in transnational criminal matters.[28] The Prosecution argues that Norway satisfies the conditions for transfer because it has jurisdiction over the criminal acts of the accused, provides for an adequate penalty structure in the context of this case, and is willing to cooperate.[29]

465. In its *Amicus Curiae* Brief, Norway submits that it has subject matter jurisdiction over Mr. Bagaragaza's alleged genocidal acts.[30] In this respect, it provides pertinent information on its legislative framework and the relationship between international law and Norwegian law.[31] Norway points to its consistent adherence to and support of international humanitarian law, in particular its early ratification of the 1948 Genocide Convention, its cooperation with the Tribunal and the ICTY, and its ratification of the Rome Statute on the International Criminal Court.[32]

466. Norway acknowledges that Norwegian criminal law does not explicitly contain the crime of genocide.[33] However, it submits that on ratifying the 1948 Genocide Convention, its Parliament considered it unnecessary to enact implementing legislation as all conduct prohibited under the convention was already criminal under existing provisions of its criminal law.[34] Norway explains that, according to its legal tradition, its laws are drafted in a general manner, but interpreted in light of both its international legal obligations as well as relevant legislative history.[35]

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[24] *Id*.
[25] Prosecution Appeal Brief, paras 3-4, 9.
[26] *Id*. at para. 12.
[27] *Id*.
[28] *Id*. at paras 11-36, 50-62.
[29] *Id*. at paras 41-49, 63-65.
[30] *Amicus Curiae* Brief, paras 4, 11, 45.
[31] *Id*. at para. 11.
[32] *Id*. at paras 14-26. In addition, Norway refers to several domestic prosecutions of war criminals for international crimes after World War II which were based primarily on its existing criminal code with full reflection of the international gravity of the crimes.
[33] *Id*. at para. 12.
[34] *Id*. at paras 18, 20. Norway notes that it is presently considering whether to revise its criminal code to codify a more specific catalogue of international crimes. *Id*. at para. 24.
[35] *Id*. at paras 12, 34-37.

467. In this respect, Norwegian law has a general provision providing jurisdiction over certain crimes, including homicide and serious bodily injury, when committed abroad by a foreigner provided that the prosecution is authorized by the King.[36] Norway submits that its provisions against homicide and bodily harm would cover the underlying acts alleged in the Indictment against Mr. Bagaragaza.[37] In addition, Norway submits that Mr. Bagaragaza's alleged genocidal intent, as well as the number of its victims, could be taken into account under provisions allowing for the most severe penalties in aggravating circumstances, thus fully reflecting the gravity of the crimes charged.[38] Norway states that

> "if an indicted person accused of acts amounting to genocide is tried before Norwegian courts on the basis of an agreement between the requesting international court and the Norwegian government, the indictment in the case will fully reflect the aggravating circumstances under which the alleged offences have been carried out."[39]

The Prosecution supports the position of Norway, and it further claims that the maximum possible penalty of 21 years' imprisonment under Norwegian law would provide adequate punishment in light of the specific charges against Mr. Bagaragaza and his willingness to cooperate.[40]

468. The Trial Chamber acknowledged that Norway could exercise jurisdiction over Mr. Bagaragaza's alleged criminal conduct committed in Rwanda in 1994.[41] However, the Trial Chamber reasoned that Norway lacked jurisdiction within the meaning of Rule 11 *bis* because it could not charge the crime of genocide as defined in the Statute, noting that the crime of homicide did not require proof of genocidal intent, an essential element of the crime of genocide.[42]

469. Considering the submissions of the parties, the Appeals Chamber is not satisfied that the Prosecution has demonstrated that the Trial Chamber erred in denying its request to refer Mr. Bagaragaza's case to Norway for trial. As the *Amicus Curiae* Brief makes clear, Norway's jurisdiction over Mr. Bagaragaza's crimes would be exercised pursuant to legislative provisions dealing with the prosecution of ordinary crimes. The Appeals Chamber recalls that the basis of the Tribunal's authority to refer its cases to national jurisdictions flows from Article 8 of the Statute, as affirmed in Security Council resolutions.[43] Article 8 specifies that the Tribunal has concurrent jurisdiction with national authorities to prosecute "serious violations of international humanitarian law". In other words, this provision delimits the Tribunal's authority, allowing it only to refer cases where the state will charge and convict for those international crimes listed in its Statute.

470. The Appeals Chamber agrees with the Prosecution that the concept of a "case" is broader than any given charge in an indictment and that the authorities in the referral State need not necessarily proceed under their laws against each act or crime mentioned in the Indictment in the same

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[36] *Id*. at para. 45.
[37] *Id*. at paras 27-32, 39-41.
[38] *Id*. at paras 28-32, 40-44.
[39] *Id*. at paras 29, 45.
[40] Prosecution Appeal Brief, paras 63-65; *Amicus Curiae* Brief, para. 28 (referring to maximum penalty).
[41] Impugned Decision, para. 13.
[42] *Id*. at paras 13, 15, 16 ("The submission that Norwegian criminal law does not provide for the crime of genocide directly affects the finding of jurisdiction *ratione materiae*, where the legal qualification of the facts alleged in the confirmed Indictment is made (…) The Chamber must determine whether the Referral State has jurisdiction within the definition provided by the Statute (…) In this case, it is apparent that the Kingdom of Norway does not have jurisdiction (*ratione materiae*) over the crimes charged in the confirmed Indictment (…) Therefore, in the Chamber's view, the *ratione materiae* jurisdiction, or subject matter jurisdiction, for the acts alleged in the confirmed Indictment dos not exist under Norwegian law.")
[43] The ICTY Appeals Chamber made this observation on the basis of the equivalent Article of the ICTY Statute (Article 9) in *Stanković* Appeal Decision, paras 14-17. See also *Mejakić et al*. Appeal Decision, para. 16. The Security Council has endorsed the referral of cases by this Tribunal in S/Res/1503 (2003) and S/Res/1534 (2004).

manner that the Prosecution would before this Tribunal.[44] In addition, the Appeals Chamber appreciates fully that Norway's proposed prosecution of Mr. Bagaragaza, even under the general provisions of its criminal code, intends to take due account of and treat with due gravity the alleged genocidal nature of the acts underlying his present indictment. However, in the end, any acquittal or conviction and sentence would still only reflect conduct legally characterized as the "ordinary crime" of homicide. That the legal qualification matters for referrals under the Tribunal's Statute and Rules is reflected *inter alia* in Article 9 reflecting the Tribunal's principle of *non bis in idem*.[45] According to this statutory provision, the Tribunal may still try a person who has been tried before a national court for "acts constituting serious violations of international humanitarian law" if the acts for which he or she was tried were "categorized as an ordinary crime". Furthermore, the protected legal values are different. The penalization of genocide protects specifically defined groups, whereas the penalization of homicide protects individual lives.

471. The Appeals Chamber recognizes that this decision may have a practical impact on Mr. Bagaragaza's situation who, according to the Prosecution's submissions to the President of the Tribunal, faces security risks if detained in the UNDF in Arusha. It also notes that it may limit future referrals to similar jurisdictions which could assist the Tribunal in the completion of its mandate. However, the Appeals Chamber cannot sanction the referral of a case to a jurisdiction for trial where the conduct cannot be charged as a serious violation of international humanitarian law. This is particularly so when the accused has been charged with genocide, an offense that – unlike murder – is designed to protect a "national, ethnical, racial or religious group, as such".

472. For the foregoing reasons, the Appeals Chamber DISMISSES the Prosecution's Appeal.

Done in English and French, the English version being authoritative.

Done this 30th day of August 2006, At The Hague, The Netherlands.

[Signed]: Fausto Pocar

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[44] See *Mejakić et al*. Appeal Decision, para. 60.

[45] Article 9 (2) states in pertinent part: "A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if: (a) The act for which he or she was tried was characterized as an ordinary crime; or (b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted."

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Decision on the Prosecutor's Application for Leave to Amend the Indictment Rule 50 of the Rules of Procedure and Evidence 30 November 2006 (ICTR-2005-86-I)

(Original: English)

Trial Chamber III

Judges: Khalida Rachid Khan, Presiding Judge ; Inés Mónica Weinberg de Roca ; Dennis C. M. Byron

Michel Bagaragaza – Reclassification of confidential documents as public documents – Amendment of the Indictment, Purpose of encouraging a State to accept a possible transfer of an Accused under Rule 11 bis of the Rules is not a relevant factor as to the amendment of an Indictment, Existence of a Prima facie case against the Accused for the Counts of Conspiracy to Commit Genocide, Genocide, and Complicity in Genocide – Fundamental purpose of the Indictment as to inform the accused of the charges against him with sufficient particularity to enable him to mount his defence, Specification of the form of joint criminal enterprise, Identification of the member of the joint criminal enterprise, Precision in relation to each individual count the particular nature of the responsibility alleged – Correction of Typographical errors – Motion granted

International Instruments cited :

Rules of Procedure and Evidence, rules 11 bis, 47(E), 47 (F), 50, 50 (A) (i), 50 (B) and 73 ; Statute, art. 6 (1), 6 (3) and 20

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Anatole Nsengiyumva, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 2 September 1999 (ICTR-96-12) ; Trial Chamber, The Prosecutor v. Jean Bosco Barayagwiza, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 11 April 2000 (ICTR-97-19) ; Trial Chamber, The Prosecutor v. Eliezer Niyitegeka, Decision on Prosecutor's Request for Leave to File an Amended Indictment, 21 June 2000 (ICTR-96-14) ; Trial Chamber, The Prosecutor v. Emmanuel Ndindabahizi, Decision on Prosecution Motion for Leave to amend indictment, 20 August 2003 (ICTR-2001-71); Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2003 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Mika Muhimana, Decision on Motion to Amend Indictment, 21 January 2004 (ICTR-95-1B) ; Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana et al., Decision on Prosecutor's Motion under Rule 50 for Leave to Amend the Indictment, 26 March 2004 (ICTR-2000-56) ; Appeals Chamber, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and ICTR-96-17); Trial Chamber, The Prosecutor v. Michel Bagaragaza, Decision on Confirmation of an Indictment against Michel Bagaragaza, 28 July 2005 (ICTR-2005-86)

I.C.T.Y.: *Appeals Chamber,* The Prosecutor v. Milorad Krnojelac, Judgment, 17 September 2003 (IT-97-25)

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

SITTING as Trial Chamber III ("Chamber"), composed of Judges Khalida Rachid Khan, Presiding, Inés Mónica Weinberg de Roca and Dennis C. M. Byron;

SEIZED OF the "Prosecutor's Application for Leave to Amend the Indictment" ("Motion"), filed on 1 November 2006;

CONSIDERING the "Defence Response to Prosecutor's Application for Leave to Amend the Indictment" ("Response"), filed on 7 November 2006; the "Prosecutor's Reply to the Defence Response to the Application for Leave to Amend the Indictment" ("Reply"), filed on 8 November 2006;

HEREBY DECIDES the Motion, pursuant to Rules 50 and 73 of the Rules of Procedure and Evidence ("Rules").

Introduction

1. The current Indictment against Michel Bagaragaza was confirmed by Judge Sergei Alekseevich Egorov on 28 July 2005 and charges the Accused with Conspiracy to Commit Genocide, Genocide, and alternatively, Complicity in Genocide.[1] The Accused made an initial appearance before the Tribunal on 16 August 2005, where he pleaded not guilty to all Counts. The Prosecution now requests leave to amend the Indictment against Michel Bagaragaza, principally by adding a new, fourth Count against the Accused pursuant to Article 4 of the Tribunal's Statute for killing and causing violence to health and physical or mental well-being as a serious violation of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II of 1977 ("War Crimes"). The Prosecution also proposes other changes to the Indictment, namely deletion of one paragraph which the Prosecution has since discovered was not supported by the evidence, a few additions to reflect changes in recent jurisprudence, several additions to make the details of the existing factual allegations more precise, and a few other corrections of a grammatical or typographical nature. The Prosecution stresses that the proposed amendments are not adding any new factual allegations of a substantial nature, an assertion with which the Defence does not take issue.

2. The Defence agrees to the granting of this Motion, provided that the newly proposed fourth Count, War Crimes, is charged only in the alternative to the Genocide Counts.[2] In the Reply, the Prosecution accedes to the Defence stance, and amends its application accordingly.

Discussion

PRELIMINARY MATTER: CONFIDENTIAL SUBMISSIONS TO BE RECLASSIFIED AS PUBLIC DOCUMENTS

3. The Motion and the Reply were filed by the Prosecution as confidential documents. The Prosecution requests that these proceedings remain confidential until the Chamber renders a decision on the Motion, in order to "avoid speculation" on any cooperation provided by a State in connection with any possible referral of the Indictment to another Court, pursuant to Rule 11 *bis* of the Rules.

4. In the Chamber's view, the Prosecution's Motion and Reply do not contain information that, if disclosed, would cause any prejudice to the Parties in the case or be contrary to the

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[1] Indictment, filed 28 July 2005; *Prosecutor v. Bagaragaza*, Case N°ICTR-2005-86-I, Decision on Confirmation of an Indictment against Michel Bagaragaza, 28 July 2005.

[2] The three Genocide Counts are Count I: Conspiracy to Commit Genocide; Count II: Genocide; and alternatively, Count III: Complicity in Genocide.

interests of justice. There was no good reason to file these as confidential documents. The Chamber therefore directs that the Motion and Reply be reclassified as public documents.

ON THE MERITS

Addition of the War Crimes Count

5. The Prosecution submits that

> "the addition of the war crimes count is appropriate in view of the evidence, and with this count included, the Indictment better reflects the criminal liability of the Accused".[3]

It also emphasises that its request to amend the Indictment by adding a War Crimes Count is mainly motivated by its intent to seek the transfer of this case to a national jurisdiction under Rule 11 *bis* of the Rules.[4]

6. In the Chamber's view and according to the Statute, the Rules and the established jurisprudence, the purpose of encouraging a State to accept a possible transfer of an Accused under Rule 11 *bis* of the Rules is not a relevant factor to be taken into consideration by a Chamber when deciding whether to grant leave to amend an Indictment. In that respect, the Chamber notes that the Prosecutor "shall act independently as a separate organ of the International Tribunal for Rwanda" and shall not seek or receive instructions from any government or from any other source.[5]

7. Rule 50 (A) (i) of the Rules prescribes that after the initial appearance of the accused, an amendment of an Indictment may only be made by leave granted by a Trial Chamber. In deciding whether to grant leave to amend the indictment, the Chamber shall, *mutatis mutandis*, follow the procedures and apply the standards set out in Sub-Rules 47 (E) and (F) in addition to considering any other relevant factors.[6] The Chamber shall therefore examine the proposed amendments to the Indictment, and any supporting materials the Prosecution has provided, to determine whether a *prima facie* case exists against the Accused.[7] Pursuant to the jurisprudence, other relevant factors include the Accused's right to be tried without undue delay, and to be promptly informed and in detail of the nature and cause of the charges against him or her.[8] In that respect, Chambers have taken into consideration whether the proposed changes more accurately describe the totality of the criminal conduct of the accused,[9] the ameliorating effect of the changes on the clarity and precision of the case to be met,[10] newly discovered evidence,[11] and the diligence of the Prosecution in bringing the amendment in a timely manner.[12]

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[3] Motion, paragraph 9.

[4] "[W]ithin [the proposed state's] jurisdiction prosecutors have considerable experience in prosecuting war crimes cases and have expressed a desire to pursue a war crimes count against the Accused in addition to the genocide counts. It is with respect for the judgment and experience of these national authorities that the Prosecutor seeks to amend the Indictment to include a charge of war crimes." Motion, paragraph 6.

[5] See Tribunal's Statute, Art. 15 (2).

[6] Rule 50 (A) (ii) of the Rules.

[7] Rule 47 (E) of the Rules.

[8] *Prosecutor v. Bizimungu et al.*, Case N°ICTR-1999-50-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2003, para. 28.

[9] *Prosecutor v. Anatole Nsengiyumva*, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 2 September 1999, para. 4; *Prosecutor v. Jean Bosco Barayagwiza*, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 11 April 2000, para. 4.

[10] *Prosecutor v. Muhimana*, Case N°ICTR-1995-1B-I, Decision on Motion to Amend Indictment, 21 January 2004, para. 6.

8. The Chamber notes that the supporting materials have already been reviewed by the confirming Judge who determined that a *prima facie* case exists against the Accused for the Counts of Conspiracy to Commit Genocide, Genocide, and Complicity in Genocide. The Chamber further notes that the proposed War Crimes Count is based on the same material facts, and having also reviewed the supporting materials, is satisfied that a *prima facie* case exists against the Accused for this Count as well.

9. Since the Defence agrees to the amendment, no date has yet been set for trial, and the additional War Crimes Count does not include any new material facts, granting leave to amend will not negatively impact the rights of, or otherwise prejudice the Accused. The Chamber therefore grants the Prosecution leave to amend.

10. The Chamber notes that according to the jurisprudence, even in the absence of new factual or evidentiary material, charges in the alternative or additional legal theories of liability are considered new charges.[13] Since the addition of the War Crimes Count amounts to alleging a new legal theory of liability of the Accused and therefore a new charge, a further appearance of the Accused is required as soon as practicable to enable the accused to enter a plea on the War Crimes Count, in accordance with Rule 50 (B) of the Rules.[14]

The Chamber's Directions on Specificity, Consistency, and Clarity of Charging

11. According to Article 20 of the Statute and Rule 47 (C) of the Rules, the Prosecution must state the material facts underpinning the charges in the indictment: the indictment has to fulfil the fundamental purpose of informing the accused of the charges against him with sufficient particularity to enable him to mount his defence. The Prosecution's characterisation of the alleged criminal conduct and the proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice. The practice by the Prosecution of merely quoting the provisions of Article 6 (1) of the Statute in the indictment is likely to cause ambiguity, and it is preferable that the Prosecution indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged.[15] If the Prosecution relies on a theory of joint criminal enterprise, then the Prosecutor must plead the purpose of the enterprise, the identity of the participants, and the nature of the accused's participation in the enterprise. The Prosecution should also specify the form of joint criminal enterprise it intends to rely on.[16] The Chamber has reviewed the details of the proposed Amended Indictment in light of these principles.

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[11] *The Prosecutor v. Emanuel Ndindabahizi*, Case N°ICTR-2001-71-I, Decision on Prosecution Motion for Leave to Amend Indictment, 20 August 2003, para. 4.

[12] *The Prosecutor v. Augustin Ndindiliyimana et al*, Case N°ICTR-2000-56-I, Decision on Prosecutor's Motion under Rule 50 for Leave to Amend the Indictment Issued on 20 January 2000 and Confirmed on 28 January 2000, 26 March 2004, paras. 40-44.

[13] *Prosecutor v. Eliezer Niyitegeka*, Case N°ICTR-96-14-I, Decision on Prosecutor's request for leave to file an amended indictment, 21 June 2000, par. 33; *Prosecutor v. M. Naletilic and Martinovic*, Case N°IT-98-34PT, Decision on Vinko Martinovic's Objection to the Amended Indictment and Mladen Naletilic's Preliminary Motion to the Amended Indictment, 14 February 2001.

[14] Rule 50 (B) reads: If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

[15] *Prosecutor v. Ntakirutimana*, Judgement (AC), 13 December 2004, para. 473.

[16] *Prosecutor v. Krnojelac*, Judgement (AC), 17 September 2003, paras. 138-145; see also *Prosecutor v. Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 475-484.

12. Paragraphs 17 through 20, 26, and 28 through 30 of the proposed Amended Indictment allege, *inter alia*, the Accused's participation in a joint criminal enterprise with the common purpose of (i) committing Genocide[17] and/or (ii) killing, and causing violence to health and physical or mental well being against the Tutsi.[18] The Prosecution does not specify which form of joint criminal enterprise it intends to rely on. Paragraph 26 alleges that, in addition to a small group of named individual participants, the joint criminal enterprise included "members of the *Interahamwe* and Presidential Guard, and other unknown participants", whereas paragraph 17 says only "other participants", despite the fact that the events alleged in support of these crimes are the same. Paragraphs 28 through 30 specify that the *Interahamwe* and Presidential Guard who allegedly carried out the attacks at Kesho Hill, Nyundo Cathedral and in Rubaya were members of the joint criminal enterprise, whereas paragraphs 18 through 20 do not. The Chamber directs the Prosecution to make the following changes to the proposed Amended Indictment:

(i) the Prosecution should specify the form of joint criminal enterprise it intends to rely on;

(ii) where possible, the Prosecution should identify individual members of the *Interahamwe* and Presidential Guard who allegedly participated in the joint criminal enterprise;

(iii) if further specificity regarding the names of the individual *Interahamwe* and Presidential Guard allegedly involved in the joint criminal enterprise is not possible, the Prosecution should replace the phrase "other participants" in paragraph 17 with the phrase "members of the *Interahamwe* and Presidential Guard, and other unknown participants" from paragraph 26, as the latter phrase adds some specificity;

(iv) the Prosecution should add the allegation that the *Interahamwe* and Presidential Guard who allegedly carried out the attacks at Kesho Hill, Nyundo Cathedral and in Rubaya were members of the joint criminal enterprise, as is already alleged in paragraphs 28, 29 and 30, to paragraphs 18, 19, and 20 for the purposes of adding specificity to those paragraphs as well as consistency.

13. Introductory Paragraphs 17 and 26 of the proposed Amended Indictment allege that Michel Bagaragaza is individually responsible under Article 6 (1) of the Statute for Genocide and War Crimes, respectively. Both paragraphs allege that the Accused "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of" these crimes, but the particular paragraphs that follow only allege that Michel Bagaragaza aided and abetted the crimes.[19] In the Chamber's view, it is preferable that the Prosecution indicate precisely in relation to each individual count the particular nature of the responsibility alleged, rather than simply quoting the provisions of Article 6 (1). The Prosecution should therefore amend Introductory Paragraphs 17 and 26 so that the particular nature of responsibility alleged is consistent with the more particular paragraphs that follow them.

14. Paragraphs 23 and 34 of the proposed Amended Indictment refer to "the chief of the plantation of the Nyabihu tea factory in Gisenyi *préfecture*" without specifying his name. If possible, the Prosecution should specify this name.

15. Paragraph 30 of the proposed Amended Indictment alleges,

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[17] Counts II and III of the proposed Amended Indictment, paras. 17-20.

[18] Count IV of the proposed Amended Indictment, paras. 26, 28-30.

[19] Paragraphs 18 through 20 of the proposed Amended Indictment set forth the particulars for Count II: Genocide, and Count III: Complicity in Genocide. Paragraphs 27 through 30 set forth the particulars for the new War Crimes Count.

"On or about 9 April 1994, at his home in Rambura, Michel Bagaragaza ordered a driver called Nsanzimana to transport a group of *Interahamwe* […]",

whereas paragraph 20 states,

"On or about 9 April 1994, Michel Bagaragaza order a driver […] to transport a group of *Interahamwe* [….]".

The underlying events are the same, but paragraph 30 alleges particulars that are not alleged in paragraph 20 – specifically, that the Accused was at his home in Rambura and that the driver was called Nsanzimana. For the purpose of consistency, these particulars should be added to paragraph 20.

16. Paragraph 31 of the proposed Amended Indictment alleges that Michel Bagaragaza is responsible for War Crimes as a superior pursuant to Article 6 (3) of the Statute. The Prosecution alleges that, in addition to those individually named or identified, "members of the *Interahamwe*" were subordinates of the Accused. Paragraph 21, which alleges Michel Bagaragaza's responsibility as an Article 6 (3) superior for Genocide or Complicity in Genocide, does not include "members of the *Interahamwe*" among the list of subordinates. The material facts alleged in support of the Genocide and War Crimes Counts are identical. Therefore, the Chamber is of the view that, for the purposes of consistency and particularity, the Prosecution should, depending on what it intends to prove at trial, either include "members of the *Interahamwe*" among the list of subordinates in paragraph 21, or remove "members of the *Interahamwe*" from the list of subordinates in paragraph 31.

17. Paragraph 35 of the proposed Amended Indictment alleges that "On or about 8 or 9 April 1994, Emmanuel Mbarshimana, a driver at the tea factory of Nyabihu, transported a truck full of *Interahamwe* to Nyundo …", whereas, paragraph 25, which deals with the same allegation, says "On or about 7-9 April 1994." The Prosecution should amend these paragraphs so that the dates alleged are consistent, and, if possible, should provide more specific dates. In addition, paragraph 35 does not clearly allege which subordinate's actions Michel Bagaragaza had reason to know of and failed to prevent or punish. Both Mbarshimana and members of the *Interahamwe* are alleged to be subordinates of the Accused elsewhere in the proposed Amended Indictment. Paragraph 25, which concerns the same material facts, clearly alleges that Mbarshimana was a subordinate of Michel Bagaragaza. If the Prosecution is also referring to Mbarshimana as the subordinate in paragraph 35, then this should be clearly specified.

18. The Prosecutor seeks to delete paragraph 14 of the current Indictment, as further investigations have revealed that the factual allegation contained therein is an inaccurate repetition of the allegation contained in paragraph 11 of the current Indictment (now renumbered as paragraph 15). The Chamber considers that the proposed deletion causes the Accused no prejudice, and is consistent with his right to be informed of the nature and cause of the changes against him. The Chamber therefore allows the proposed change.

19. The Chamber has identified typographical errors and other minor issues that should be corrected:
    (i) In paragraph 18 of the proposed Amended Indictment the second sentence of the paragraph includes the phrase "of the tea" twice in immediate succession.
    (ii) In paragraph 28 of the proposed Amended Indictment the Prosecution should change the internal reference from paragraph number 27, which is incorrect, to paragraph number 26, which is the correct number of the paragraph it is referring to.
    (iii) Paragraph 35 of the proposed Amended Indictment includes the following sentence: "These Tutsi civilians were taking no active part in the non-international armed conflict referred to in paragraph 6 above but were perceived to be sympathizers or accomplices of the RPF. but hundreds of them were killed and seriously injured as a

result." These sentences are not clear and should be amended in a comprehensible way.

FOR THE ABOVE REASONS, THE CHAMBER

I. GRANTS leave to amend the Indictment to add an additional, and in the alternative with the Genocide Counts, Count pursuant to Article 4 of the Tribunal's Statute for killing and causing violence to health and physical or mental well-being as a serious violation of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II of 1977, subject to the above-mentioned directions; and,

II. ORDERS the Prosecution to file an Amended Indictment with the Registry and the Chamber, including the directions on specificity, consistency, and clarity as outlined above within three (3) days from the service of this Decision; and

III. ORDERS that a further appearance shall be held as soon as practicable, and, accordingly, requests that the Registrar make further arrangements.

Arusha, 30 November 2006.

[Signed] : Khalida Rachid Khan ; Inés Mónica Weinberg de Roca ; Dennis C. M. Byron

Le Procureur c. Michel BAGARAGAZA

Affaire N° ICTR-2005-86

Fiche technique

- Nom: BAGARAGAZA
- Prénom: Michel
- Date de naissance: 1945
- Sexe: masculin
- Nationalité: rwandaise
- Fonction occupée au moment des faits incriminés: Directeur général de l'OCIR-Thé
- Date de l'acte d'accusation: 28 juillet 2005
- Date de modification de l'Acte d'accusation: 1 décembre 2006
- Chefs d'accusation: génocide, entente en vue de commettre le génocide, complicité dans le génocide, Meurtres et atteintes portées à la vie, à la santé et au bien-être physique ou mental des personnes en tant que violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II (Crimes de guerre)
- Date et lieu de l'arrestation: 15 août 2005, Arusha, Tanzanie (Rendu)
- Date du transfert: 15 août 2005
- Date de la comparution initiale: 16 août 2005
- Date de comparution supplémentaire : 1 décembre 2006
- Précision sur le plaidoyer: non coupable
- Date du début du procès: 18 août 2005, l'accusé a été transféré pour détention à La Haye (Pays-Bas) ; le 7 mai 2007 l'affaire a été transmise à une juridiction nationale hollandaise ; le 20 mai 2008, l'accusé était transféré en retour à Arusha
- Date et contenu du jugement : 6 novembre 2009, condamné à 8 ans d'emprisonnement

Ordonnance invitant les parties à soumettre des arguments supplémentaires relatifs à la requête aux fins du renvoi de l'acte d'accusation en Norvège 23 mars 2006 (ICTR-2005-86-PT)

(Original: Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président ; Jai Ram Reddy ; N. Joseph Asoka de Silva

Michel Bagaragaza – Renvoi de l'acte d'accusation à la Norvège, Faculté pour toute partie intéressée de comparaître ou de faire des dépositions

Instrument international cité :

Règlement de Procédure et de Preuve, art. 11 bis (A), 11 bis (A) (iii) et 74

Introduction

1. Le 15 février 2006, le Procureur a déposé une requête aux fins du renvoi de l'acte d'accusation de la présente affaire devant les juridictions de la Norvège. Dans sa réponse, la Défense a soutenu cette requête dans le principe, mais a déposé une autre requête auprès de la Chambre[20]. En vertu de l'article 11 *bis* (A) du Règlement de Procédure et de Preuve, le Président a désigné la présente Chambre de première instance pour statuer sur cette requête[21].

2. Afin de mieux étudier la requête, la Chambre a besoin d'arguments supplémentaires émanant des parties et de la Norvège.

3. Vu l'article 11 *bis* du Règlement et l'intérêt que pourraient exprimer d'autres personnes, certaines organisations et/ou certains Etats, la Chambre rappelle les dispositions de l'article 74 du Règlement selon lesquelles toute partie intéressée peut être autorisée à comparaître devant elle et lui présenter toute question spécifiée par la Chambre.

LA CHAMBRE

I. ORDONNE aux parties de déposer, dans un délai de 14 jours à compter de la date de la présente ordonnance, des arguments supplémentaires sur la question de savoir :

(i) Si la Chambre doit tenir compte de la gravité des crimes retenus contre l'accusé et son degré de responsabilité au sens de la résolution 1534 (2004) du Conseil de Sécurité ;

(ii) Dans l'affirmative, de quelle manière ces critères pourraient-ils influer sur la décision que prendra la Chambre concernant le renvoi ;

II. ORDONNE aux parties de déposer, dans un délai de 14 jours à compter de la date de la présente ordonnance, des arguments supplémentaires sur la compétence éventuelle de la Norvège pour juger des crimes allégués dans l'acte d'accusation, en application de l'article 11 *bis* (A) (ii) du Règlement et INVITE la Norvège à faire de même ;

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[20] Requête déposée le 20 février 2006.

[21] Désignation d'une Chambre de première instance en vertu de l'article 11 *bis* du Règlement (Président), 21 février 2006.

III. INVITE chaque partie à répondre aux arguments des autres dans un délai de 21 jours à compter de la date de la présente ordonnance.

Fait à Arusha, le 23 mars 2006.

[Signé] : Dennis C. Byron ; Jai Ram Reddy, N. Joseph Asoka de Silva

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Décision relative à la requête du Procureur en renvoi de l'affaire aux autorités du Royaume de Norvège
Article 11 bis du Règlement de procédure et de preuve
19 mai 2006 (ICTR-2005-85-R11bis)

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. Byron, président ; Jai Ram Reddy ; Joseph Asola Nihal de Silva

Michel Bagaragaza – Renvoi au Royaume de Norvège, Conditions d'un renvoi d'affaire, Compétence et volonté de l'Etat de renvoi : pas de disposition contre le génocide en droit interne norvégien, Principe de compétence universelle, Pas de juridiction ratione materiae sur les crimes contenus dans l'acte d'accusation – Exclusion de la Tanzanie et du Rwanda comme potentiels Etats de renvoi – Requête rejetée

Instrument international cité :

Accord de siège (31 août 1995), art. XX (1) ; Règlement de Procédure et de preuve, art. 11 bis (A), 11 bis (A) (i), 11 bis (A) (ii), 11 bis (A) (iii), 11 bis (C) et 74 ; Statut, art. 1, 2, 3, 4, 5 et 7

Jurisprudence internationale citée :

C.I.J., Affaire relative au mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique)*, 14 février 2002*

T.P.I.Y.: Banc de renvoi, Le Procureur c. Radovan Stanković, Decision on Referral of Case Under Rule 11 bis - Partly Confidential and Ex Parte, 17 mai 2005 (IT-96-23/2) ; Chambre d'appel, Le Procureur c. Radovan Stanković, Decision on Rule 11 bis Referral (AC), 1 septembre 2005 (IT-96-23/2)

I. Introduction

1. Confirmé le 28 juillet 2005 par le juge Sergei Alekseevich Egorov, l'acte d'accusation dressé contre Michel Bagaragaza retient trois chefs d'accusation à savoir : entente en vue de commettre le génocide, génocide et, à titre subsidiaire, complicité dans le génocide. Pour l'essentiel, il y est allégué que Michel Bagaragaza a participé à de nombreuses réunions au cours desquelles il a planifié, de concert avec d'autres personnes, l'extermination de tous les membres de la population tutsie en raison de leur association avec les *Inkotanyi* ; qu'il a prononcé des discours de haine pour inciter d'autres à participer à un tel plan ; qu'il a fourni une assistance financière aux *Interahamwe,* accepté de collecter des fonds à leur profit, et souscrit à l'idée de leur faire suivre une formation paramilitaire ; qu'il a ordonné aux employés de l'usine de thé de Rubaya de fournir du carburant aux *Interahamwe* et aux éléments de la Garde présidentielle lorsque ceux-ci se rendaient sur la colline de Kesho dans le but

d'attaquer et tuer des centaines de Tutsis qui s'y trouvaient ; qu'il a ordonné à l'un des chauffeurs de l'usine de thé de Nyabihu de transporter des *Interahamwe* à la cathédrale de Nyundo pour y attaquer des Tutsis ; qu'il a ordonné à un autre chauffeur de transporter des *Interahamwe* à Rubaya pour y mener une autre attaque ; que l'un de ses subordonnés a donné des emplois à des réservistes de l'armée, assuré une formation militaire, fourni des armes et des munitions à d'autres employés de l'usine de thé de Rubaya, et par la suite, que les deux groupes d'employés ont participé au massacre de Tutsis.

2. Avant sa reddition le 16 août 2005, l'accusé avait conclu un accord avec le Procureur, acceptant de coopérer avec celui-ci, faisant une déclaration exhaustive sur les événements survenus au Rwanda en 1994, incriminant d'autres Rwandais[1] et lui-même. Il a convenu avec le Procureur d'être jugé devant un tribunal interne qui serait désigné à une date ultérieure. Le 15 février 2006, le Procureur a déposé une requête en renvoi de l'acte d'accusation aux autorités du Royaume de Norvège conformément à l'article 11 *bis* du Règlement de procédure et de preuve (le « Règlement »). La Défense a répondu à la requête y donnant son accord de principe et saisissant la Chambre d'autres demandes[2].

3. Le 21 février 2006, par application de l'article 11 *bis* (A) du Règlement, le Président a saisi la Chambre de première instance III composée des juges Dennis C. M. Byron (Président), Jai Ram Reddy et Joseph Asoka Nihal de Silva, de la requête[3]. Le 23 mars 2006, la Chambre a ordonné aux parties et au Royaume de Norvège de déposer des écritures supplémentaires, tout en rappelant les dispositions de l'article 74 du Règlement *(Amicus curiae)*[4]. La Défense, le Procureur et le ministère des affaires étrangères du Royaume de Norvège ont déposé ces écritures respectivement les 30 mars, 6 avril et 10 avril 2006. Le 12 avril 2006, le Procureur a déposé une réponse, le Greffier produisant le 20 avril 2006, des observations sur le fondement de l'article 33 (B) du Règlement. Le 24 avril 2006, la Défense a déposé une réponse à ces dernières écritures et une clarification de ses propres écritures supplémentaires. Aucune autre partie n'a déposé de conclusions ou demandé l'autorisation de le faire. La Chambre statue sur la requête sur la base de toutes ces écritures.

II. Délibération

4. Le 19 mai 2006, le Président a communiqué à la Chambre une note verbale émanant du Ministère rwandais des affaires étrangères[5] tendant à ce que la République rwandaise soit entendue en vertu de l'article 74 du Règlement, avant que la Chambre ne statue sur la demande de renvoi de l'acte d'accusation. Dans sa décision du 23 mars 2006, la Chambre, relevant qu'aux termes de l'article 74 du Règlement toute partie intéressée peut être autorisée à comparaître ou à lui présenter toute question spécifiée par elle, estime que la République rwandaise aurait dû la saisir à cet effet à la suite de sa décision. Rejetant la demande formulée par la République rwandaise en vue de présenter des écritures à ce stade de la procédure, elle fait observer que le droit d'être entendu invoqué dans la note verbale n'en sera pas affecté.

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[1] L'accord et la déclaration ont été joints à la requête en renvoi comme documents confidentiels leur divulgation étant de nature à nuire à la sécurité de l'accusé et des membres de sa famille.

[2] La Défense a déposé sa réponse le 20 février 2006.

[3] Désignation de la Chambre de première instance en vertu de l'article 11 *bis* du Règlement (Président), 21 février 2006.

[4] L'article 74 du Règlement est libellé comme suit : « une Chambre peut, si elle le juge souhaitable dans l'intérêt d'une bonne administration de la justice, inviter ou autoriser tout Etat, toute organisation ou toute personne à comparaître devant elle et lui présenter toute question spécifiée par la Chambre ».

[5] Voir Mémorandum du Président sous la cote [ICTR/PRES/026.06] et la note verbale sous la cote [247/09.01/CAB/MIN/06].

5. Selon l'article 11 *bis* du Règlement, trois conditions doivent être satisfaites pour qu'il soit statué sur une demande de renvoi, à savoir : (1) l'État de renvoi doit avoir compétence et être disposé et tout à fait prêt à accepter une telle affaire ; (2) l'État de renvoi doit être en mesure de garantir un procès équitable et ; (3) l'accusé n'encourt pas la peine capitale dans l'État de renvoi. Dans leurs conclusions, les parties ont mis d'autres conditions au renvoi[6].

A. L'Etat de renvoi doit avoir compétence et être disposé et tout à fait prêt à accepter la cause

6. Aux termes de l'article 11 *bis* (A) du Règlement, un acte d'accusation confirmé peut être renvoyé aux autorités d'un État (i) sur le territoire duquel le crime a été commis ; (ii) dans lequel l'accusé a été arrêté, ou (iii) ayant compétence et étant disposé et tout à fait prêt à accepter une telle affaire. En l'espèce, le Procureur demande le renvoi de l'acte d'accusation aux autorités du Royaume de Norvège en vertu de la troisième disposition de l'article 11 *bis* (A).

7. Dans sa requête, le Procureur exclut aussi bien la République rwandaise que la République-Unie de Tanzanie comme États de renvoi. Si la République rwandaise est l'État sur le territoire duquel les crimes ont été commis (alinéa (A) (i) de l'article 11 *bis*), le Procureur, rappelant les dispositions du paragraphe (C) dudit article qui posent deux autres conditions (l'absence de la peine capitale et la garantie d'un procès équitable) fait valoir qu'aucune de ces conditions ne peut être à l'heure actuelle satisfaite. Le Procureur soutient en outre que, même si ces conditions étaient satisfaites, de solides raisons d'ordre public militent en faveur de l'intervention d'autres pays dans les poursuites contre l'accusé, y voyant une manière de sensibiliser la population desdits pays aux leçons du génocide rwandais et de cultiver les idées de nature à prévenir pareilles tragédies dans l'avenir. En ce qui concerne la République-Unie de Tanzanie où l'accusé a été arrêté (alinéa (A) (ii) de l'article 11 *bis*) à la suite de sa reddition le 16 août 2005, le Procureur soutient que lui renvoyer l'affaire ferait entorse à l'article XX (1) de l'Accord de siège[7].

8. Toutefois, le Procureur soutient que le Royaume de Norvège satisfait à la troisième condition, étant un État qui a compétence et qui est disposé et tout à fait prêt à accepter une telle affaire (alinéa (A) (iii) de l'article 11 *bis*). Le Procureur joint à sa requête la correspondance échangée avec les autorités norvégiennes, attestant leur volonté d'être saisies de l'affaire.

9. De cet échange de correspondances et des écritures supplémentaires présentées par le ministère des affaires étrangères de la Norvège, la Chambre a conclu que le droit pénal interne norvégien ne réprime pas le génocide. Les autorités norvégiennes informent la Chambre que, sur la base des faits allégués dans l'acte d'accusation, l'accusé peut être poursuivi des chefs de complicité d'homicide ou d'homicide par imprudence, crimes passibles d'une peine maximale de 21 ans d'emprisonnement. Les autorités norvégiennes font valoir également que les poursuites en l'espèce peuvent être exercées en vertu du principe de compétence universelle, lequel exigerait que l'acte d'accusation soit approuvé par le King in Council. Autrement dit, même si les tribunaux norvégiens n'ont pas pleine compétence pour

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[6] S'il est fait droit au renvoi de l'affaire, le Procureur demande à la Chambre de rendre une décision portant détention et remise de l'accusé le 18 août 2006 au plus tard, et de maintenir en vigueur les mesures de protection des témoins en l'espèce, jusqu'à ce que les autorités norvégiennes prennent une décision comparable. De plus, en cas de renvoi, la Défense demande à la Chambre d'ordonner la réinstallation permanente de l'accusé en toute sécurité dans un pays hors du continent africain, à l'issue de son procès et à l'expiration d'une peine éventuelle purgée en Norvège, et la continuation de l'assistance juridique de son conseil international commis d'office par le TPIR.

[7] L'article **XX** (1) de l'Accord de siège (31 août 1995) est libellé comme suit : «Le pays hôte s'abstient d'exercer sur une personne se trouvant sur son territoire qui a été ou doit être amenée en qualité de suspect ou d'accusé dans les locaux du Tribunal en exécution d'un mandat ou d'une demande du Tribunal, sa juridiction criminelle à l'égard d'actes, omissions ou condamnations de cette personne antérieurs à son entrée dans le pays hôte ».

juger les faits allégués dans l'acte d'accusation, les poursuites peuvent néanmoins être exercées dans certaines circonstances, comme il ressort des observations des autorités norvégiennes en date du 10 avril 2006. Enfin, le Royaume de Norvège fait valoir qu'en cas de renvoi, il appréciera souverainement l'opportunité de poursuites au vu des éléments de preuve.

10. Invoquant la décision de renvoi dans l'affaire *Stanković*, le Procureur soutient que le critère de la « compétence » n'exige pas que le droit pénal interne de l'État concerné doive contenir les mêmes dispositions que le Statut du Tribunal. Il fait valoir que la peine maximale prévue par le *Norwegian General Civil Penal Code* est adéquate, quand on sait que l'accusé est âgé de 60 ans, qu'il a assumé l'entière responsabilité de ses actes, comme il ressort de sa déclaration, et qu'il a accepté de coopérer à l'exercice de poursuites pénales internes et internationales a raisons des faits survenus en 1994 au Rwanda.

11. La Défense fait valoir que rien n'empêche le Royaume de Norvège d'exercer une compétence universelle en l'espèce. Elle invoque la loi norvégienne portant compétence universelle à l'égard des infractions de droit commun réprimées en droit interne. Elle invoque également la jurisprudence internationale, notamment l'arrêt relatif au mandat d'arrêt[8]. Toutefois, le Procureur, s'opposant à l'évocation de l'affaire sur le mandat d'arrêt, soutient que l'unique titre de compétence du Royaume de Norvège est l'article 11 *bis* du Règlement, et qu'il n'est pas nécessaire de satisfaire les conditions relevées par la Défense dans l'opinion individuelle conjointe des juges Higgins, Kooijmans et Buergenthal dans l'arrêt relatif au *mandat d'arrêt* rendu le 14 février 2002.

12. La Chambre d'appel a déclaré que si le Statut du TPIY ne renferme pas de base légale explicite pour l'article 11 *bis* du Règlement, à l'évidence des compétences internes alternatives ont toujours été envisagées aux fins de « transfert » d'accusés[9]. En recherchant si le Royaume de Norvège a compétence en vertu de l'article 11 *bis* (A) (iii), la Chambre doit être convaincue de l'existence d'un cadre légal adéquat qui permette de réprimer le comportement présumé de l'accusé, et s'il est déclaré coupable, lui infliger une peine appropriée par référence aux infractions justiciables du Tribunal[10]. La Chambre estime qu'à cette fin, elle doit se guider principalement sur le Statut.

13. Le Statut définit la compétence en ses articles 1, 2, 3, 4, 5 et 7. L'interprétation de l'article 11 *bis* (A) (iii) doit se fonder sur cette définition de la compétence *ratione materiae, ratione personae, ratione loci* et *ratione temporis*. Lorsqu'il confirme un acte d'accusation, le juge saisi doit rechercher si chacune de ces conditions est satisfaite pour donner compétence au Tribunal. En l'espèce, la compétence universelle invoquée dans les observations du Royaume de Norvège permettra de poursuivre l'accusé *(ratione personae)* pour les actes qu'il aurait commis au Rwanda *(ratione loci)* en 1994 *(ratione temporis)*. Le seul titre de compétence qui ne serait pas envisagé par le droit norvégien est la compétence *ratione materiae*. L'argument selon lequel le génocide est inconnu du droit pénal norvégien intéresse directement la compétence *ratione materiae* puisqu'il touche la qualification juridique des faits allégués dans l'acte d'accusation confirmé[11].

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[8] Cour internationale de justice, affaire relative au mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique), 14 février 2002.

[9] Le Procureur c. Radovan Stanković, Decision on Rule 11 bis Referral (AC), 1er septembre 2005, par. 14.

[10] Le Procureur c. Radovan Stanković, Decision on Referral of Case Under Rule 11 bis - Partly Confidential and Ex Parte (Referral Bench), 17 mai 2005, par. 32.

[11] Le principe de compétence universelle invoqué par les parties et le Royaume de Norvège ne joue que s'agissant de la compétence *ratione loci* ou territoriale, à l'exclusion de la compétence *ratione materiae*. Le 22 juillet 1994, le Royaume de Norvège a ratifié la Convention de 1948 pour la prévention et la répression du crime de génocide. L'affirmation selon laquelle le droit pénal norvégien ne réprime pas le génocide signifie que la Convention n'a pas été incorporée dans son droit inteme, ce qui rend impossibles toutes poursuites de ce chef.

14. La Chambre s'inspire de l'affaire *Stanković* à l'occasion de laquelle la formation saisie a refusé de dire, entre deux régimes de droit applicable aux crimes allégués dans l'acte d'accusation, lequel l'État de renvoi devrait appliquer, mais a néanmoins donné une analyse détaillée du droit de fond qui pourrait être appliqué si l'affaire était renvoyée à la Bosnie-Herzégovine[12]. Le Code pénal de la République socialiste de Bosnie-Herzégovine ne réprimant ni les violations de lois ou coutumes de la guerre ni les crimes contre l'humanité, la formation saisie a conclu qu'il n'y avait nullement lieu d'envisager les crimes retenus dans l'acte d'accusation considéré[13]. Toutefois, ladite formation était convaincue que d'autres instruments de droit pénal à la disposition de l'État de renvoi renfermaient des dispositions similaires, sinon égales, à celles du Statut et du Règlement du TPIY, érigeant en crime la participation. En conséquence, la formation saisie a conclu que des poursuites peuvent être engagées contre l'accusé dans l'État de renvoi à raison de certains ou de tous les actes criminels allégués[14].

15. La Chambre juge trompeur l'argument du Procureur selon lequel la Chambre n'est pas tenue de déterminer le droit de fond applicable devant la juridiction interne. Elle doit déterminer si l'État de renvoi a compétence au sens de la définition donnée par le Statut. Lorsque plusieurs régimes de droit applicable existent dans le droit interne de l'État de renvoi, la Chambre n'a pas qualité pour dire lequel doit trouver application, si chacun des régimes prévoit une qualification appropriée en conformité avec le Statut.

16. En l'espèce, il appert que le Royaume de Norvège n'a pas compétence (*ratione materiae*) à l'égard des crimes imputés dans l'acte d'accusation confirmé. En outre, la Chambre rappelle que les crimes allégués (génocide, entente en vue de commettre le génocide et complicité dans le génocide) diffèrent sensiblement sous l'angle de leurs éléments constitutifs et de leur gravité du crime d'homicide, du chef duquel le Royaume de Norvège estime pouvoir poursuivre l'accusé au regard de son droit interne. La Chambre rappelle que le crime de génocide se singularise en ceci qu'il requiert l'« intention de détruire, en tout ou en partie, un groupe national, ethnique, racial ou religieux, comme tel ». Cette intention spécifique n'est pas requise pour le crime d'homicide en droit pénal norvégien. En conséquence, la Chambre estime que la compétence *ratione materiae*, à l'égard des faits allégués dans l'acte d'accusation confirmé n'est pas organisée par le droit positif norvégien. Il suit de là que les actes criminels reprochés à Michel Bagaragaza ne peuvent être pleinement qualifiés en droit pénal norvégien, la demande de renvoi de l'affaire aux autorités du Royaume de Norvège devant être rejetée.

B. Autres conditions

17. Ayant conclu que le Royaume de Norvège n'a pas compétence *ratione materiae* pour connaître des crimes allégués dans l'acte d'accusation dressé contre Michel Bagaragaza, la Chambre estime sans intérêt d'examiner les autres conditions de renvoi envisagées à l'article 11 *bis* du Règlement ou invoquées dans les écritures des parties.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête dans son intégralité.

Fait à Arusha, le 19 mai 2006.

[Signé]: Dennis C. M. Byron ; Jai Ram Reddy ; Joseph Asoka Nihal de Silva

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[12] Le Procureur c. Radovan Stanković, Decision on Referral of Case Under Rule 11 bis - Partly Confidential and Ex Parte (Referral Bench), 17 mai 2005, par. 32.

[13] *Ibid*., par. 38.

[14] *Ibid*,, par. 46.

The Prosecutor v. Théoneste BAGOSORA, Gratien KABILIGI, Aloys NTABAKUZE and Anatole NSENGIYUMVA

Case N° ICTR-98-41

Case History: Théoneste Bagosora

• Name: BAGOSORA

• First Name: Théoneste

• Date of Birth: 16 August 1941

• Sex: male

• Nationality: Rwandan

• Former Official Function: Director of Cabinet at the Ministry of Defence

• Date of Indictment's Confirmation: 10 August 1996

• Date of Indictment's Amendments: 12 August 1999

• Date of the decision to joint Trials: 29 June 2000 – Kabiligi, Ntabakuze et Nsengiyumva

• Counts: genocide, complicity in the genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

• Date and Place of Arrest: 9 March 1996, in Cameroon

• Date of Transfer: 23 January 1997

• Date of Initial Appearance: 20 February 1997

• Pleading: not guilty

• Date Trial Began: 2 April 2002

• Third Party Intervention: *Amicus curiae*, Belgium

• Date and Content of the Sentence: 18 December 2008, sentenced to life imprisonment

• Case on appeal

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Case History: Gratien Kabiligi

• Name: KABILIGI

• First Name: Gratien

• Date of Birth: 18 December 1951

• Sex: male

• Nationality: Rwandan

• Former Official Function: Brigadier-General in the *Forces armées rwandaises* (FAR)

• Date of Indictment's Confirmation: 15 October 1997

• Date of Indictment's Amendments: 8 October 1999

• Date of the decision to joint Trials: 29 June 2000 – Bagosora, Nsengiyumva and Ntabakuze

• Counts: genocide, complicity in the genocide, conspiracy to commit genocide, crimes against humanity, violations of article 3 common to the 1949 Geneva Conventions and of the 1977 Additional Protocol II

• Date and Place of Arrest: 18 July 1997, in Kenya

• Date of Transfer: 18 July 1997

• Date of Initial Appearance: 17 February 1998

• Pleading: not guilty

• Date Trial Began: 2 April 2002

• Date and Content of the Sentence: 18 December 2008, Acquitted

• Case on appeal

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Case History: Aloys Ntabakuze

• Name: NTABAKUZE

• First Name: Aloys

• Date of Birth: 1954

• Sex: male

• Nationality: Rwandan

• Former Official Function: Commander of Battalion in FAR

• Date of Indictment's Confirmation: 15 October 1997

• Date of the decision to joint Trials: 29 June 2000 – Bagosora, Kabiligi and Nsengiyumva

• Counts: genocide, complicity in the genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of the 1977 Additional Protocol II

• Date and Place of Arrest: 18 July 1997, in Kenya

• Date of Transfer: 18 July 1997

• Date of Initial Appearance: 24 October 1997

• Pleading: not guilty

• Date Trial Began: 2 April 2002

• Date and Content of the Sentence: 18 December 2008, sentenced to life imprisonment

• Case on appeal

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Case History: Anatole Nsengiyumva

• Name: NSENGIYUMVA

• First name: Anatole

• Date of Birth: 4 September 1950

• Sex: male

• Nationality: Rwandan

• Former Official Function: Lieutenant-Colonel

• Date of Indictment's Confirmation: 12 July 1996

• Date of Indictment's Amendments: 12 August 1999

• Date of the decision to joint Trials: 29 June 2000 – Bagosora, Kabiligi and Ntabakuze

• Counts: direct and public incitement to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

• Date and Place of Arrest: 27 March 1996, in Cameroon

• Date of Transfer: 23 January 1997

• Date of Initial Appearance: 19 February 1997

• Pleading: not guilty

• Date Trial Began: 2 April 2002

• Date and Content of the Sentence: 18 December 2008, sentenced to life imprisonment

• Case on appeal

Decision on Kabiligi Defence Request to meet Witness LE-1
30 January 2006 (ICTR-98-41-T)

(Original: not specified)

Trial Chamber I

Judge : Erik Møse

Gratien Kabiligi – Meeting with a protected witness, Change of Lead Counsel – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 73 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Postponement of Defence of Accused Kabiligi, 21 April 2005 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, designated by the Chamber in accordance with Rule 73 (A) of the Rules of Procedure and Evidence;

BEING SEIZED of the "Urgent Motion for Trial Chamber Authorization to Interview Witness LE-1", filed by the Kabiligi Defence on 24 January 2006;

CONSIDERING the Prosecution Response, filed on 25 January 2006;

HEREBY DECIDES the motion.

1. The Kabiligi Defence requests permission to meet with Witness LE-1, who testified as a Defence witness on 19, 20 and 21 October 2005, notwithstanding the Chamber's instruction to the witness not to "discuss your testimony with anyone".[1]

2. Following a change of Lead Counsel, the Kabiligi Defence was authorized by the Chamber to present its case after the other Defence teams.[2] Recognizing that witnesses appearing for the other Accused may subsequently testify on behalf of the Accused Kabiligi, the Chamber has in the past routinely authorized the Kabiligi Defence to meet with these witnesses, when so requested.[3] There is no reason not to do so in the present case. The permission should be understood as applying to any matters potentially relevant to the present trial, including matters on which the witness has testified before the Chamber.

FOR THE ABOVE REASONS, THE CHAMBER

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[1] T. 21 October 2005 p. 60.

[2] *Bagosora et al*., Decision on Postponement of Defence of Accused Kabiligi (TC), 21 April 2005.

[3] See e.g. T. 4 May 2005 pp. 41-42 ("MR. PRESIDENT: Thank you. Mr. Witness, your testimony is over. Thank you very much for having come the long way to the Tribunal to testify, and we wish you a very safe journey home. Please do not discuss your testimony with anyone… Now, what I just said is the general order we give to all witnesses, but then in relation to you there may be a specific situation which will imply that Mr. Skolnik may wish to interview you, and of course, he and his team will be free to do so. So my general admonishment did not include the Kabiligi Defence team, should they wish to get in touch with you").

GRANTS THE MOTION by permitting Witness LE-1 to discuss any matters potentially relevant to the present trial, including matters on which the witness has testified before the Chamber.

Arusha, 30 January 2006.

[Signed] : Erik Møse

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Decision on Certification of Appeal from Decision Denying Request for Further Particulars of the Indictment
10 February 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Certification of Appeal, No material advance of the proceedings – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 73 (B)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and ICTR-96-17) ; Trial Chamber, The Prosecutor v. Jean Mpambara, Decision on the Defence Preliminary Motion Challenging the Amended Indictment, 30 May 2005 ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Kabiligi Request for Particulars of the Amended Indictment, 27 September 2005 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Kabiligi "Application for Certification for Appeal Pursuant to Rule 73 (B) of the Trial Chamber's 'Decision on Request for Particulars of the Amended Indictment'", filed on 4 October 2005;

CONSIDERING the Prosecution Response, filed on 11 October 2005; the Defence Reply, filed on 14 October 2005; the Prosecution Further Response, filed on 17 October 2005; and the Defence Reply thereto, filed on 19 October 2005;

HEREBY DECIDES the application.

Introduction

1. On 27 September 2005, the Chamber denied a Kabiligi Defence motion that the Prosecution be ordered to remedy alleged deficiencies in the Indictment against the Accused by providing further

particulars.[1] The issue now before the Chamber is whether leave to appeal this Decision should be granted.

2. As a preliminary matter, the Kabiligi Defence objects to consideration of the Prosecution's Further Response, as being both out of time and not permitted under the Rules. The Trial Chamber has discretion to consider late-filed or supplementary submissions and, in the present instance, chooses to do so.[2]

Deliberations

3. Leave to appeal a Trial Chamber decision may, pursuant to Rule 73 (B) of the Rules of Procedure and Evidence, be granted where it

> "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

4. The Kabiligi Defence argues that the Decision affects the essential fairness of the trial and its outcome. Allowing the trial to proceed on the basis of the "vague charges set out in the Indictment" impairs the Defence's ability to meet and counter the Prosecution case.[3] The Chamber's consideration of the Pre-trial Brief to determine whether the Defence had sufficient notice of certain material facts was improper.[4] Immediate resolution by the Appeals Chamber would materially advance the proceedings by, if successful, requiring the Prosecution to clarify the scope of its case and, hence, reducing the length of the Defence case.[5]

5. The adequacy of an indictment is undoubtedly a question which affects the "fair and expeditious conduct of proceedings" as required by the first prong of Rule 73 (B). The basis for the certification request is that the lack of particulars impairs the Defence's ability to directly and succinctly address the Prosecution case. Even if the evidence admitted in relation to the allegedly vague portions of the Indictment is ultimately excluded by the Trial Chamber, the "fair and expeditious conduct of proceedings" would have been affected.

6. The issue in the present application is whether immediate resolution by the Appeals Chamber "may materially advance the proceedings". The application asserts that communications which supplement the Indictment, such as the Pre-trial Brief, should not have been considered by the Chamber, and that "the Indictment itself" must be rectified to cure its alleged vagueness.[6] No jurisprudence is cited in support of this principle. On the contrary, the Appeals Chamber has declared unambiguously that an indictment which is insufficiently specific in respect of some material fact or allegation may be cured by other forms of disclosure to the Defence, including the Pre-trial Brief.[7] Whether this is the case depends on the

> "the timing of such communications, the importance of the information to the ability of the Accused to prepare its defence, and the impact of the newly-disclosed material facts on the Prosecution's case are relevant".[8]

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[1] *Bagosora et al*., Decision on Kabiligi Request for Particulars of the Amended Indictment (TC), 27 September 2005 ("the Decision").
[2] *Id*.; *Mpambara*, Decision on the Defence Preliminary Motion Challenging the Amended Indictment (TC), 30 May 2005, para. 1.
[3] Motion, para. 9.
[4] Motion, paras. 9, 12.
[5] Motion, para. 10.
[6] Application, pp. 5, 9.
[7] *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 27.
[8] Id.

Factual determinations as to the weight of each of these factors are the primary responsibility of the Trial Chamber. Similarly, no reasonable basis has been raised showing how the Chamber committed any reversible error in relation to multiple counts arising from the same material facts, or the charge of superior responsibility.

7. In the Chamber's opinion, reference of the Decision to the Appeals Chamber in these circumstances would not materially advance the proceedings.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Kabiligi Defence application for certification.

Arusha, 10 February 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Application for Certification to Appeal Decision on Exclusion of testimony
10 February 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Certification of appeal, Effect on the outcome of the Trial, Events highly incriminating of the Accused, Admissibility of evidence, Certification as the absolute exception for a decision concerning the admissibility of evidence, No demonstration of application by the Trial Chamber of an incorrect legal standard – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (B) and 89 (C)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Théoneste Bagosora et al.,Decision (Appeal of the Trial Chamber I 'Decision on Motions By Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses' of 9 September 2003), 28 October 2003 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004 (ICTR-98-42) ; Appeals Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 (ICTR-98-42)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Application for Certification for Appeal Pursuant to Rule 73 (B) of Part of the Trial Chamber's 'Decision on Exclusion of Testimony Outside the Scope of the Indictment' filed 27 September 2005", filed by the Kabiligi Defence on 4 October 2005 ("the Application");

CONSIDERING the Prosecution Response, filed on 11 October 2005; the Reply thereto, filed on 14 October 2005; the Prosecution's Further Response, filed on 17 October 2005; and the Reply to the Further Response, filed on 19 October 2005;

HEREBY DECIDES the Application.

Introduction

1. The Kabiligi Defence requests leave to appeal the Chamber's Decision on Exclusion of Testimony Outside the Scope of the Indictment, filed on 27 September 2005[1]. The Decision declared that portions of the testimony of two witnesses were inadmissible as not relevant to the Indictment against the Accused, but denied all other such requests in respect of a total of eight witnesses[2].

Deliberations

2. Leave to appeal may be certified under Rule 73 (B) of the Rules where a decision

> "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

3. The first criterion is undoubtedly met. More than a dozen events, some of which may be characterized as highly incriminating of the Accused, are at issue in the Decision. The case against the Accused – and the need for a Defence case to rebut this evidence – would be substantially reduced if this evidence were to be excluded at this stage.

4. The second requirement for granting leave to appeal is that it be "the opinion of the Trial Chamber" that immediate resolution by the Appeals Chamber "may materially advance the proceedings". The issue addressed by the Decision is whether various items of testimony should be declared inadmissible as not relevant to the Indictment. This depends, in turn, on whether general allegations in the Indictment have been clarified by virtue of subsequent disclosure, in particular, through the Pre-trial Brief. The Decision makes very clear the interrelationship between these two questions:

> Rule 89 (C) provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value". To be admissible, the "evidence must be in some way relevant to an element of a crime with which the Accused is charged." The present motion complains that the evidence has no relevance to anything in the Indictment, or that some paragraphs of the Indictment to which it might be relevant are too vague to be taken into account. Some recent Appeals Chamber judgements thoroughly discuss the specificity with which an indictment must be pleaded, and the significance of other forms of Prosecution disclosure of its case. Although the question addressed in those cases was whether a conviction should be quashed because of insufficient notice of a charge in the indictment, the analysis is equally relevant to the present question, namely, whether evidence is sufficiently related to some charge in the Indictment to be admissible[3].

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[1] *Bagosora et al*., Decision on Exclusion of Testimony Outside the Scope of the Indictment (TC), 27 September 2005 ("the Decision").
[2] Witness XAI's testimony about the killing of three civilians, allegedly on the orders of the Accused, and Witness DCH's testimony about killings at Mburabuturo School, allegedly in the presence of the Accused, were ruled inadmissible.
[3] Decision, para. 2 (references omitted).

In short, the Decision is a ruling on the admissibility of evidence.

5. The Appeals Chamber has held that certification should not ordinarily be granted on questions of admissibility of evidence, reasoning that

> "as the matters in the Appeal are clearly for the Trial Chamber, as trier of fact, to determine in the exercise of its discretion, in the view of the Appeals Chamber, it … should not have been certified"[4].

Although such rulings are not immune from interlocutory review, the Appeals Chamber has stated that certification must be the "the absolute exception"[5]. The applicant must raise some ground for certification other than that an error has been made in evaluating a fact on which the Chamber's discretion was exercised[6].

6. The Defence acknowledges that the scope of the material facts encompassed by an indictment may be supplemented by additional disclosure, but argues that the Trial Chamber

> "erred in its exercise of discretion to admit such material facts, given the specific methods and timing of disclosure adopted by the Prosecution in this case in relation to the abovementioned witness"[7].

The Defence asserts that, cumulatively, the evidence admitted by the Chamber is "tantamount to a radical transformation of the Amended Indictment and the case"[8]. Such a "radical transformation" is, according to the Appeals Chamber, impermissible[9].

7. The characterization of the cumulative effect of the Decision as constituting a legal error is not convincing. No argument has been made that an incorrect legal standard was applied to any particular evidence, or even that the Chamber made any specific error of fact in applying that legal standard. The complaint of the Defence, in substance, is that the Chamber has exercised its discretion in a manner with which it disagrees and considers incorrect. This is just the type of factual determination which the Appeals Chamber has specifically described as not appropriate for certification. Nothing in the present request for certification takes it into the realm of the "absolute exception" contemplated by the Appeals Chamber.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Application.

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[4] *Nyiramasuhuko et al*., Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5 (" Indeed, the submissions regarding the chain of custody, ownership of the diary, and whether pages are missing are all matters which go to the authenticity, reliability and admissibility of the diary, the assessment of which falls within the discretion of the Trial Chamber. It is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of the trial; it is not for the Appeals Chamber to assume this responsibility"); *Nyiramasuhuko et al*., Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 10 ("certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence"). Trial scheduling, though often implicating the rights of the accused under Articles 19 and 20 of the Statute, has also been described as a matter within the discretion of a Trial Chamber, subject to reversal on interlocutory appeal "in limited circumstances only, for instance where the Trial Chamber has failed to exercise such discretion or to take into account a material considerations". *Bagosora et al*., Decision (Appeal of the Trial Chamber I 'Decision on Motions By Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses' of 9 September 2003) (AC), 28 October 2003, p. 4.

[5] *Nyiramasuhuko et al*., Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 10 ("certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence").

[6] *Nyiramasuhuko et al*., Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5

[7] Application, para. 5.

[8] Application, para. 13.

[9] Application, paras. 14-15.

Arusha, 10 February 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal 16 February 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Gratien Kabiligi – Standards for Granting Certification of Interlocutory Appeal, Material advance of the proceedings, Role of the Appeals Chamber to verify the correctness of a Trial Chamber decision, Chance of a success of the appeal, No possible certification of appeal on a decision of admissibility of evidence, No error of law or abuse of discretion demonstrated – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 73 (B)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision (Appeal of the Trial Chamber I 'Decision on Motions By Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses' of 9 September 2003), 28 October 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP and DA, 5 December 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Certification of Appeal Concerning Admission of Written Statement of Witness XXO, 11 December 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Nyiramasuhuko's Motion for Reconsideration of the Decision of the "Decision on Defence Motion for Certification to Appeal the 'Decision on Defence Motion for a Stay of Proceedings and abuse of process'", 20 May 2004 (ICTR-98-42) ; Appeals Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004 (ICTR-98-42) ; Appeals Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material", 4 February 2005 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Prosper Mugiraneza's Motion for Certification, 7 July 2005 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Kabiligi Application for Certification Concerning Defence Cross-Examination After Prosecution Cross-Examination, 2 December 2005 (ICTR-98-41)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Pavle Strugar, Decision on Defence Motion for Certification, 17 June 2004 (IT-01-42) ; Trial Chamber, The Prosecutor v. Enver Hadžihasanović and

Amir Kubura, Decision on the Request for Certification to Appeal the Decision Rendered Pursuant to Rule 98 bis of the Rules, 26 October 2004 (IT-01-47) ; Trial Chamber, The Prosecutor v. Slobodan Milošević, Decision on Interlocutory Appeals of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004 (IT-02-54) ; Trial Chamber, The Prosecutor v. Slobodan Milošević, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding, 20 June 2005 (IT-02-54) ; Trial Chamber, The Prosecutor v. Jadranko Prlić et al., Decision on Milivoj Petkovic's Application for Certification to Appeal Decision on Motions Alleging Defect in the Form of the Indictment, 19 September 2005 (IT-04-74)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Kabiligi "Motion for Reconsideration of the 'Decision on Kabiligi Application for Certification'", etc., filed on 12 December 2005;

CONSIDERING the Prosecution Response, filed on 16 December 2005; and the Kabiligi Reply, filed on 21 December 2005.

HEREBY DECIDES the motion.

Introduction

1. On 21 October 2005, the Chamber made an oral ruling preventing the Defence from asking questions after the Prosecution's cross-examination. The Chamber observed that the questions concerned a "general issue which has been on the table throughout these proceedings", and which, therefore, was not a new question arising only during the Prosecution cross-examination.[1] Leave to appeal this decision was subsequently denied.[2]

2. The Kabiligi Defence now asks the Chamber to reconsider the denial of leave to appeal. Its primary argument is that the Chamber should not have considered the merits of the underlying decision. Rule 73 (B), which requires that the appeal may "materially advance the proceedings", is said to exclude consideration of the nature of the underlying decision or the likelihood of success on appeal.[3] A second but related argument is that the Chamber should not have relied on the "primacy of Trial Chamber decisions which involve an exercise of discretion", a consideration which applies only to the standard of appellate review, not the standard for leave to appeal. Finally, the Defence complains that the Chamber's explanation that "interlocutory appeals are only warranted under exceptional circumstances" did not sufficiently address the specific arguments presented by the Defence.

Deliberations

3. The present motion raises the question whether a Trial Chamber is barred from considering the merits of an appeal in deciding whether leave for that appeal should be granted. In the Decision challenged by the Kabiligi Defence, the Chamber held, quoting a decision from 2003, that

[1] T. 21 October 2005 pp. 43, 49.
[2] *Bagosora et al*., Decision on Kabiligi Application for Certification Concerning Defence Cross-Examination After Prosecution Cross-Examination (TC), 2 December 2005 ("the Decision").
[3] Motion, paras. 14, 17.

the question of whether resolution of the matter by the Appeals Chamber may materially advance the proceedings "requires consideration not only of the effect on proceedings assuming that there would be a reversal or modification of the Chamber's decision, but also whether there is serious doubt as to the correctness of the legal principles at issue". The Defence has failed to raise such doubt on the Chamber's decision, in large part because the decision rested on an exercise of the Chamber's discretion.[4]

4. The correctness of a decision is a matter for the Appeals Chamber, should certification be granted. In this sense, it is certainly true that a Trial Chamber is not concerned with the correctness of its own decision when determining whether to grant leave to appeal.[5] On the other hand, Trial Chambers do have a responsibility to screen out requests for certification with no prospect of success and which, accordingly, would not "materially advance the proceedings". The Appeals Chamber has emphasized, for example, that certification should not ordinarily be granted on questions of admissibility of evidence, reasoning that

> "as the matters in the Appeal are clearly for the Trial Chamber, as trier of fact, to determine in the exercise of its discretion, in the view of the Appeals Chamber, it … should not have been certified".[6]

Numerous Trial Chamber decisions – and not only by this Trial Chamber – have applied this concept more generally, and inquired whether a request for certification discloses any grounds to believe that the appeal might succeed.[7] The narrow reading of the words "materially advance"

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[4] Decision, para. 7 (citations omitted).

[5] *Milosevic*, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding (TC), 20 June 2005, para. 3 ("A request for certification is not concerned with whether a decision was correctly reasoned or not. This is a matter for appeal, be it an interlocutory appeal or one after the final Judgement has been rendered"). *Bizimungu et al*., Decision on Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material" (TC), 4 February 2005, para. 28 ("All other considerations such as whether there was an error of law or abuse of discretion in the Impugned Decision are for the consideration of the Appeals Chamber after certification to appeal has been granted by the Trial Chamber. They are irrelevant to the decision for certification and will not be considered by the Chamber"); *Nyiramasuhuko et al*., Decision on Nyiramasuhuko's Motion for Certification to Appeal", etc., (TC), 20 May 2004, para. 21 ("The Chamber notes that the Defence submissions on the Chamber's alleged errors in law and fact, in Impugned Decisions I and II, are not relevant at the certification stage").

[6] *Nyiramasuhuko et al*., Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5 ("Indeed, the submissions regarding the chain of custody, ownership of the diary, and whether pages are missing are all matters which go to the authenticity, reliability and admissibility of the diary, the assessment of which falls within the discretion of the Trial Chamber. It is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of the trial; it is not for the Appeals Chamber to assume this responsibility"); *Nyiramasuhuko et al*., Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 10 ("certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence"). Trial scheduling, though often implicating the rights of the accused under Articles 19 and 20 of the Statute, has also been described as a matter within the discretion of a Trial Chamber, subject to reversal on interlocutory appeal "in limited circumstances only, for instance where the Trial Chamber has failed to exercise such discretion or to take into account a material consideration". *Bagosora et al*., Decision (Appeal of the Trial Chamber I 'Decision on Motions By Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses' of 9 September 2003) (AC), 28 October 2003, p. 4.

[7] See e.g. *Bagosora et al*., Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries (TC), 21 July 2005, para. 5 ("Interlocutory appeals under Rule 73 (B) have been described as exceptional, and the Appeals Chamber has underscored the primacy of Trial Chamber rulings involving an exercise of discretion. Permitting interlocutory appeals of decisions on the basis of arguments which were not advanced in relation to the original motion would encourage repetitive pleadings and could lead to resolution of issues by the Appeals Chamber without a prior decision on the merits by the Trial Chamber. Even though a Trial Chamber may at the certification stage revisit the substance of a decision, it does so only within the context of the criteria set out in Rule 73 (B)"); *Bizimungu et al*., Decision on Prosper Mugiraneza's Motion for Certification (TC), 7 July 2005, para. 12 ("[The] Chamber does not consider that there is serious doubt, raised by the Defence Motion, about any question of law, resolution of which by the Appeals Chamber would materially advance the proceedings, as required by Rule 73 (B)"); *Bagosora et al*., Decision on Certification of Appeal Concerning Admission of Written Statement of Witness XXO (TC), 11 December 2003, para. 7 ("In light of Rule 90 (A), and the absence of any argument raising a serious doubt as to the correctness of its oral decision of 20 November 2003, the Chamber does not believe that immediate resolution of the legal issue by the Appeals Chamber may materially advance the proceedings, as

proposed by the Defence would lead to the result that Trial Chambers are bound to certify decisions even on motions which had been found to be frivolous, provided that the subject-matter concerned the fair and expeditious conduct of proceedings, and reversal of which would advance the proceedings. Rule 73 (B) requires no such inconceivable result. It must be "the opinion of the Trial Chamber" that certification could "materially advance the proceedings": in the absence of any reasonably articulated ground of appeal, certification could not materially advance the proceedings. This does not mean, of course, that a Trial Chamber should simply substitute its own opinion for that of the Appeals Chamber; rather, the appropriate inquiry is whether a showing has been made that the appeal could succeed. That threshold would be met, for example, by showing some basis to believe that the Chamber committed an error as to the applicable law; that it made a patently incorrect conclusion of fact; or that it was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[8]

5. The Decision correctly observes that the

> "Appeals Chamber has repeatedly emphasized the primacy of Trial Chamber rulings involving an exercise of discretion".[9]

The underlying decision "rested on an exercise of the Chamber's discretion", based on a fact-specific analysis of the particular cross-examination in question.[10] The Chamber concluded in summary fashion that no "serious doubt as to the correctness of the legal principles" had been raised. For the reasons described above, the Chamber was correct to consider whether the appeal had any prospect of success. The repetition of the settled formulation that interlocutory appeals "are only warranted under exceptional circumstances" was descriptive, rather than determinative, of the Chamber's conclusion. No error of law or abuse of discretion has been demonstrated.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 16 February 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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required by Rule 73 (B)"); *Bagosora et al*., Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP and DA (TC), 5 December 2003, para. 10 ("The Chamber does not believe that there is serious doubt on a question of law, resolution of which by the Appeals Chamber would materially advance the proceedings, as required by Rule 73 (B)"). *Prlić et al*., Decision on Milivoj Petkovic's Application for Certification to Appeal Decision on Motions Alleging Defect in the Form of the Indictment (TC), 19 September 2005 (asserting that "the Chamber has properly addressed and adequately examined the 'essence of those complaints or arguments' enumerated in the motion"); *Strugar*, Decision on Defence Motion for Certification (TC), 17 June 2004, para. 8 ("… the Trial Chamber is not able to see from the very general terms of the Defence Motion that there may well be some oversight or error which has affected its decision"); *Strugar*, Decision on the Defence's Request for Certification to Appeal the Trial Chamber's Decision Dated 26 November 2003 on the Prosecutor's Motion for Separate Trial and Order to Schedule a Pre-trial Conference and the Start of the Trial Against Pavle Strugar (TC), 12 December 2003, paras. 7-8 ("the Defence failed to identify an error ... Moreover, the November Decision found that Pavle Strugar's right to an expeditious trial would be promoted by the separation of cases. The Defence has not cast doubt on this either"); *Hadzihasanovic and Kubura*, Decision on the Request for Certification to Appeal the Decision Rendered Pursuant to Rule 98 *bis* of the Rules (TC), 26 October 2004 (asserting that "the case-law of the Tribunal has ruled on repeated occasions" that the elements applied in its decision were correct).

[8] See *Milosevic*, Decision on Interlocutory Appeals of the Trial Chamber's Decision on the Assignment of Defence Counsel (TC), 1 November 2004, para. 10.

[9] Decision, para. 5.

[10] Decision, paras. 7-8.

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Decision on Defence Motion to Amend the Defence Witness List 17 February 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Amendment of the Defence Witness List, Discretion for variance of the witness list solely vested with the Chamber, Standards of Good Cause and Interests of justice, Removal of witnesses, Addition of witnesses : obligation for the Defence to inform the Prosecutor of the identifying information of the new witnesses and to provide with a summary of the intended testimony, Probative value of the testimony recently discovered through ongoing investigations of a specific allegation against the Accused – Witness Protection Measures – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (E), 73 ter (E), 75 and 82 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Ferdinand Nahimana, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. André Ntagerura et al., Decision on Defence for Ntagerura's Motion to Amend Its Witness List Pursuant to Rule 73ter (E), 4 June 2002 (ICTR-99-46) ; Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on the Defence Application Under Rule 73 ter (E) Leave to Call Additional Defence Witnesses, 9 October 2002 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis(E), 26 June 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Bagosora Motion for Protection of Witnesses, 1 September 2003 (ICTR-98-41); Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Kabiligi Motion for Protection of Witnesses, 1 September 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Admissibility of Witness DBQ, 18 November 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Ntabakuze Motion for Protection of Witnesses, 15 March 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E), 21 May 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagasora et al., Decision on Motion to Harmonize and Amend Witness Protection Orders, 1 June 2005 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Requête de la Défence de Bagosora en Modification de sa Liste de Témoins", filed on 7 December 2005; the Ntabakuze Defence "Motion for Leave to Vary the Witness List Pursuant to Rule 73 *ter* (E)", filed on 7 December 2005; and the Nsengiyumva Defence "Urgent Motion for Leave to Amend the List of Defence Witnesses", filed on 15 December 2005;

CONSIDERING the parties' subsequent written pleadings;

HEREBY DECIDES the motions.

Introduction

1. The Bagosora, Ntabakuze, and Nsengiyumva Defence teams request leave to amend their witness lists so as to eliminate a total of fifty-one of their prospective witnesses and to add thirty-one others. The Prosecution does not oppose the deletion of names from the witness lists, but argues that the addition of any new witnesses must be conditional upon complete disclosure of the witnesses' intended testimony and identifying information. A detailed mechanism to ensure such disclosure is proposed, by which the Prosecution would determine whether the disclosure conditions have been met as a prerequisite to their addition to the witness lists. If the Chamber declines to authorize such a mechanism, the Prosecution opposes the motion.

2. The Chamber notes that some of the parties' submissions were filed outside of the time-limits prescribed by the Rules of Procedure and Evidence ("the Rules"). The Trial Chamber has discretion to consider late-filed submissions and, in the present instance, chooses to do so.[1]

Deliberations

(i) Applicable Standard

3. Rule 73 *ter* (E) of the Rules provides that:

> After commencement of the Defence case, the Defence, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called.

4. In interpreting a similarly worded provision applicable to Prosecution witnesses, this Trial Chamber has held that amendments of a witness list must be supported by "good cause" and be in the "interests of justice".[2] Similar principles have been applied in assessing Defence motions to vary a witness list.[3] The determination of whether to grant a request to vary the witness list requires a close analysis of each witness, including the sufficiency and time of disclosure of the witness' information; the materiality and probative value of the proposed testimony in relation to existing witnesses and allegations in the indictment; the ability of the other party to make an effective cross-examination of the witness; and the justification offered by the party for the addition of the witness.[4]

(ii) Removal of Witnesses

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[1] *Bagosora et al*., Decision on Kabiligi Request for Particulars of the Amended Indictment (TC), 27 September 2005, para. 3; *Mpambara*, Decision on the Defence Preliminary Motion Challenging the Amended Indictment (TC), 30 May 2005, para. 1, n.1.

[2] *Nahimana et al*., Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses (TC), 26 June 2001, paras. 17-20; *Bagosora et al*., Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, paras. 13-14; *Bagosora et al*., Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) (TC), 21 May 2004, para. 8.

[3] *Ntagerura et al*., Decision on Defence for Ntagerura's Motion to Amend its Witness List Pursuant to Rule 73 *ter* (E) (TC), 4 June 2002, paras. 8, 10; *Nahimana et al*., Decision on the Defence Application Under Rule 73 *ter* (E) Leave to Call Additional Defence Witnesses (TC), 9 October 2002.

[4] *Bagosora et al*., Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, para. 14; *Bagosora et al*., Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) (TC), 21 May 2004, paras. 8-10.

5. The Bagosora, Ntabakuze and Nsengiyumva Defence teams seek leave to drop nine, thirty-two and ten witnesses respectively.[5] The requests are not opposed by the Prosecution, will economize judicial resources, and are obviously consistent with the effective presentation of Defence evidence. The requests are, therefore, granted.

(iii) Proposed Consent Mechanism

6. The Prosecution does not oppose the requests to add Defence witnesses, provided that the addition of any witness is conditional upon (i) disclosure of the witness' intended testimony, identifying information and statements; (ii) written confirmation by the Prosecution that adequate disclosure has taken place; and (iii) the witness not testifying sooner than sixty days after the Prosecution's confirmation that full disclosure has taken place.

7. The Prosecution has rightly pointed out its need to be informed of the identifying information of any new witnesses and to be provided with a summary of the intended testimony. However, the suggested procedure would interfere with the Chamber's responsibility to grant or deny permission under Rule 73 *ter* (E). Discretion for variance of the witness list is solely vested with the Chamber, and any Defence team wishing to add new witnesses must make application to the Chamber. Moreover, granting the Defence requests subject to a series of subsequent conditions imposed by the Prosecution could cause confusion and give rise to further disputes. Based on the parties' submissions, the Chamber is in a position not only to assess the merits of the Defence requests to add witnesses, but also to prescribe the timing of the Defence's disclosure obligations so as to ensure that the Prosecution has adequate information and time to prepare for cross-examination.[6]

(iv) Addition of Witnesses

a. General Issues

8. The Chamber will first address issues common to the three motions and will then turn to each Defence team's specific request. The timing of the motions has not been challenged by the Prosecution. It does not claim unfair surprise or an inability to prepare an effective cross-examination of the proposed witnesses, provided that it is given sufficient time for preparation.

9. The Defence requests provide a general indication of the scope of each witness' proposed testimony and, where applicable, identify the Prosecution evidence to be rebutted by the new witness. The Bagosora and Ntabakuze Defence teams also refer to the paragraphs of the Indictment which are relevant to each proposed witness' testimony. The Ntabakuze and Nsengiyumva Defence teams specify the anticipated duration of the witness' examination-in-chief. The information which the Defence has thus far provided may be viewed as a substantial step toward compliance with the Defence's disclosure obligations. Moreover, the Defence requests establish that the proposed testimony is relevant to the charges against the Accused, responds to evidence offered by the Prosecution as part of its case against the Accused, and is relatively brief in length.

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[5] The Bagosora Defence wishes to remove Witnesses I-08, J-01, J-06, J-10, K-04, K-05, K-06, K-10 and expert witness Hounkpatin. The witnesses to be removed by the Ntabakuze Defence are: Witnesses Anyidoho, Apedo, Matthew Morcher, Kwesi, Michel Chossudovsky, Gilbert Ngijol, Romeo Dallaire, Plante, Lancaster, Luc Marchal, Todd Howland, DK-17, DM-27, DM-45, DN-15, DN-30, DN-35, DH-50, DM-40, DH-65, DK-12, DH-23, DH-26, L-21, DH-11, DH-21, DH-52, DI-21, DK-51, DK-52, DK-71 and DM-198. The witnesses to be removed by the Nsengiyumva Defence are: GW-1, BZ-2, CF-3, SR-1, BR-5, LN-2, BD-1, LK-7, BK-2 and LND-1.

[6] This Chamber has previously addressed the issue of remedies for late disclosures of witness information. Where new information pertaining to Prosecution Witness DBQ was disclosed shortly before the witness' appearance, the Chamber postponed cross-examination of the witness in order to afford the Defence sufficient time to investigate and prepare for the new evidence. *Bagosora et al*., Decision on Admissibility of Evidence of Witness DBQ (TC), 18 November 2003, paras. 24-29.

10. The Prosecution places particular emphasis on the overall number of Defence witnesses and on the trial schedule. The Defence challenges the Prosecution arguments and asserts that each team's request must be assessed separately in accordance with Rule 82 (A). The Chamber need not resolve this dispute in deciding the present motions. Each witness is considered individually, applying the criteria mentioned above.

11. Notwithstanding the fact that each witness' proposed testimony must be individually assessed by the Chamber, the Chamber notes that the overall number of witnesses to be called by the Defence teams is reduced, thereby expediting the proceedings. This does not exclude, however, the possibility that certain testimony may be duplicative and may not be allowed by the Chamber at a later stage.

b. Bagosora Request

12. The Bagosora Defence requests leave to amend its list of witnesses by adding one witness. The proposed witness, Witness X-04, will testify about his observations at the SGP gas station on the night of 6 April 1994 and the morning of 7 April 1994. His evidence directly responds to the testimony of Prosecution Witness CW and addresses paragraph 6.32 of the Indictment. The Defence claims to have learned of the witness' existence on 24 October 2005 and to have immediately taken measures to contact him.

13. The Chamber finds that the Bagosora Defence has satisfied the criteria for adding Witness X-04. His proposed testimony is probative of a specific allegation against the Accused and appears to have been recently discovered through ongoing investigations. Moreover, the testimony will directly respond to Prosecution evidence.

c. Ntabakuze Request

14. The Ntabakuze Defence seeks leave to amend its list of witnesses by adding eight witnesses.[7] In the Chamber's view, the criteria for adding these witnesses have been satisfied. The Defence has stated that each of the proposed witnesses was discovered as a result of new or ongoing investigations. The probative value of each witness has also been sufficiently established, with reference to specific Prosecution evidence and paragraphs of the Indictment. Moreover, several of the witnesses replace or condense testimony of other Defence witnesses, which economizes judicial resources and streamlines the presentation of evidence for Ntabakuze. The Chamber grants the request.

d. Nsengiyumva Request

15. The Nsengiyumva Defence requests leave to amend its list of witnesses by adding twenty-two witnesses.[8] It has provided a summary of the proposed testimony for each witness and has estimated the length of the examination-in-chief. In most instances, the Defence has also expressly described the Prosecution evidence to which the proposed testimony responds. The Defence has explained that the availability of most of these witnesses has only recently been confirmed.

16. Even though the explanation for the late availability could have been more detailed, the Chamber finds that the criteria have been met with regard to each of the proposed testimonies. The witnesses respond directly to Prosecution evidence proffered in this case and many are claimed to be the sole witness on a particular issue. The estimated examination-in-chief for each of the proposed witnesses is also relatively brief.

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[7] The witnesses to be added by the Ntabakuze Defence are: Witnesses DM-04, DH-133, DI-41, DK-14, DI-40, DI-37, L-22 and DH-7.

[8] The witnesses to be added by the Nsengiyumva Defence are: Witnesses ZEU-1, ZDR-1, XEN-1, KYZ-1, ZDR-2, XEN-2, OME-1, BRA-1, WIN-1, ANG-1, SUM-1, KB-1, MNC-1, BE-1, WY, ZEU-2, MAR-1, Joseph Nzirorera, Ephrem Setako, Edouard Karemera, Simon Bikindi and Joseph Serugendo.

(v) Timing of Disclosures

17. The Chamber orders that disclosure of all information pertaining to the new witnesses must be made at least thirty-five days before the trial session in which the witness is to appear. This requirement is consistent with prior witness protection decision in this case.[9]

(vi) Witness Protection Measures

18. Pursuant to Rule 75, the Chamber has ordered measures to safeguard the privacy and security of witnesses in this case.[10] Existing witness protection measures shall apply to all new witnesses.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS, in their entirety, the requests of the Bagosora, Ntabakuze, and Nsengiyumva Defence teams;

ORDERS that witness protection measures in this case be extended to each new witness;

ORDERS that all identifying information and unredacted statements of the witness be disclosed to the Prosecution at least thirty-five days before the appearance of the witness.

Arusha, 17 February 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[9] *Bagosora et al*., Decision on Motion to Harmonize and Amend Witness Protection Orders and to Permit Investigations (TC), 1 June 2005; *Bagosora et al*., Decision on Ntabakuze Motion for Protection of Witnesses (TC), 15 March 2004; *Bagosora et al*., Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003; *Bagosora et al*., Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003.

[10] *Bagosora et al*., Decision on Motion to Harmonize and Amend Witness Protection Orders and to Permit Investigations (TC), 1 June 2005; *Bagosora et al*., Decision on Ntabakuze Motion for Protection of Witnesses (TC), 15 March 2004; *Bagosora et al*., Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003; *Bagosora et al*., Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003.

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Decision on Bagosora Request for Certification Concerning Additional Questioning of Witness LE-1
22 February 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora – Certification of appeal, Burden of the Defence to show that the decision affects the fair and expeditious conduct of proceedings, Conditions to allow Defence cross-examination after the Prosecution, No material advance of the proceedings, Assessment of supplemental cross-examination is a fact-specific inquiry within the Trial Chamber's discretion – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (B) and 82

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Kabiligi Application for Certification Concerning Defence Cross-Examination After Prosecution Cross-Examination, 2 December 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 February 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Amended Request for Certification of 21 October 2005 Decision on Request to Cross-Examine a Witness on New Evidence", filed by the Bagosora Defence on 7 November 2005;

CONSIDERING the Prosecution Response, filed on 9 November 2005;

HEREBY DECIDES the Request.

Introduction

1. The Bagosora Defence requests leave to appeal an oral decision of the Chamber on 21 October 2005 denying permission to ask additional questions to Defence Witness LE-1 after the Prosecution cross-examination of the witness. The entire context of the witness's testimony, and a prior ruling of the Chamber in respect of an earlier request for additional cross-examination, are relevant to the present motion and are set out below.

2. Witness LE-1 testified for three days, on 19, 20 and 21 October 2005. The Nsengiyumva Defence, as the party calling the witness, conducted the examination-in-chief. The Ntabakuze and Bagosora Defence teams followed with additional questions to the witness.[1] During the subsequent Prosecution cross-examination, the witness was asked about his request to re-join active military service in April 1994. In particular, he was asked about a written statement in which he had asserted that a condition of his reappointment was that he "be made part of the [army] command because the population was requesting … clear and bold orders to put an end to massacres".[2] The Prosecution suggested to the witness that this indicated that he must have thought that the army command was in a position to stop the massacres of civilians, and that some of its members did not support stopping them. Furthermore, the Prosecution suggested that the rejection of his re-appointment showed that the Minister of Defence did not support stopping the massacres. The witness denied these propositions.[3]

3. Immediately following the Prosecution cross-examination, the Kabiligi Defence requested permission to ask questions concerning matters raised during the Prosecution cross-examination.[4] After oral argument, the Chamber authorized the Kabiligi Defence to ask additional questions:

> Now we are faced with a request for cross-examination to be limited to information that came up in connection with the Prosecution's cross-examination. We can only possibly allow such cross-examination within that framework, not anything beyond that scope, and we expect the Defence counsel now to concentrate on what came up, which is adverse to his client.[5]

After a few questions had been asked, it became apparent that the Kabiligi Defence was embarking on a general inquiry about the military situation in Kigali in April 1994. When asked to explain the line of questioning, the Kabiligi Defence argued that its purpose was to show that the army was not in a position to stop massacres of civilians.[6] After oral argument, the Chamber precluded any further cross-examination on this subject. Though acknowledging that the Prosecution questions had arisen from the previously undisclosed statement of the witness, the Chamber ruled that "this is a general issue which has been on the table throughout the proceedings".[7] On 2 December 2005, the Chamber denied certification to appeal this decision.[8]

4. During the witness's re-examination, the Nsengiyumva Defence tendered the witness's statement as an exhibit, but did not ask specific questions about the capacity of the military to stop the massacres of civilians. The Ntabakuze Defence then asked additional questions about other, unrelated matters, which elicited no objection from the Prosecution.[9]

5. The Bagosora Defence then indicated that it wished to ask additional questions about "the document which was produced, and which I was not aware of at this time". After a Prosecution

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[1] The Chamber has prescribed the modalities for additional questions in a written decision: *Bagosora et al*., Decision on Modalities for Examination of Defence Witnesses (TC), 26 April 2005, paras. 5-6. As Witness LE-1 was not a Bagosora witness, the questioning conducted by the Bagosora Defence was not an examination-in-chief.
[2] T. 21 October 2005 p. 35; Exhibit DNS-117.
[3] *Id*. pp. 36-38.
[4] *Id*. p. 39 ("…we can cross-examine where things may be adverse to our position. And, accordingly, I feel that – just to give you an example, yesterday Mr. Rashid in his cross-examination asked questions about General Kabiligi. I wish to cross-examine on that. And there are things which the witness just said now which I wish to cross-examine him on now").
[5] *Id*. p. 43.
[6] *Id*. p. 45 ("I want to show that when this witness says that – or leaves the impression that the army could put down the massacres, I want to go through with him, because my client's position is that the army could not put down the massacres").
[7] *Id*. p. 48.
[8] *Bagosora et al*., Decision on Kabiligi Application for Certification Concerning Defence Cross-Examination After Prosecution Cross-Examination (TC), 2 December 2005. A request for reconsideration of the certification decision was also denied: *Bagosora et al*., Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006.
[9] An objection was made by the Prosecution about the scope of the questioning after a number of questions had been asked, but no objection was made at the outset of the questioning. T. 21 October 2005 pp. 52-55.

objection, the Chamber ruled orally that the Bagosora Defence was not entitled to ask additional questions:

> The idea that one could be in this privileged position, first, to cross-examine the witness, and then to re-examine the witness would be a novel approach in this Tribunal. We have to stick to normal practice and not allow that.
>
> When it comes to that particular situation, when it was mentioned in the immigration statement that the witness approached authorities, I note that two Defence teams have had the possibility to cross-examine on that immigration statement, and one of them even tendered it as an exhibit. So that's that.[10]

The Bagosora Defence now requests leave for an interlocutory appeal of that decision.

Deliberations

6. The Bagosora Defence requests certification of the decision, arguing that, as required by Rule 73 (B), it affects the "fair and expeditious conduct of proceedings or the outcome of the trial" and that "immediate resolution may materially advance the proceedings".

7. The applicant has not discharged its burden of showing that the decision affects the fair and expeditious conduct of proceedings. The witness denied the incriminating propositions put to him by the Prosecution. He denied unequivocally and repeatedly that his request to be appointed to the army command implied that it was not doing enough to stop the massacres. Reversal of the present decision, and recalling the witness for further cross-examination by the Defence, would be of marginal significance to the outcome or conduct of the present trial.

8. Further, immediate resolution of the present controversy could not, in the Chamber's view, materially advance the proceedings. Defence cross-examination after the Prosecution is permitted where: (i) a new issue has arisen during the Prosecution cross-examination, which (ii) is adverse to the Accused who wishes to pose additional questions.[11] The Defence does not disagree with this standard.[12] The Bagosora Defence suggests, however, that the Chamber improperly considered the possibility that other Defence teams could pose questions to defend its interests. This is said to deprive the Accused of his right under Rule 82 "to be accorded the same rights as if he were being tried separately".[13] The Bagosora Defence argues that the questions would have been allowed had this been a single-accused trial.

9. If the Bagosora Defence had shown that the testimony was adverse to the Accused, then it would have been entitled to pose additional questions to the witness. However, the submission by Lead Counsel failed to show that the subject-matter of the testimony in question was actually detrimental to the Accused Bagosora.[14] The Accused was not mentioned in the document by name, and the witness had denied all of the incriminating propositions suggested by the Prosecution. The

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[10] *Id*. p. 55.
[11] T. 11 April 2005, p. 67, concerning Witness DM-25 ("We understand the situation as follows: The Defence has not found that there is anything adverse coming out of this witness's testimony and will not ask any questions now, but reserve the rights if there should be new issues coming out by the cross-examination"); T. 12 April 2005 p. 37 ("[A]s we agreed earlier in this courtroom, there will be an opportunity to cross-examine this witness if adverse information is coming up from him. And that will then be the remedy for the other defence teams").
[12] Request, para. 8 ("a party cannot retake the floor after the Prosecution has completed its cross-examination unless the witness has provided new information detrimental to the accused).
[13] Request, paras. 12-13, 25-26 ("It is respectfully submitted that Colonel Bagosora cannot rely on the Defence for two other Accused to defend his interests during the course of this trial").
[14] T. 21 October 2005 p. 55 ("I want to cross this witness on the new element. I want to ask questions on this document … which was produced, and which I was not aware of before this time").

Chamber made a fact-specific determination based on the submissions before it, applying the correct legal standard.[15] Leave to appeal this determination would not materially advance the proceedings.

10. The Bagosora Defence also suggests that the Chamber's decision in respect of Witness LE-1 is irreconcilable with its decision concerning Witness DM-25, of whom the Defence was permitted to ask questions after the Prosecution cross-examination. The Bagosora Defence had explicitly reserved the right to ask questions after the Prosecution cross-examination of Witness DM-25. The Bagosora Defence argues that this difference is immaterial.[16]

11. The Chamber did not rely on the absence of a reservation of rights as a reason for denying leave to ask additional questions. Nothing in the decision suggests that this was part of the Chamber's reasoning. Certification would not be justified on this basis. The assessment of whether to allow supplemental cross-examination or re-examination is a fact-specific inquiry involving a detailed evaluation of a variety of factors, including the efficient use of courtroom time, which falls squarely within the Trial Chamber's discretion. As the Defence agrees with the legal standard applied by the Chamber, reference of the present decision to the Appeals Chamber would not materially advance the proceedings.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the request.

Arusha, 22 February 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[15] Although the Chamber did not specifically recite the two-part test in response to the Bagosora application, the oral ruling was very soon after the ruling on the Kabiligi request for additional cross-examination, which did apply the two-part test. T. 21 October 2005 p. 43. Furthermore, the Chamber's use of the term "re-examine" rather than "cross-examine" is immaterial: the Chamber was simply referring to the additional questioning.
[16] Request, paras. 13-14.

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Order for Transfer of Defence Witness Jean Kambanda 27 February 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Jean Kambanda – Transfer of Detained Witness, Mali – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 90 bis (B)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Jean Kambanda, Judgement and Sentence, 4 September 1998 (ICTR-97-23) ; Appeals Chamber, The Prosecutor v. Jean Kambanda, Judgement, 19 October 2000 (ICTR-97-23)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Bagosora "Requête en Extrême Urgence", etc., filed on 15 February 2006;

HEREBY DECIDES the motion.

1. The Bagosora Defence requests an order for the temporary transfer of one its witnesses, Jean Kambanda, to the Detention Unit of the Tribunal in Arusha for the purpose of testifying before the Chamber. Mr. Kambanda is serving a life sentence of this Tribunal in the Republic of Mali.[1] The Bagosora Defence wishes to call Mr. Kambanda some time after 13 March 2006 and before the end of the present trial session on 7 April 2006. In a letter to Defence Counsel, Mr. Kambanda has indicated his willingness to testify on behalf of the Accused.

2. Rule 90 *bis* (B) sets two conditions for such an order: first, that

> "the detained witness is not required for any criminal proceedings in the territory of the requested State during the period the witness is required by the Tribunal";

and second, that the "[t]ransfer … does not extend the period of his detention as foreseen by the requested State". Furthermore, Article 4 (3) of the agreement between the United Nations and the Republic of Mali specifically provides for the temporary transfer of a detained person for the purpose of giving testimony, provided that the detainee is not required for criminal proceedings in Mali.[2]

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[1] *Kambanda*, Judgement (TC), 4 September 1998, p. 28; *Kambanda*, Judgement (AC), 19 October 2000, p. 39.

[2] Agreement Between the Government of the Republic of Mali and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda, 12 February 1999, registered 4 October 2000 (Reg. N°36963), <http://www.ictr.org/ENGLISH/agreements/mali.pdf>.

3. The Chamber has been advised by the Registry that Mr. Kambanda is not required for criminal proceedings in Mali during the proposed period of transfer. The first condition, therefore, is satisfied. As Mr. Kambanda is serving a life sentence, there is no scope for the application of the second condition. On the basis of Mr. Kambanda's expression of willingness to testify on behalf of the Accused, the order is justified.

FOR THE ABOVE REASONS, THE CHAMBER

ORDERS, conditional upon the agreement of the Government of Mali, that Jean Kambanda shall be temporarily transferred to the Detention Unit in Arusha on or about 10 March 2006, and returned no later than 20 April 2006, pursuant to Rule 90 *bis* of the Rules;

REQUESTS the Government of Mali to facilitate the transfer in cooperation with the Registrar and the Tanzanian Government;

INSTRUCTS the Registrar to:

(A) transmit this decision to the Governments of Mali and Tanzania;

(B) ensure the proper conduct of the transfer, including the supervision of the witnesses in the Tribunal's detention facilities;

(C) remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the timing of the temporary detention, and as soon as possible, inform the Trial Chamber of any such change.

Arusha, 27 February 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A)
8 March 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Obligation of Disclosure of the Prosecutor regarding the Defence Witness Statements in his Possession, Initial determination of whether information is exculpatory to be made by the Prosecution, Establishment by the Defence of a prima facie determination of the exculpatory character of the statements requested – Discretion of the Trial Chamber to consider late-filed submissions – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rules 68 (A) and 68 (D)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Defence Motion for Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda, and All Other Documents or Information Pertaining to the Judicial Proceedings in their Respect, 18 September 2001 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Elie Ndayambaje, Decision on the Defence Motion for Disclosure, 25 September 2001 (ICTR-96-8 and ICTR-98-42) ; Appeals Chamber, The Prosecutor v. Georges Rutaganda, Decision on the Urgent Defence Motion for Disclosure and Admisssion of Additionnal Evidence and Scheduling Order, 12 December 2002 (ICTR-96-3) ; Trial Chamber, The Prosecutor v. Jean Mpambara, Decision on the Defence Preliminary Motion Challenging the Amended Indictment, 30 May 2005 (ICTR-2001-65) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses, 27 September 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Kabiligi's Request for Particulars of the Amended Indictment, 27 September 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Reconsideration of Oral Ruling of 1 June 2005 on Evidence Relating to the Crash of the Plane Carrying President Habyarimana, 23 February 2006 (ICTR-99-50)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Tihomir Blaškić, Decision on the production of discovery materials, 27 January 1997 (IT-95-14) ; Trial Chamber, The Prosecutor v. Zejnil Delalić et al., Decision on the Request by the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information, 24 June 1997 (IT-96-21) ; Appeals Chamber, The Prosecutor v. Radoslav Brđanin, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004 (IT-99-36)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Urgent Motion for Immediate Disclosure of Defence Witness Prior Statements" and its "Strictly Confidential Annexes", filed by the Ntabakuze Defence on 4 October 2005; the "Motion to be Relieved of the Obligation to Disclose Witness Statement", filed by the Prosecution on 10 October 2005;

CONSIDERING the Responses to the Prosecution Motion, filed by the Defence for Ntabakuze, Bagosora and Kabiligi on 14, 18 and 20 October 2005, respectively; the Kabiligi *Memorandum* in support of the Ntabakuze Motion, filed on 20 October 2005; the Prosecution "Response to Ntabakuze Defence Motion for Disclosure of Exculpatory Evidence and Motion for Relief from any Disclosure Obligation as to the statement of Witness DM46", filed by the Prosecution on 10 November 2005; and the Response filed by the Ntabakuze Defence on 14 November 2005;

HEREBY DECIDES the motions.

Introduction

1. The Defence for Ntabakuze seeks disclosure of prior statements made by Defence Witnesses DM-30, DM-46, DM-80 and DM-81, on the basis that they are exculpatory under Rule 68 (A) of the Rules of Procedure and Evidence ("the Rules"). The Prosecution denies possessing any statements by Witness DM-30 and DM-81, and objects to the disclosure of the statements of the other witnesses on the grounds that they contain no exculpatory information. The Prosecution also asks to be relieved of any disclosure obligation under the Rule 68 (D), as such disclosure would prejudice ongoing Prosecution investigations into individuals named in the statements.

Deliberations

(i) Procedural Matters

2. The Defence argues that the Prosecution motion of 10 October 2005 is, in substance, a response to the Defence motion which, accordingly, must be deemed to have been filed outside of the time-limits prescribed by the Rules. Even assuming this to be the case, the Trial Chamber has discretion to consider late-filed submissions and, in the present instance, chooses to do so.[1]

(ii) Exculpatory Character of the Statements

3. Rule 68 (A) requires the Prosecution to disclose any material which "may suggest the innocence or mitigate the guilt" of the accused. The initial determination of whether information is exculpatory is to be made by the Prosecution.[2] If the Defence contests this determination, it must present a *prima facie* basis to believe that the material sought is exculpatory.[3] As the Prosecution avers that it does not possess any statements of Witnesses DM-30 and DM-81, the Chamber need only consider the statements of Witnesses DM-46 and DM-80.

4. The Prosecution claims that Witness DM-46's statement contains "only second-hand information", as the witness was outside Rwanda in 1994. Any disclosure obligation which does exist should be suspended in accordance with Rule 68 (D), as the statement names certain individuals, disclosure of which would prejudice ongoing investigations.[4] The exculpatory character of Witness DM-80's statement is also contested. The Prosecution argues that information about the alleged criminal conduct of others could only be exculpatory if it related to"the exact specific acts with which the accused person has been charged".[5] Information concerning crimes committed by other persons is irrelevant to the case against the accused, and could be used for no other reason than to mount a *tu quoque* defence. The Defence responds that the information can be used for a variety of purposes which are directly relevant to the Prosecution case against the accused.[6] As with Witness DM-46, the Prosecution asserts that Witness DM-80's statement names specific individuals, disclosure of which would prejudice ongoing investigations, and that these statement cannot be easily redacted to conceal their identity. The Prosecution asks to be relieved of its disclosure obligation or, in the alternative, to be given the opportunity to redact the statement so as not to disclose certain individuals referred to therein.

5. The only issue now before the Chamber is whether the statements of Witness DM-46 and Witness DM-80 contain material which may be exculpatory, as defined by Rule 68 (A). The Chamber is not here concerned with the admissibility of such information. Nevertheless, whether information "may suggest the innocence or mitigate the guilt of the accused" must depend on an evaluation of whether there is any possibility, in light of the submissions of the parties, that the information could be relevant to the defence of the accused.

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[1] *Bagosora et al*., Decision on Kabiligi Request for Particulars of the Amended Indictment (TC), 27 September 2005, para. 3; *Mpambara*, Decision on the Defence Preliminary Motion Challenging the Amended Indictment (TC), 30 May 2005, para. 1, n.1.

[2] *Bagosora et al*., Decision on Disclosure of Materials Relating to Immigrations Statements of Defence Witnesses (TC), 27 September 2005, para. 9; *Brđanin*, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials (AC), 7 December 2004, para. 9; *Rutaganda*, Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order (AC), 12 December 2002, para. 18; *Blaskić*, Decision on the Production of Discovery Materials (TC), 27 January 1997 ("*Blaskić* Decision"), para. 47.

[3] *Bagosora et al*., Decision on Disclosure of Materials Relating to Immigrations Statements of Defence Witnesses (TC), 27 September 2005, Decision of 27 September 2005, para. 9; *Blaskić* Decision, para. 50; *Delalic et al*., Decision on the Request by the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information (TC), 24 June 1997, para. 13; *Nyiramasuhuko et al*., Decision on the Defence Motion for Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda, and All Other Documents or Information Pertaining to the Judicial Proceedings in their Respect (TC), 18 September 2001, para. 17; *Ndayambaje*, Decision on the Defence Motion for Disclosure (TC), 25 September 2001, para. 5.

[4] Response, 10 November 2005, paras. 9-10.

[5] Motion, 10 October 2005, paras. 4-5.

[6] Response, 14 October 2005, para. 11.

6. The Chamber is of the view, having examined the statements of Witness DM-46 and DM-80, that some of the information may be exculpatory. For example, descriptions of infiltration into areas of government control by RPF soldiers disguised as civilians could provide context or background information which may assist the Chamber in understanding some of the conduct about which the Chamber has heard testimony during the Prosecution case. Information concerning the assassination of President Habyarimana may also assist the Chamber in understanding the background to events in April 1994. The admission of any particular element of evidence will depend on the purpose for which it is tendered; whether the extent of detail is necessary for that purpose; and the Chamber's discretion to avoid needless consumption of time.[7]

7. On the other hand, some of the information in the statements of the two witnesses is not exculpatory. Descriptions of crimes committed by RPF forces against civilians in geographic areas physically distant from combat between the opposing armed forces in 1994 would not suggest the innocence or mitigate the guilt of the accused. The impact of such events on the criminal conduct with which the accused are charged is too remote and indirect. The Defence submissions have not demonstrated that such information would assist in disproving any element of the offences with which the Accused are charged, or how it could sustain a valid excuse or justification for their alleged conduct.[8] The possible uses of such information suggested by the Defence would not, in the Chamber's view, be exculpatory.

(iii) Exemption under Rule 68 (D)

8. Having reviewed the statements, the Chamber is satisfied that they may feasibly be redacted so as to conceal the identity of any targets of ongoing investigations, while still conveying the substance of exculpatory information. This is the appropriate means of both respecting the rights of the Accused and safeguarding the ability of the Prosecution to continue its investigations under Rule 68 (D).

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motions in part;

ORDERS the Prosecution to immediately identify and disclose to the Defence any exculpatory information in the statements of Witness DM-46 and Witness DM-80, in accordance with the guidance in the present decision;

ORDERS the Defence, including the Accused, to keep the statements confidential to itself;

GRANTS the Prosecution request to redact the statements of Witness DM-46 and Witness DM-80 so as to conceal the identities of individuals who are the target of ongoing Prosecution investigations.

Arusha, 8 March 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[7] A recent decision has underlined that questions concerning the assassination of the President Habyarimana warranted only general inquiry, and that extensive examination would not be permitted: *Bizimingu et al*., Reconsideration of Oral Ruling of 1 june 2005 On Evidence Relating to the Crash of the Plane Carrying President Habyarimana (TC), 23 February 2006, para. 11 ("The jurisprudence of the Tribunal shows that questions relating to the responsibility for the shooting down of the plane may be put to a witness provided that this line of questioning does not go into great detail").

[8] The word "disprove" is used here simply to mean that an element of the crime is less likely to be present than not. This should not be understood as meaning that any burden is placed on the Defence.

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Decision on Request for Severance of Three Accused 27 March 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Jean Kambanda – Severance of Accused, Discretion of the Trial Chamber, Factors to be weighed in the exercise of this discretion, Preference for joint trials of individuals accused of acting in concert in the commission of a crime, Intentionally antagonistic defences do not necessarily outweigh the positive effects of a joint trial, No serious prejudice to a co-accused but a normal incident of a joint trial – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rules 82 (B), 85 (A) (i) and 90 (G) (i) ; Statute, art.

International and National Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Emmanuel Bagambiki, Samuel Imanishimwe and Yussuf Munyakazi, Decision on the Defence Motion for the Separation of Crimes and Trials, 1 October 1998 (ICTR-99-46) ; Trial Chamber, The Prosecutor v. Augustin Bizimana et al., Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Juvénal Kajelijeli, 6 July 2000 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Joseph Nzirorera, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, 12 July 2000 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Motions By Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses, 9 September 2003 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision (Appeal of the Trial Chamber I 'Decision on Motions By Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses' of 9 September 2003), 28 October 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Arsène Shalom Ntahobali, Decision on Ntahobali's Motion for Separate Trial, 2 February 2005 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Severance by Accused Kabiligi, 24 March 2005 (ICTR-98-41); Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Bagosora Request for Certification, 22 February 2006 (ICTR-98-41)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Zejnil Delalić, Decision on Motions for Separate Trial Filed by the Accused Zejnil Delalić and the Accused Zdravko Mucić, 25 September 1996 (IT-96-21-T) ; Trial Chamber, The Prosecutor v. Kovacević, Decision on Motion for Joinder of Acuused and Concurrent Presentation of Evidence, 14 May 1998 (IT-97-24) ; Trial Chamber, The Prosecutor v. Blagoje Simić et al., Decision on Defence Motion to Sever Defendants and Counts, 15 March 1999 (IT-95-9) ; Trial Chamber, The Prosecutor v. Radoslav Brđanin and Momir Talić, Decision on Motions By Momir Talić for a Separate Trial and for Leave to File a Reply, 9 March 2000 (IT-99-36) ; Appeals Chamber, The Prosecutor v. Radoslav Brđanin, Decision on Request to Appeal, 16 May 2000 (IT-99-36)

Canada : Court of Appeal, Ontario, Canada, R. v. Torbiak and Gillis (1978) 40 CCC (2d) 193 ; Supreme Court of Canada, R. v. Crawford, 30 March 1995, [1995] 1 S.C.R. 858 ; Supreme Court of Canada, R. v. Mapara, 27 April 2005, [2005] 1 S.C.R. 358, 2005 SCC 23

United States of America : United States Court of Appeals, First Circuit, U.S. v. Talavera, 14 January 1982, 668 F.2d 625 ; Supreme Court of the United States of America, Zafiro v. United States, 25 January 1993, 506 U.S. 534

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Extremely Urgent Joint Motion for Severance", filed by the Defences of Kabiligi, Nsengiyumva and Ntabakuze on 17 March 2006;

CONSIDERING the Prosecution Response, filed on 20 March 2006; the Bagosora Response, filed on 21 March 2006; the Joint Reply to the Prosecution Response, filed on 21 March 2006; the Joint Reply to the Bagosora Response, filed on 21 March 2006; and the oral submissions on 22 March 2006;

HEREBY GIVES WRITTEN REASONS for having denied the motion.

Introduction

1. The Accused Kabiligi, Nsengiyumva and Ntabakuze argue that they will be prejudiced by the testimony of two witnesses whom the Bagosora Defence wishes to call, Jean Kambanda and Marcel Gatsinzi.[1] This prejudice is said to justify their severance from the present trial, pursuant to Rule 82 (B) of the Rules of Procedure and Evidence ("the Rules").[2] The motion does not ask for a new trial; rather, the remedy requested is that the evidence tendered by the Bagosora Defence after the moment of severance would not form part of the case against the three Accused. Suspension of the testimony of Jean Kambanda is requested pending resolution of the motion.

2. On 22 March 2006, the Chamber denied the motion orally.[3] These are the reasons for that decision.

Deliberations

3. The present motion is brought under Rule 82 (B):

> The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

Whether to order a separate trial of an accused is within the discretion of the Trial Chamber.[4] The nature of the possible prejudice to an accused, the advantages of a joint trial, and the mechanisms for mitigating the claimed prejudice by means other than severance, must all be weighed in the exercise of this discretion.[5] The preference for joint trials of individuals accused of acting in concert in the

[1] Although the motion was filed confidentially, all the responses and replies have been filed publicly. The Chamber does not see any need for the present decision to be confidential.
[2] The trials of the four accused were joined in 2000, *see Bagosora et al*., Decision on the Prosecutor's Motion for Joinder (TC), 29 June 2000.
[3] T. 22 March 2006 p. 8.
[4] *Bagosora et al*., Decision (AC), 28 October 2003 p. 5 ("[U]nder Rule 82 (B) the Trial Chamber has discretion to determine whether it is necessary to order separate trials to avoid a conflict of interest that might cause prejudice, or to protect the interests of justice"); *Brdanin and Talic*, Decision on Request to Appeal (AC), 16 May 2000 ("[S]ub-Rule 82 (B) is permissive rather than obligatory, thus leaving to the relevant Trial Chamber the power to determine the matter of separate trials in the circumstances of the case before it"); *Nyiramasuhuko et al*., Decision on Ntahobali's Motion for Separate Trial (TC), 2 February 2005, para. 32.
[5] *Bagosora et al*., Decision on Request for Severance by Accused Kabiligi (TC), 24 March 2005, para. 13 (with references).

commission of a crime is not based merely on administrative efficiency. A joint trial relieves the hardship that would otherwise be imposed on witnesses, whose repeated attendance might not be secured; enhances fairness as between the accused by ensuring a uniform presentation of evidence and procedure against all; and minimizes the possibility of inconsistencies in treatment of evidence, sentencing, or other matters, that could arise from separate trials.[6] The burden of establishing serious prejudice rests with the moving party.[7]

4. The Defence argues that the Bagosora witnesses will

> "introduce evidence which is Prosecution-oriented and highly prejudicial to the defence cases of all four defendants".[8]

Given the allegations in Kambanda's plea agreement against, amongst others, the Rwandan Armed Forces, the potential prejudice against the Accused is said to be "obvious".[9] Furthermore, the testimony will include evidence "which does not currently form part of the Prosecution evidence against the defendants". No procedural mechanism is available, according to the motion, which can adequately mitigate this prejudice other than severance.[10]

5. The fact that one co-accused may adduce evidence which is said to be disadvantageous to another co-accused does not, in and of itself, justify severance. Even intentionally antagonistic defences do not necessarily outweigh the positive effects of a joint trial. In rejecting severance where two co-accused sought to blame one another for criminal acts with which they were both charged, an ICTY Trial Chamber has held:

> Nor does the Trial Chamber see any possibility of serious prejudice resulting from the prospect that Brdanin may give evidence which incriminates Talic or that Talic will be unable, without fear of contradiction, to blame Brdanin and others for the orders which the prosecution may establish that he followed. A joint trial does not require a joint defence, and necessarily envisages the case where each accused may seek to blame the other. The Trial Chamber will be very alive to the "personal interest" which each accused has in such a case. Any prejudice which may flow to either accused from the loss of the "right" asserted by Talic here to be tried without incriminating evidence being given against him by his co-accused is not ordinarily the type of serious prejudice to which [Rule 82 (B)] is directed. The Trial Chamber recognises that there could possibly exist a case in which the circumstances of the conflict between the two accused

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[6] *Bagosora et al*., Decision on Request for Severance by Accused Kabiligi (TC), 24 March, 2005, para. 13; *Bagosora et al*., Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses (TC), 9 September 2003, para. 22; *Delalic et al*., Decision on Motions for Separate Trial Filed by the Accused Zejnil Delalic and the Accused Zdravko Mucic (TC), 25 September 1996, para. 7; *Brdanin and Talic*, Decision on Motions by Momir Talic for a Separate Trial and for Leave to File a Reply (TC), 9 March 2000, para. 31; *Simic et al*., Decision on Defence Motion to Sever Defendants and Counts (TC), 15 March 1999; *R. v. Lake*, 68 Cr.App.R. 172, CA (England), p. 175: "It has been accepted for a very long time in English practice that there are powerful public reasons for why joint offences should be tried jointly. The importance is not merely one of saving time and money. It also affects the desirability that the same verdict and the same treatments shall be returned against all those concerned in the same offence. If joint offences were widely to be tried as separate offences, all sorts of inconsistencies might arise"); *R. v. Mapara* (2003) 2003 BCC LEXIS 2148, pp. 12-13 (CA) (British Columbia, Canada); *R. v. Torbiak and Gillis* (1978) 40 CCC (2d) 193, p. 199 (CA) (Ontario, Canada); *Zafiro v. United States*, 506 U.S. 534, p. 538 (Supreme Court): ("Joint trials 'play a vital role in the criminal justice system.' They promote efficiency and 'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts'") (citations omitted).

[7] *Nyiramasuhuko et al*., Decision on Ntahobali's Motion for Separate Trial (TC), 2 February 2005, para. 33; *Ngeze*, Decision on the Defence Request for Separate Trials (TC), 12 July 2000, p. 5; *Bagambiki, Imanishimwe and Munyakazi*, Decision on the Defence Motion for the Separation of Crimes and Trials (TC), 1 October 1998, p. 6.

[8] Motion, paras. 17, 22.

[9] Motion, para. 18; Reply to Prosecution, para. 10.

[10] Motion, paras. 17-23; Reply to Prosecution, para. 16.

are such as to render unfair a joint trial against one of them, but the circumstances would have to be extraordinary.[11]

Requests to sever trials on the basis of hostile or inconsistent defences have been repeatedly rejected by Chambers of the international tribunals, as in national jurisdictions.[12]

6. The applicants submit, however, that the present situation is more prejudicial than the intentional introduction of adverse evidence by a co-accused. Having failed in its attempt to call Kambanda as its own witness, the Prosecution will now have the opportunity to obtain "Prosecution-oriented" evidence by an indirect route. The cross-examination will give it a chance to "fill the gaps" in its case and, effectively, to reopen its case. The three co-Accused will have no choice but to call "a litany of additional witnesses" to rebut the prejudicial evidence of these witnesses.[13]

7. The suggestion that the Prosecution case can be re-opened through cross-examination is unfounded. Rule 90 (G) (i) constrains the scope of cross-examination to three areas: the subject-matter of the examination-in-chief; matters affecting credibility; and,

> "where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of the case".

This last category must read in light of Rule 85 (A) (i), which prescribes that

> "the trial shall be presented in the following sequence: (i) Evidence of the prosecution; (ii) Evidence for the defence; (iii) Prosecution evidence in rebuttal; (iv) Defence evidence in rejoinder …"

This sequence implies that the Defence may reasonably infer that matters on which no evidence was led during the Prosecution case do not form part of that case. Accordingly, the "case for the cross-examining party" must now be understood as defined and limited by the evidence presented during the Prosecution case.[14] The Prosecution may adduce evidence during its cross-examination which

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[11] *Brdanin and Talic*, Decision on Motions by Momir Talic for Separate Trial and for Leave to File a Reply (TC), 9 March 2000, para. 29 (affirmed by *Brdanin and Talic*, Decision on Request to Appeal (AC), 16 May 2000.

[12] *Nyiramasuhuko et al*., Decision on Ntahobali's Motion for Separate Trial (TC), 2 February 2005, para. 39 (recognizing that any prejudice from mutually antagonistic defences could be avoided in a joint trial through cross-examination and, where justified, by permitting rebuttal evidence); *Simic et al*., Decision on Defence Motion to Sever Defendants and Counts (TC), 15 March 1999 ("a Trial Chamber of the International Tribunal, composed of professional Judges, is able to assess the evidence in a case involving conflicting defences in a fair and just manner, without prejudice to any of the accused, and that such a case is best tried by the same Trial Chamber rather than a number of different Chambers … the possibility of such 'mutually antagonistic defences' does not constitute a conflict of interests capable of causing serious prejudice"). See also *Zafiro v. United States*, 506 U.S. 534, pp. 538-539 (federal rule of procedure authorizing severance "does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion"); *U.S. v. Talavera*, 668 F.2d 625, p. 630 (1st Cir. 1982) ("'antagonistic defences do not per se require severance, even if the defendants are hostile or attempt to cast the blame on each other.' Severance is required only where the conflict is so prejudicial and the defences are so irreconcilable that the trier of fact will unjustifiably infer that this conflict alone demonstrates that both are guilty") (citations omitted); *R. v. Crawford*, [1995] 1 S.C.R. 858, pp. 880-881 (Canada) ("There exist, however, strong policy reasons for accused persons charged with offences arising out of the same event or series of events to be tried jointly. The policy reasons apply with equal or greater force when each accused blames the other or others, a situation which is graphically labelled a "cut-throat defence". Separate trials in these situations create a risk of inconsistent verdicts … Although the trial judge has a discretion to order separate trials, that discretion must be exercised on the basis of principles of law which include the instruction that severance is not to be ordered unless it is established that a joint trial will work an injustice to the accused. The mere fact that a co-accused is waging a 'cut-throat' defence is not in itself sufficient"); *R. v. Cairns, Zaidi and Chaudhary* [2003] 1 Cr.App.R. 38, para. 52 CA (England) ("Of course the trial court has a discretion to be exercised in the interests of justice. But the fact that one defendant is likely to give evidence adverse to a co-defendant, after that co-defendant has given evidence, will not of itself normally require separate trials. It is, after all … a common enough experience of the courts").

[13] Reply to Prosecution, paras. 16-18.

[14] This reading of Rule 90 (G) (i) is reinforced by Rule 90 (G) (ii), which requires the cross-examining party, when it is adducing evidence relevant to its case, to "put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness". In other words, the evidence which is being adduced

corroborates or reinforces evidence presented during the presentation of its case, but may not, at this stage, venture into new areas.

8. The Chamber does not see that there is any basis to distinguish between the jurisprudence concerning mutually antagonistic defences of co-accused, and the present case where the allegedly prejudicial evidence rather appears to arise from a disagreement as to strategy. In either case, the issue is whether the evidence might cause "serious prejudice" to the co-accused, which can only be avoided by severance of trial. No such "serious prejudice" has been established. The fact that more evidence will be heard than would be the case if the three co-Accused had absolute control over the presentation of the defence does not constitute "serious prejudice", as is amply demonstrated by the jurisprudence concerning antagonistic defences. This is a normal incident of a joint trial which, in other respects, may be beneficial to the three co-Accused or to the administration of justice. The proposed testimony of Jean Kambanda is not even alleged to concern any of the co-Accused individually. Indeed, the motion emphasizes that the testimony is prejudicial to all four accused, demonstrating that there is a disagreement between the three co-Accused and the Bagosora Defence, rather than a conflict of interest.[15] If evidence is adduced which, in the opinion of the co-Accused, is prejudicial to their interest, then they will have the opportunity, subject to the Chamber's control, to cross-examine the witness on any matter raised by the Prosecution and, where legally justified, to call additional rebuttal evidence.[16] In short, the co-Accused have not demonstrated that there is any specific aspect of the witnesses' testimony which is particularly or unusually prejudicial so as to justify severance.[17]

9. The timing of the present motion also weighs against severance. While the appearance of a scheduled witness is never certain, the Bagosora Defence gave notice on 13 December 2005 that it had a reasonable basis to believe that the witness would testify, by including his name on a list of persons which it "intended to call during the next session". Although the three-month delay since that time does not, of itself, warrant dismissing the motion, the advanced stage of proceedings, combined with this delay, is a factor against granting severance. More than eighty Defence witnesses have been called so far. Only the two named in the present motion have given cause for a motion for severance. In these circumstances, the interests of ensuring uniform presentation of evidence and procedure strongly favour maintaining the joint trial. Severing individual segments of trials because portions, viewed separately, might cause a disadvantage to the position of some co-accused, would undermine the very purpose of joint trials. The present claim of prejudice must be viewed in the context of the entire trial, from which the co-Accused have accrued substantial benefit as a result of being able to rely on the evidence presented by one another. At this advanced stage of proceedings, and in the absence of any particularized showing of prejudice, granting severance even in the limited form requested by the co-Accused, is unwarranted.

10. The decisions in *Kajelijeli* and in *Kovacević*, mentioned by the Defence, concern very different circumstances.[18] Severance in the former case was granted before start of trial because "most of the

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must be relevant to evidence which, in the case of a party which is conducting a cross-examination of a witness after the presentation of its case, has already been presented.

[15] Motion, para. 17 (the evidence is "highly prejudicial to the defence cases of all four defendants"); Reply to Prosecution, para. 16.

[16] *Bagosora et al*., Decision on Bagosora Request for Certification (TC), 22 February 2006, para. 9 (holding that an accused is entitled to ask supplemental questions after the Prosecution cross-examination where "(i) a new issue has arisen issue has arisen during the Prosecution cross-examination, which (ii) is adverse to the Accused who wishes to pose additional questions"); *Nyiramasuhuko et al*., Decision on Ntahobali's Motion for Separate Trial (TC), 2 February 2005, para. 39 ("several remedies … are always available should any prejudice arise within the course of the trial. In particular, the Defence has a full opportunity to cross-examine the witnesses called by other co-accused. And, where necessary and the legal requirements have been met, it may be open to a party to apply for leave to call additional evidence in rebuttal").

[17] The fact that Jean Kambanda formerly appeared on the Prosecution witness list is not unique. Other Defence witnesses, including those called by the co-Accused, also formerly appeared on that list. Similar situations have arisen in other trials without leading to severance, see e.g. *Nyiramasuhuko et al*., Decision on Ntahobali's Motion for Separate Trial (TC), 2 February 2005, para. 6.

[18] Motion, para. 11; T. 22 March 2006 p. 6.

allegations in the indictment" did not relate to the accused. He would thus endure a lengthy trial concerning many matters which would be of no concern to him, impairing his right to be tried without undue delay.[19] The *Kovacević* decision concerned a motion for joinder before the commencement of trial, not near the end of the trial, as here. Rule 82 (B) was mentioned tangentially, but the balance of prejudice and benefits of a joint trial were apparently quite different in that case.[20]

11. The Defence has requested that the testimony of Jean Kambanda be suspended pending decision on the joint motion. As he has not yet testified, this request is moot.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 27 March 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[19] *Bizimana et al*., Decision on Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed By the Accused Juvenal Kajelijeli, (TC), 6 July 2000, paras, 28, 35. Furthermore, the disproportion of allegations between the accused and his co-accused might in that case unfairly exaggerate his culpability. This Chamber has already rejected severance on the basis of such arguments. *Bagosora et al*., Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses (TC), 9 September 2003, paras. 30-31 ("As to the claim that Mr. Ntabakuze is a minor figure unfairly prejudiced by association with figures of much greater responsibility, the Chamber notes that this assertion was contested by the Prosecution. In the absence of a clear showing of a severe disproportion of responsibility, the Chamber can only make that determination upon a presentation of the facts at trial. Unlike a trial before a jury, there is little danger of Mr. Ntabakuze being unfairly tarnished by guilt by association before a panel of judges … The Chamber considers the degree of responsibility of the Accused and the quantum of evidence implicating him to be contested issues that can only be evaluated in the course of the trial. The Defence has made no clear showing that only a tiny percentage of the testimony in this case concerns Mr. Ntabakuze. The Chamber eschews a minute analysis of the expected testimony of Prosecution witnesses but notes that the pre-trial brief does identify many witnesses as providing evidence against Mr. Ntabakuze, and that there is testimony implicating him in a conspiracy with his co-Accused").

[20] *Kovacevic, Kvocka, Radic, Zigic*, Decision on Motion for Joinder of Accused and Concurrent Presentation of Evidence (TC), 14 May 1998. In that case, the Accused was ready to proceed to trial immediately, whereas joinder with the other co-accused would have delayed the start of trial, impairing his right to be tried without undue delay. None of these factors are present here.

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Decision on Request to the Kingdom of Belgium for Assistance Pursuant to Article 28 of the Statute
21 April 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Cooperation of the States, Belgium, Interviews with four UNAMIR officers, Meeting with a person said to be in Belgian custody – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 28

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request to the Kingdom of The Netherlands for Cooperation and Assistance, 7 February 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request to the Republic of Bangladesh Pursuant to Article 28 of the Statute, 31 October 2005 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Urgent Motion Requesting an Order Directed at the Kingdom of Belgium", etc., filed by the Nsengiyumva Defence on 7 April 2006;

CONSIDERING the Registrar's submissions, filed on 10 April 2006;

HEREBY DECIDES the request.

1. The Nsengiyumva Defence asks the Chamber to make a request to the Kingdom of Belgium, under Article 28 of the Tribunal's Statute, to facilitate interviews with four UNAMIR officers who were stationed in Gisenyi *Préfecture* in 1994. These four individuals, Commander Marc Biot, Captain Luc Geysels, Major Jacques De Koninck, and Warrant Officer Marc Beyens, are said to have information concerning the Butotori training facility – in particular, whether it was used to train *Interahamwe*, as alleged by Prosecution witnesses. The Nsengiyumva Defence also requests permission to meet with a certain Alphonse Higaniro, a person said to be in Belgian custody who can contradict the testimony of Witness XBH that the Accused met with Colonel Bagosora and other persons in Butare before April 1994 to plan a genocide against the Tutsi.[1]

[1] Motion, paras. 19-20.

2. Article 28 of the Statute imposes an obligation on States to

> "cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law".

A request to a Chamber to make an order under Article 28 must set forth the nature of the information sought; its relevance to the trial; and the efforts that have been made to obtain it. The type of assistance sought should also be defined with particularity.[2]

3. The motion adequately articulates the nature of the information sought and its relevance to the proceedings against the Accused. The four UNAMIR officers were likely in a position to observe events in Gisenyi *préfecture* which are relevant to the present trial.[3] As to Mr. Higaniro, the Defence appears to have reason to believe that he has precise information which will contradict the incriminating testimony of Prosecution Witness XBH. Based on these submissions, the Chamber is satisfied that the information sought is relevant to the present trial.

4. The Defence has demonstrated that it has made reasonable efforts to obtain the information without recourse to Article 28. The Registrar explains that the Belgian authorities do not object to the content of the request, but that Belgian law requires the issuance of a judicial order as a prerequisite to any cooperation.[4] Under these circumstances, the Chamber finds that the second condition under Article 28 is satisfied.

FOR THE ABOVE REASONS, THE CHAMBER

RESPECTFULLY REQUESTS the Kingdom of Belgium to provide any relevant assistance in facilitating meetings between the Defence for Nsengiyumva and Commander Marc Biot, Captain Luc Geysels, Major Jacques De Koninck, Warrant Officer Marc Beyens and Mr. Alphonse Higaniro;

DIRECTS the Registry to transmit this decision to the relevant authorities of the Kingdom of Belgium.

Arusha, 21 April 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[2] *Bagosora et al*., Decision on Request to the Kingdom of The Netherlands for Cooperation and Assistance (TC), 7 February 2005, para. 5; *Bagosora et al*., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4.

[3] Several requests to interview former UNAMIR officers have been the subject of previous Article 28 requests: *Bagosora et al*., Decision on Request to the Republic of Bangladesh Pursuant to Article 28 of the Statute (TC), 31 October 2005; *Bagosora et al*., Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute (TC); *Bagosora et al*., Decision on Request to the Kingdom of The Netherlands for Cooperation and Assistance (TC), 7 February 2005, para. 5; *Bagosora et al*., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4.

[4] Submissions, para. 10.

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Decision on Request for Extension of Time to Respond 2 May 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Aloys Ntabakuze – Extension of Time – Motion denied

International Case cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Exclusion of Testimony Outside the Scope of the Indictment, 27 September 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Prosecution "Urgent Request for Extension of Time", etc., filed on 4 April 2006;

CONSIDERING the Response filed by the Ntabakuze Defence on 10 April 2006;

HEREBY DECIDES the motion.

1. On 28 March 2006, the Ntabakuze Defence filed a motion for exclusion of evidence as falling outside the scope of the Indictment.[1] The Prosecution asks for an extension to respond to the motion until 15 June 2006, or five days after all of the Defence teams have filed such a motion, whichever is later. The Prosecution argues that given the length of motion, five days is too short a period to prepare an adequate response. Furthermore, since there will be substantial overlap in the response to each of the motions, judicial economy is served by a single, omnibus response to all four motions. Finally, granting the request will not prejudice the Defence, which will not commence the next trial segment until mid-May.

2. As is evident from the arguments presented in the Ntabakuze motion, and the Chamber's own recent decision on this question, the issues to be resolved by the Chamber are highly fact-specific.[2] In particular, the Chamber will be required to analyze, with the assistance of the parties' submissions, the relationship of the evidence in question to the wording of the Indictment. Although some of the evidence identified in the motion may also be relevant to other Accused, most of it is pertinent only to the Accused Ntabakuze. Under these circumstances, the Chamber sees little justification for extending the deadline so as to permit an omnibus response.

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[1] Ntabakuze Defence Motion for the Exclusion of Evidence of Allegations Falling Outside the Scope of the Indictment (TC), 28 March 2006.

[2] *Bagosora et al*., Decision on Exclusion of Testimony Outside the Scope of the Indictment (TC), 27 September 2006. This is not to say, of course, that important issues of legal principle are not also at stake.

3. As of 8 May, the Prosecution will have had forty-one days to respond to the motion. The Chamber considers this sufficient time and shall, in its discretion, set this as the deadline for submission of a response.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion in part;

DECLARES that the Response to the Ntabakuze Motion mentioned above shall be filed no later than 5 May 2006.

Arusha, 2 May 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Request for Extension of Time to Respond 11 May 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Aloys Ntabakuze – Extension of Time, Response to a Defence motion for the exclusion of evidence as falling outside the scope of the Indictment of the Accused – Motion granted

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Prosecution "Urgent Request for Extension of Time", etc., filed on 10 May 2006;

HEREBY DECIDES the motion.

1. On 9 May 2006, the Nsengiyumva Defence filed a 30-page motion for the exclusion of evidence as falling outside the scope of the Indictment of the Accused.[1] The Prosecution requests additional time to respond, citing the detailed nature of the factual, procedural and legal issues involved.

2. In light of the scope and complexity of the issues raised by the Nsenigyumva motion, the Chamber is convinced that the Prosecution needs more than the five-day statutory time-period to prepare a response. The approach of the next trial session and the need for clarity in respect of the issues raised by the motion must also, however, be taken into consideration. Accordingly, the Prosecution will have until 19 May 2006 to file a response, being ten full days after the Nsengiyumva motion was filed.

[1] Anatole Nsengiyumva Motion, etc., 9 May 2006.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part;

DECLARES that the Response to the Nsengiyumva Motion mentioned above shall be filed no later than 19 May 2006.

Arusha, 11 May 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Motion to Preclude a Joint Response 15 May 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – No rules regarding the Form of the responses to motions – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 73 (E)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Extension of Time to Respond, 2 May 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Kabiligi Defence "Motion to Preclude the Prosecution from Filing a Joint Response to the Accused's Separate Motions for Exclusion of Evidence of Facts not Included in the Indictment", filed on 3 May 2006;

HEREBY DECIDES the motion.

1. The Kabiligi Defence requests that the Prosecution be precluded from filing a joint response to pending and expected Defence motions for exclusion of evidence falling outside the scope of the Indictments.[1] The motion presumes that the Prosecution has sought, or may in the future seek, to

[1] Such motions have already been filed by the defence teams for Kabiligi, Ntabakuze and Nsengiyumva: Kabiligi Defence Motion on the Prejudice Caused by the Testimony of Prosecution Witnesses on Facts not Included in the Amended Indictment, 5 April 2006; Ntabakuze Defence Motion for the Exclusion of Evidence of Allegations Falling Outside the Scope

extend the deadline for filing responses to all of the Defence motions on the basis that an omnibus response will avoid duplication of effort.

2. The Rules of Procedure and Evidence ("the Rules") do not prescribe the form in which responses to motions may be filed. Any response to a motion is, however, required to be filed within five days of the filing of the original motion, pursuant to Rule 73 (E). The Prosecution is entitled to compose responses to motions in any form which it considers appropriate, but must do so within the time period prescribed by the Rules unless otherwise authorized.[2] If a party objects, for whatever reason, to an extension of time requested by another party then the appropriate means of doing so is to file a response to a motion for extension of time.

3. No such extension of time has yet been requested in respect of the Kabiligi motion. The Prosecution did file a request for the extension of time to respond to the motion filed by the Ntabakuze Defence, and did argue in that motion that an omnibus motion would serve judicial economy.[3] But no request to extend the time to respond to the Kabiligi motion was ever made. Nevertheless, in the interests of clarity, the Chamber hereby sets 16 May 2006 as the deadline for the Prosecution to respond to the Kabiligi motion. The Chamber considers this sufficient to prepare a response, being more than forty days after the motion was filed.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion;

DECLARES that the Prosecution shall have until 16 May 2006 to file a response to the Kabiligi Defence Motion on the Prejudice Caused by the Testimony of Prosecution Witnesses on Facts not Included in the Amended Indictment, filed on 5 April 2006.

Arusha, 15 May 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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of the Indictment, 28 March 2006; Nsengiyumva Defence Motion for the Exclusion of Evidence of Allegations Falling Outside the Indictment Pursuant to Articles 17 and 18 of the Statute of the International Tribunal and Rules 47, 50, 53 *bis* and 62 of the Rules of Procedure and Evidence, 9 May 2006. The Bagosora Defence has indicated its intention to file a similar motion. T. 7 April 2006 p. 20.

[2] The Chamber may, however, in its discretion, consider responses filed after the deadline.

[3] Prosecution Urgent Request for Extension of Time to Respond (TC), 4 April 2006. The deadline to respond to that motion was extended until 8 May 2006, although the Chamber rejected the request to delay filing a response until after all the Defence teams had filed their motions: *Bagosora et al*., Decision on Request for Extension of Time to Respond (TC), 2 May 2006.

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Decision on Prosecution Request for Extension of Time to Respond to Bagosora Motion
16 May 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Extension of time, Response to a Defence motion for the exclusion of evidence falling outside the scope of the Indictment of the Accused, Volume and complexity of the issues raised by the Bagosora motion – Motion partially granted

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Prosecution "Urgent Request for Extension of Time", etc., filed on 15 May 2006;

HEREBY DECIDES the motion.

1. On 15 May 2006, the Bagosora Defence filed a motion for the exclusion of evidence falling outside the scope of the Indictment of the Accused.[1] The motion is thirty-six pages in length, including a detailed annex. The Prosecution requests additional time to respond, citing the scope of the factual, procedural and legal issues involved.

2. In light of the volume and complexity of the issues raised by the Bagosora motion, the Chamber is convinced that the Prosecution needs more than the five-day statutory time-period to prepare a response. The approach of the next trial session and the need for clarity in respect of the issues raised by the motion must also, however, be taken weighed in setting an appropriate deadline for the submission of a response. Accordingly, the Prosecution will have until 2 June 2006 to file a response, being eighteen full days after the filing of the Bagosora motion.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part;

DECLARES that any response to the Bagosora Motion mentioned above shall be filed no later than 31 May 2006.

Arusha, 16 May 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[1] Requête de la Défense de Bagosora en Exclusion de Preuve des Allegations ne Figurant pas dans l'Acte d'Accusation, 15 May 2006.

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Decision on Ntabakuze Defence Motion Requesting Extension of Time to File a Reply
19 May 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Extension of time, Response to a Defence motion for the exclusion of evidence falling outside the scope of the Indictment of the Accused, No mention of replies in the Rules – Motion denied

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Ntabakuze Defence "Ancillary Motion for Extension of Time", filed on 18 May 2006;

HEREBY DECIDES the motion.

1. The Ntabakuze Defence has filed a motion for exclusion of evidence falling outside the scope of the Indictment of the Accused.[1] The Prosecution has filed its Response[2] and an annex thereto.[3] On 15 May 2006, the Ntabakuze Defence replied to the Prosecution Response and its annex, indicating that a further Ntabakuze reply would be forthcoming on 22 May 2006.[4] The Ntabakuze Defence now notifies the Chamber that, due to logistical complications, the reply will require four days longer than originally anticipated. In the alternative, if the Chamber believes that the Rules of Procedure and Evidence ("the Rules") prescribe a deadline for filing a reply, the Ntabakuze Defence requests an extension until 26 May 2006 to file its reply.

2. The Rules make no mention of replies and their consideration by the Chamber is a matter of discretion. There is no basis to request extension of a deadline which does not exist. However, the Chamber has taken cognizance of the situation described in the Ntabakuze notification.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 19 May 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[1] Ntabakuze Defence motion for the Exclusion of Evidence of Allegations Falling Outside the Scope of the Indictment, 28 March 2006.
[2] Prosecutor's Response to Ntabakuze Defence Motion, etc., 8 May 2006.
[3] Part III Annex to Prosecutor's Response, etc., 12 May 2006.
[4] Ntabakuze Reply to Prosecutor's Response, etc., 15 May 2006.

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Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements 22 May 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Interlocutory appeal of a decision, Fair and expeditious conduct of the proceedings, No blanket obligation for the Prosecution to disclose documents pertinent to its cross-examination of Defence witnesses, Material advance of the proceedings, Use of Defence witness statements to immigration authorities, Information affecting the credibility of Defence evidence – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rules 66 (B), 68 (A) and 73 (B)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible', 18 March 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Certification Of Appeal Concerning Access To Protected Defence Witness Information, 29 July 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 February 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A), 8 March 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Request to Certify for Appeal 'Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses', etc., filed by the Kabiligi Defence on 4 October 2005; and the "Motion to Request for Certification to Appeal the Trial Chamber's Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses", filed by the Nsengiyumva Defence on 11 October 2005;

CONSIDERING the Prosecution Response to the Kabiligi request, filed on 11 October 2005; the Reply thereto, filed on 14 October 2005; the Prosecution Further Response, filed on 17 October 2005; and the Reply to the Prosecution's Further Response, filed on 19 October 2005;

HEREBY DECIDES the requests.

Introduction

1. On 27 September 2005, the Chamber denied a request by the Nsengiyumva Defence for an order requiring the Prosecution to disclose any documents or other materials in its possession concerning the immigration status of Defence witnesses.[1] The Prosecution had previously acknowledged that it had obtained statements made by Defence witnesses to national or inter-governmental immigration authorities, and had asked questions to Defence witnesses based on those previous statements. The Chamber rejected the Defence argument that either Rule 66 (B) or Rule 68 of the Rules of Procedure and Evidence ("the Rules") generated an obligation to disclose any such materials. The Defence requests leave to appeal the Decision.

Deliberations

2. Leave to file an interlocutory appeal of a decision "may" be granted under Rule 73 (B) where it significantly affects the "fair and expeditious conduct of proceedings or the outcome of the trial" and where "immediate resolution may materially advance the proceedings".

(i) Fair and Expeditious Proceedings

3. The Defence argues that Defence witness statements in the possession of the Prosecution must be disclosed under Rule 66 (B), which provides that the Prosecution must permit inspection of documents "which are material to the preparation of the defence". The Chamber interpreted this provision to require the Prosecution to make available any document material to the Prosecution case-in-chief. The Defence argues, however, that the provision should encompass any document which could be used to challenge the credibility of Defence witnesses.[2] The failure to require the Prosecution to make any prior statements of Defence witnesses available well in advance of cross-examination is said to deprive the Defence of the opportunity to make a fully informed assessment of the credibility of its witnesses.[3] Disclosure would assist the Defence in deciding whether to withdraw its witness or, alternatively, to more fully prepare the witness's testimony so as to clarify and explain any apparent contradictions with a prior statement.[4] Allowing the Prosecution to pose questions about statements which are disclosed no earlier than the start of the witness's cross-examination interferes with the fair trial rights of the Accused.

4. The category of documents covered by the Decision is much broader than witness statements. The original motion requested not only statements of Defence witnesses, but also any

> "material, documents, correspondence and any papers in [the Prosecution's] possession, control and/or custody that relate to immigration status".[5]

In rejecting this request, the Chamber ruled that

> "Rule 66 (B) cannot be interpreted as laying down a blanket obligation for the Prosecution to disclose documents pertinent to its cross-examination of Defence witnesses".

5. The Chamber agrees that the Decision, as it relates to the broad category of documents potentially covered by Rule 66 (B), does affect the "fair and expeditious conduct of the proceedings". Certification may be appropriate where, in particular, "broad categories of evidence" are affected by a

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[1] *Bagosora et al*., Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses (TC), 27 September 2005 ("the Decision").
[2] *Bagosora et al*., Anatole Nsengiyumva's Reply, etc., 1 June 2005, para. 27 ("It has also been shown that the Prosecution must disclose all relevant material in its possession intended for use or actually used at trial. Materials intended to assist impeachment or test the credibility should also be disclosed in accordance with the jurisprudence in *Delalic*").
[3] Kabiligi Request, paras. 22-23.
[4] *Id*. para. 15.
[5] *Bagosora et al*., Anatole Nsengiyumva's Extremely Urgent Motion Requesting Disclosure, etc., 16 May 2005, para. 22.

decision.[6] The obligation advocated by the Defence could, in practice, require the Prosecution to disclose any and all documents which may be relevant to its cross-examination of Defence witnesses. Such an obligation, if it exists, would constitute a significant expansion of the Prosecution's duty to disclose which, in and of itself, could impact on the fair and expeditious conduct of proceedings. Failure to disclose a document which the Prosecution might wish to use during its cross-examination could, presumably, lead to an adjournment. Furthermore, the modalities for examining witnesses, including the practice of permitting the cross-examining party to disclose documents as late as the beginning of the cross-examination, would be changed. Given the range of documents involved, and its consequences for the conduct of the trial, the Chamber agrees that the first condition for granting certification is satisfied.

(ii) Materially Advance the Proceedings

6. The interpretation of Rule 66 (B) is a determination of law which may have significant practical consequences. The Defence has articulated its grounds for challenging the correctness of the decision, and the Chamber cannot say that the appeal has no prospect of success.[7] The use of Defence witness statements to immigration authorities has not thus far had an obviously significant impact on Prosecution cross-examinations. The Chamber nonetheless believes, in light of the potential impact of its decision, that immediate resolution of the interpretation of Rule 66 (B)

> "will avoid the serious consequences that could result from proceeding throughout the remainder of the Defence case on an incorrect legal footing."[8]

7. Certification of the ruling in respect of Rule 68 (A) would not, however, materially advance the proceedings. The decision applied the well-established rule that the Defence must suggest a *prima facie* basis to believe that the material requested is exculpatory.[9] The Chamber found, on the basis of the submissions before it, that no such showing had been made. The Kabiligi Defence has raised the new argument in its certification request that any material which might be used by the Prosecution to undermine the credibility of Defence witnesses should be considered exculpatory. This new argument is inadmissible as a basis for certification, having not been raised in the original motion.[10] In any event, the Chamber finds the argument to be unconvincing. Rule 68 (A) refers to "material" which

> "may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence".

Information which affects the credibility of Defence evidence does not, of itself, suggest the innocence or mitigate the guilt of the Accused.

8. The Chamber does not consider that a stay pending resolution of the appeal is warranted.[11] The only category of documents which the Defence has sought in this application is statements of prior witnesses to national immigration authorities. As mentioned above, absence of advance disclosure of

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[6] *Bagosora et al*., Certification of Appeal Concerning Access to Protected Defence Witness Information (TC), 29 July 2005, para. 2.
[7] *Bagosora et al*., Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4.
[8] *Bagosora et al*., Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, 21 July 2005, para. 11. This certification related to an impugned decision which dealt with the correctness of the Trial Chamber's interpretation of witness protection orders.
[9] *Bagosora et al*., Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A) (TC), 8 March 2006, para. 3.
[10] *Nyiramasuhuko et al*., Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible" (TC), 18 March 2004, para. 21.
[11] Nsengiyumva Motion, p. 7. The precise request is that the use of any immigration statements be stayed pending resolution of the appeal.

these documents has not proven to be of great significance. Furthermore, the Defence may always make a request to recall a witness, should it be justified in the circumstances of a particular case.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part;

CERTIFIES for interlocutory appeal that part of the Decision on Disclosure of Material Relating to Immigration Statement of Defence Witnesses concerning the Prosecution's disclosure obligations under Rule 66 (B);

DENIES the request for a stay.

Arusha, 22 May 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Certification of Request for Severance of Three Accused 22 May 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Jean Kambanda – Certification to leave appeal, Unfairness of a testimony, Remedy by cross-examination, No effect on the fair and expeditious conduct of proceedings – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (B) and 82 (B)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Severance of Three Accused, 27 March 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Joint "Motion for Certification of the 'Decision on Request for Severance of Three Accused'", etc., filed by the Defences of Kabiligi, Nsengiyumva and Ntabakuze on 3 April 2006;

CONSIDERING the oral submissions of the Prosecution on 4 April 2006, opposing the motion;

HEREBY DECIDES the motion.

Introduction

1. The Accused Kabiligi, Nsengiyumva and Ntabakuze request leave to file an interlocutory appeal from the Chamber's oral decision of 22 March 2006, denying severance of the Accused Kabiligi, Nsengiyumva, and Ntabakuze from the present trial.[1]

Deliberations

2. Leave to file an interlocutory appeal of a decision "may" be granted under Rule 73 (B) where it significantly affects the "fair and expeditious conduct of proceedings or the outcome of the trial" and where "immediate resolution may materially advance the proceedings or the outcome of the trial".

(i) Fair and Expeditious Proceedings

3. In denying the severance motion from which leave to appeal is now requested, the Chamber considered, as required by Rule 82 (B), whether the testimony of the two witnesses "might cause serious prejudice to an accused". The Chamber is now confronted with a similar issue in deciding whether to grant leave to appeal under Rule 73 (B): whether permitting these two witnesses to testify is a decision which would significantly affect the "fair and expeditious conduct of proceedings".

4. The motion argues that the testimony of Jean Kambanda and Marcel Gatsinzi will be highly prejudicial to the three Accused, thus rendering the trial unfair, and possibly affecting the outcome of the trial. Two specific areas of testimony are identified as damaging. Kambanda, according to a will-say statement issued by the Bagosora Defence, will testify that there was a genocide in Rwanda between April and July 1994, a view which is contested by the Accused.[2] Gatsinzi will testify, according to media reports, that "Colonel Théoneste Bagosora is a criminal", and that "Bagosora and other former military officials planned and supervised the genocide".[3] Though called by the Accused Bagosora, these witnesses will, in effect, present new Prosecution evidence against the Accused, which would not be heard but for the fact that the Accused are bring tried jointly. Cross-examination is said to be insufficient to remedy the unfairness arising from this testimony. Furthermore, proceedings will be substantially lengthened by the need of the three co-Accused to call witnesses in rebuttal.

5. The Chamber does not see that the fair and expeditious conduct of proceedings, or the outcome of the trial, will be affected by permitting Jean Kambanda to testify that there was a genocide in Rwanda between April and July 1994. This is a general proposition on which the Chamber has already heard considerable testimony. The addition of Kambanda's evidence on this subject will not render the proceedings unfair, nor does it foreseeably justify rebuttal evidence of any significant scope by the three co-Accused, if at all. Gatsinzi's prospective testimony is, at present, far from clear. The Bagosora pre-Defence brief says only that he will testify on

> "his military career; his activity in GOMN; his activity as acting deputy chief of staff; his activities from April to July 1994".[4]

The media reports about Gatsinzi's opinions are an inadequate foundation upon which to rule that the testimony would impair the "fair conduct of proceedings", just as they were inadequate to establish that the testimony could cause "serious prejudice" to the co-Accused.

(ii) Materially Advance the Proceedings

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[1] Reasons for that decision were issued five days later: *Bagosora et al*, Decision on Request for Severance of Three Accused (TC), 27 March 2006.
[2] Certification Motion, para. 10.
[3] Certification Motion, para. 12.
[4] "List of Colonel Bagosora Defence Witnesses", 4 May 2005, p. 7.

6. Having found that the first criterion for certification is not met, the Chamber need not determine whether certification would materially advance the proceedings.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 22 May 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Corrigendum to Decision on Prosecution Request for Extension of Time to Respond to Bagosora Motion 23 May 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Error on a date

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

CONSIDERING the Chamber's Deicison on Prosecution Request for Extension of Time to Respond to Bagosora Motion, filed on 16 May 2006;

HEREBY ORDERS that the date "31 May 2006", which appears in the operative paragraph shall be replaced by the date "2 June 2006".

Arusha, 23 May 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Disclosure of Identity of Prosecution Informant 24 May 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Disclosure of Identity of Prosecution Informant, Disclosure of exculpatory material in the actual knowledge of the Prosecutor, Independent power of the Prosecution to withhold information on unenumerated grounds – Condition of issuance of a subpoena, Reasonable basis to believe that the prospective witness may be able to provide information of material importance, Reasonable attempts of the applicant to obtain the voluntary cooperation – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 39 (ii), 54, 68, 68 (A) and 68 (D)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Prosper Mugiraneza's Motion to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68, 10 December 2003 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision for Disclosure Under Rule 68, 1 March 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Bagosora Defence's Request for a Subpoena Regarding Mamadou Kane, 22 October 2004 (ICTR-98-41)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Radislav Krstić, Decision on Application for subpoenas, 1 July 2003 (IT-98-33) ; Appeals Chamber, The Prosecutor v. Radislav Krstić, Judgement, 19 April 2004 (IT-98-33) ; Appeals Chamber, The Prosecutor v. Sejér Halilović, Decision on Issuance of Subpoenas, 21 June 2004 (IT-01-48)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "*Requête Confidentielle*", etc., filed by the Bagosora Defence on 19 December 2005;

CONSIDERING the Prosecution Preliminary Response, and its Further Response, filed on 23 December 2005 and 12 January 2006, respectively;

HEREBY DECIDES the Motion.

Introduction

1. On 23 September 2005, the Prosecution disclosed to the Defence a statement entitled "Witness AIU". The attached cover letter explained that the person had never been listed as a witness in the present case, and was not otherwise the subject of any protective order. Nevertheless, portions of the statement were redacted to conceal the witness's identity, even though

> "[g]iven the nature of the statement, Colonel Bagosora will undoubtedly have personal knowledge of the identity of witness AIU".

The cover letter indicated that Prosecution counsel in the present case had become aware of the statement within the previous twenty-four hours.[1]

2. The Defence asks the Chamber to order the Prosecution to disclose the statement in its entirety, arguing that there is no justification for withholding Witness AIU's identity, which is itself exculpatory. The Defence also asks for a *subpoena* requiring Witness AIU to meet with the Defence.

Deliberations

(i) The Exculpatory Nature of Witness AIU's Identity

3. Rule 68 (A) of the Rules of Procedure and Evidence ("the Rules") requires the disclosure of any material in the actual knowledge of the Prosecutor which

> "may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence".

The Prosecution implicitly acknowledges that the statement itself was disclosed pursuant to this provision. For example, the Prosecution argues that disclosing Witness AIU's identity would not "make the information in the statement more exculpatory", and that it is under no obligation to "disclose the entire document from which exculpatory evidence is extracted".[2] The Chamber infers, therefore, that the Prosecution has disclosed the content of the statement pursuant to Rule 68 (A).

4. The Prosecution argues that this obligation requires disclosure of only the content of the statement, and that no *prima facie* showing has been made that Witness AIU's identity is itself exculpatory. A previous decision of this Trial Chamber, which did require such disclosure, is said to be distinguishable from the present situation.[3] In that decision, the Chamber required the identification of three individuals, formerly listed as Prosecution witnesses, who had made statements concerning the same events as a witness who was still scheduled to appear before the Chamber. The Prosecution relies on the Chamber's comment that

> "[t]he importance of any discrepancies in the statements may depend, for example, on the nature of the relationships between the different witnesses to the events".[4]

As this element is not present in respect of Witness AIU, argues the Prosecution, his identity need not be disclosed.

5. The Chamber is of the view that Witness AIU's identity is "inextricably connected with the substance of the statements".[5] The statement cannot be properly understood without knowing the author's ability to observe the events he describes; his possible biases or point of view; or the consistency of his account with any other statements he may have given. Providing the author's identity does not merely assist the Defence to carry out further investigations, but is essential to the content of the statement itself. Accordingly, the identity of Witness AIU, and any portions of the statement redacted to protect the witness's identity, must be considered to be exculpatory within the meaning of Rule 68 (A).[6]

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[1] The statement appears to have been taken by representatives of the Office of the Prosecution on 17 and 26 April 2003, and 28 May 2003.
[2] Preliminary Response, paras. 7-8; Further Response, paras. 19-20.
[3] *Bagosora et al.*, Decision on Motion for Disclosure Under Rule 68 (TC), 1 March 2004.
[4] *Id.* para. 6.
[5] *Id.*
[6] See *Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68 (TC), 10 December 2003, para. 21.

6. Witness AIU's present location does not assist in understanding the content of the statement. Accordingly, any indications in the statement of the witness's present location is not exculpatory and need not be disclosed to the Defence. The Prosecution may make redactions for that purpose.

(ii) Non-Disclosure of Exculpatory Information

7. The Prosecution asserts that it is empowered to withhold Witness AIU's identity on the basis of Rule 39 (ii) of the Rules, which authorizes the Prosecution to

> "take all measures necessary for the purpose of the investigation and to support the prosecution at trial, including the taking of special measures to provide for the safety of potential witnesses and informants".

8. Rule 39 (ii) is a general provision appearing in Part 4 of the Rules, "Investigations and Rights of Suspects". By contrast, Rule 68 itself contains a specific provision which offers the Prosecution a mechanism to be relieved of the obligation to disclose exculpatory material. Sub-part (D) provides:

> The Prosecutor shall apply to the Chamber sitting *in camera* to be relieved from an obligation under the Rules to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any reasons may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

Rule 68 (D), as the specific provision governing this particular type of material, is applicable to the present situation, not Rule 39 (ii). The Appeals Chamber has referred to the obligation to disclose exculpatory material as "fundamental to the fairness of proceedings before the Tribunal".[7] Exceptions to that obligation must be subject to the specific, judicially-controlled provisions of Rule 68 (D). An independent power of the Prosecution to withhold information on unenumerated grounds could undermine the scope of Rule 68 (A).

9. The Prosecution has made no application to the Chamber under Rule 68 (D). Rather than arguing that any of the three conditions for non-disclosure are present, the Prosecution relies on a general concern that the security and trust of informants can only be maintained by non-disclosure of their identities.

10. Whatever force this argument may have in other circumstances, it is not relevant here, in light of the Prosecution concession that the Accused must already know Witness AIU's identity, given the content of his statement. In the absence of any submissions showing that any of the conditions of Rule 68 (D) are satisfied, the Prosecution cannot be relieved of its obligation to disclose exculpatory information.

(iii) Subpoena for Purpose of Meeting With Witness AIU

11. The Prosecution indicates in a letter to the Defence that Witness AIU "was informed about [the Defence's] probable request" for a meeting, and that the witness has refused the request on the ground that any meeting near his place of residence would reveal his present whereabouts and jeopardize his security.[8] As an alternative, the Prosecution proposes that the Defence submit questions in writing, which would then be conveyed to the witness with a recommendation that he cooperate. In essence, the Prosecution argues that this would constitute a form of cooperation which would obviate the need for a *subpoena*. The Defence argues that the method proposed by the Prosecution is

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[7] *Krstic*, Judgement (AC), 19 April 2004, para. 180.
[8] Defence Motion, Annex C; Prosecution Further Response, para. 14.

impractical, as written questions and answers could lead to many rounds of further questions and clarifications.

12. Rule 54 of the Rules authorizes a Trial Chamber to

> "issue such orders, summonses, *subpoenas*, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial".

This authority includes the power to require

> "a prospective witness to attend at a nominated place and time in order to be interviewed by the Defence where that attendance is necessary for the preparation or conduct of the trial".[9]

The first condition for such a *subpoena* is that there is a reasonable basis to believe that the prospective witness may be able to provide information of material importance.[10] Having reviewed the witness's statement, the Chamber finds this condition to be satisfied.

13. A second condition for the issuance of a *subpoena* is that the applicant has

> "made reasonable attempts to obtain the voluntary cooperation of the parties involved and has been unsuccessful".[11]

At present, those efforts must be channelled through the Prosecution, which legitimately wishes to keep the current location of its informant secret. Based on the submissions now before the Chamber, it is not clear that the Prosecution has communicated an actual, pending Defence request for an interview. A *subpoena* cannot be issued until those efforts have been exhausted.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion for disclosure of portions of the statement of Witness AIU which have been redacted by the Prosecution to safeguard his identity;

DECLARES that the Prosecution may continue to make redactions to protect Witness AIU's current location;

DENIES the request for a *subpoena*.

Arusha, 24 May 2006.

[Signed]: Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[9] *Halilovic*, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 5. See also *Kristic*, Decision of Application for Subpoena (AC), 1 July 2003, para. 10 ("Such a power [referring to Rule 54] clearly includes the possibility of a subpoena being issued requiring a prospective witness to attend at a nominated place and time in order to be interviewed by the defence where that attendance is necessary for the preparation or conduct of the trial"); *Bagosora et al*., Decision on Request for Subpoena of General Yaache and Cooperation of The Republic of Ghana (TC), 23 June 2004, para. 4 ("[T]he Chamber has incidental and ancillary jurisdiction over persons other than an accused, that may assist the Tribunal in its pursuit of criminal justice".); *Bagosora et al*., Decision on Bagosora Defence's Request for a Subpoena Regarding Mamadou Kane (TC), 22 October 2004, para. 2 (quoting the Trial Chamber's 23 June 2004 decision); *Bizimungu et al*., Decision on Prosper Mugiraneza's Motion to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68 (TC), 10 December 2003, para. 23.
[10] *Halilovic*, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 6.
[11] *Bagosora et al*., Decision on Request for Subpoena of General Yaache and Cooperation of The Republic of Ghana (TC), 23 June 2004, para. 4.

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Decision on Motion to Unseal Testimony of Defence Witness RAS-1 24 May 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Sealed Testimony, References throughout the transcript which could reveal the witness's identity, Impracticable parsing of the testimony into two documents, Re-classification of an exhibit – Motion partially granted

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Prosecution "Motion to Unseal the Transcripts and Exhibits of the Testimony of Defence Witness RAS-1", etc., filed on 12 December 2005;

CONSIDERING the Response filed by the Nsengiyumva Defence on 20 December 2005;

HEREBY DECIDES the motion.

Introduction

1. On 13 October 2005, the Nsengiyumva Defence requested that the testimony of Witness RAS-1 be held entirely in closed session citing, in particular, a concern that his voice was easily identifiable. The Prosecution opposed the motion. Following arguments, the Chamber ruled:

> We do not find all the arguments advanced in relation to this witness convincing for holding his entire testimony in closed session. But the factual situation, leaving aside our view on some of the arguments, is that we do not have voice scrambling available … And, therefore, because of the voice recognition issue, we will then grant your request, Mr Ogetto.[1]

At the end of the testimony, the Prosecution raised the possibility of unsealing some of the testimony that had been heard in closed session. The Presiding Judge invited further submissions:

> We have to now look into the transcripts because there will obviously be some portions that, by their substance, should be placed under seal, whereas there may be other portions which may not cause protection issues. If you would also, Defence, it's your witness, look into this matter, and then we can solve this in a practical way later on.[2]

2. The Prosecution now asks that all the testimony of Witness RAS-1 be unsealed, with the exception of excerpts specified in its motion. The Prosecution also requests that two of the three exhibits entered under seal be made public. The Defence opposes the motion, and cites several example of information that would reveal the identity of the witness.

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[1] T. 13 October 2005 p. 63.
[2] T. 19 October 2005 p. 30.

Deliberations

3. The Chamber has reviewed Witness RAS-1's testimony in its entirety. There are numerous references throughout the transcript which could reveal the witness's identity. Parsing the testimony into two documents, one closed and one public, is impracticable. Neither would be comprehensible in light of the numerous transitions from public to confidential.

4. Exhibit P-336 does not seem likely to identify the witness. Accordingly, the Chamber grants the request to re-classify this exhibit as a public document. The re-classification shall be delayed for seven days from the date of this decision to give any party the opportunity to file submissions concerning this re-classification.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the request to reclassify Prosecution Exhibit 366 as a public document, subject to a delay of seven days from the date of this decision;

DENIES the remainder of the motion.

Arusha, 24 May 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Request to Admit United Nations Documents into Evidence under Rule 89 (C)
25 May 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Admission of Evidence, Demonstration by the Applicant that prima facie the document is relevant and has probative value, No need of approval by a witness in order to grant probative value, No technical requirements for establishing the authenticity of a document, Balance of probabilities in favour of a finding of probative value for all the documents produced contemporaneously with the events – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rule 89 (C)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Alfred Musema, Judgement, 27 January 2000 (ICTR-96-13) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Admissibility of Witness DBQ, 18 November 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole, 13 September 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v.

Théoneste Bagosora et al., Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89 (C), 14 October 2004 (ICTR-98-41)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Zejnil Delalić and Hazim Delić, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998 (IT-96-1) ; Trial Chamber, The Prosecutor v. Tihomir Blaškić, Judgement, 3 March 2000 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000 (IT-95-14/2) ; Trial Chamber, The Prosecutor v. Miroslav Kvočka et al., Decision on Exhibits, 19 July 2001 (IT-*98-30/1)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED of the Ntabakuze "Motion to Deposit Certain United Nations Documents into Evidence for the Truth of Their Contents", filed on 7 December 2005;

CONSIDERING the Prosecution Response, filed on 12 December 2005; the Defence Reply, filed on 3 January 2006; and the Prosecution Further Response, filed on 4 January 2006;

HEREBY DECIDES the motion.

Introduction

1. The Ntabakuze Defence seeks to admit twenty-three sets of documents into evidence. Lead Counsel for Ntabakuze explained that he personally procured these documents from the United Nations.[1] The documents consist of official United Nations correspondence arising from the UNAMIR peacekeeping mission in Rwanda in 1994. Each document is authored by one of three senior officials: Jacques-Roger Booh-Booh, former Special Representative of the Secretary-General to Rwanda; Kofi Annan, former Under-Secretary-General for Peacekeeping Operations; or Lieutenant-General Roméo Dallaire, former Force Commander of UNAMIR. With one exception, all of the documents are dated January through April 1994.

Deliberations

2. Rule 89 (C) of the Rules of Procedure and Evidence ("the Rules") provides that a Chamber "may admit any relevant evidence which it deems to have probative value". When offering a document for admission, the moving party must make a *prima facie* showing that the document is both relevant and has probative value.[2]

3. The Defence has discharged its *prima facie* burden of showing the relevance of the documents, which reflect the views of United Nations officials as to the political and military context of Rwanda

[1] T. 22 November 2005 p. 58.

[2] *Bagosora et al*., Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89 (C) (TC), 14 October 2004, para. 22; *Bagosora et al*., Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole (TC), 13 September 2004, para. 7; *Delalic and Delic*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998, para. 17 ("At the stage of admission of evidence, the implicit requirement of reliability means no more than that there must be sufficient indicia of reliability to make out a *prima facie* case.").

in 1994. This context is relevant to the charges against the Accused and has been the object of extensive testimony called by both the Defence and the Prosecution.

4. Documents need not be recognized by a witness in order to have probative value.[3] On the other hand, there must be some indication that the document is what the moving party says it is, and that its contents are reliable.[4] The Rules impose no technical requirements for establishing the authenticity of a document, but a number of factors have been considered relevant:

- the extent to which the document's content is corroborated by other evidence;[5]
- the place where the it was obtained;[6]
- whether the it is an original or a copy;[7]
- if it is a copy, whether it is registered or filed with an institutional authority;[8]
- whether it is signed, sealed, stamped, or certified in any way.[9]

At the admissibility stage, the Chamber is not called upon to make a final determination whether the document is what the party says it is, much less whether its contents are truthful or accurate.[10]

6.* In this case, the balance of probabilities favors a finding of probative value for all the documents that were produced contemporaneously with the events that occurred in Rwanda in 1994. The documents were obtained from the archives of United Nations Headquarters, confirming their apparent status as United Nations documents. Furthermore, the documents were created at the time of the events in question as part of the routine exchange of correspondence between top UNAMIR officials, or is directly linked to this correspondence. These characteristics endow the documents with sufficient reliability to be admissible.

8. The Prosecution contention that some of the documents have already been admitted is correct.[11] There is no need for these documents to be exhibited a second time.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Defence's request to admit Annexes A, C, F, H, I, K, L, N, P, Q, R, S, T, U, V and W into evidence;

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[3] *Kvočka et al*., Decision on Exhibits, 19 July 2001 ("It is not the practice in this case to insist on exhibits being tendered during the examination of witnesses."); *Blaskic*, Judgement (TC), 3 March 2000, para. 35 (holding that a bench composed of professional judges was able to assess documentary evidence and accord it the proper weight).

[4] *Bagosora et al*., Decision on Admissibility of Evidence of Witness DBQ (TC), 18 November 2003, para. 24 ("[E]vidence whose reliability cannot adequately be tested … cannot have probative value."); *Musema*, Judgement and Sentence (TC), 27 January 2000, paras. 59-72 (discussing the assessment of credibility and linking it to the determination of whether evidence has probative value); *Kordić et al*., Decision on Appeal Regarding Statement of a Deceased Witness (AC), 21 July 2000, para. 24 ("A piece of evidence may be so lacking in terms of the indicia of reliability that it is not 'probative' and is therefore inadmissible.").

[5] *Bagosora et al*., Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole (TC), 13 September 2004, para. 7; *Musema*, Judgement and Sentence (TC), 27 January 2000, para. 75. See also *Delalic and Delic*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998, para. 18 (b) (affirming the admission of evidence that corresponded to previous witness testimony and other documentary evidence).

[6] *Bagosora et al*., Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole (TC), 13 September 2004, para. 8. See also *Delalic and Delic*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998, para. 18(a) (affirming the admission of evidence that was seized from a company linked to the defendant).

[7] *Musema*, Judgement and Sentence (TC), 27 January 2000, para. 67.

[8] *Id*.

[9] *Bagosora et al*., Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole (TC), 13 September 2004, para. 8; *Musema*, Judgement and Sentence (TC), 27 January 2000, para. 67.

[10] *Musema*, Judgement and Sentence (TC), 27 January 2000, para. 56.

* The wrong numeration is the fact of the Tribunal.

[11] Annexes B, D, E, G, J, M, and O were previously admitted into evidence.

DENIES the Defence's request to admit Annexes B, D, E, G, J, M, and O into evidence.

Arusha, 25 May 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Order Assigning Judges to a Case Before the Appeals Chamber 1 June 2006 (ICTR-98-41-AR73)

(Original: English)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Assignation of Judges before the Appeals Chamber

International Instrument cited :

Rules of Procedure and Evidence, rule 73 (B) ; Statute, art. 11 (3) and 13 (4)

I, FAUSTO POCAR, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

RECALLING the "Decision on Disclosure of Materials Relating to Immigration Statements of Defense Witnesses" and the "Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements" rendered by Trial Chamber I respectively on 27 September 2005 and 22 May 2006;

NOTING "Kabiligi and Nsengiyumva Joint Appeal Under Rule 73 (B) of Trial Chamber I's 'Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses', 27 September 2005" filed on 29 May 2006;

CONSIDERING Articles 11 (3) and 13 (4) of the Statute of the International Tribunal and Rule 73 (B) of the Rules of Procedure and Evidence;

CONSIDERING the composition of the Appeals Chamber of the International Tribunal as set out in document IT/245 issued on 12 May 2006;

HEREBY ORDER that the Bench in *Théoneste Bagosora et al. v. The Prosecutor,* Case N° ICTR-98-41-AR73, shall be composed as follows:

Judge Fausto Pocar, Presiding
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Shomburg

Done in English and French, the English version being authoritative.

Done this first day of June 2006, At The Hague, The Netherlands.

[Signed]: Fausto Pocar

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Decision on Nsengiyumva Motion for Leave to Amend its Witness List 6 June 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Anatole Nsengiyumva – Modification of the Witness List, Addition of witnesses, Close analysis of each testimony, Analysis of whether the addition of witnesses will cause unfair surprise or prejudice, Removal of witnesses – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 73 ter (B) (iii) (b) and 73 ter (E)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Ferdinand Nahimana, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. André Ntagerura et al., Decision on Defence for Ntagerura's Motion to Amend Its Witness List Pursuant to Rule 73 ter (E), 4 June 2002 (ICTR-99-46) ; Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on the Defence Application Under Rule 73 ter (E) Leave to Call Additional Defence Witnesses, 9 October 2002 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E), 26 June 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E), 21 May 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Defence Motions to Amend the Defence Witness List, 17 February 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Nsengiyumva "Confidential and Extremely Urgent Motion for Leave to Amend the List of Defence Witnesses", filed on 16 May 2005;

CONSIDERING the Prosecution Response thereto, filed 18 May 2006; the Nsengiyumva Reply, filed 23 May 2006; and the Corrigendum to the motion, filed on 25 May 2006;

HEREBY DECIDES the motion.

Introduction

1. Nsengiyumva requests leave to add twelve new witnesses to its witness list, and to remove twelve others. The new witnesses are said to have been contacted only recently, allegedly because of the difficult conditions in the places where they reside and lack of information concerning their whereabouts. The testimony of the new witnesses concerns matters on which the Chamber has not yet heard testimony, which will replace that of the witnesses being removed. The identities and content of the testimony of each of the twelve new witnesses is provided with the motion, and the total expected time for their testimony is said not to exceed five days.[1]

2. The Prosecution opposes the addition of the new witnesses.

Deliberations

(i) Applicable Standard

3. Rule 73 *ter* (E) of the Rules provides that:

> After commencement of the Defence case, the Defence, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called.

This standard has previously been addressed in this case:[2]

> In interpreting a similarly worded provision applicable to Prosecution witnesses, this Trial Chamber has held that amendments of a witness list must be supported by "good cause" and be in the "interests of justice".[3] Similar principles have been applied in assessing Defence motions to vary a witness list.[4] The determination of whether to grant a request to vary the witness list requires a close analysis of each witness, including the sufficiency and time of disclosure of the witness' information; the materiality and probative value of the proposed testimony in relation to existing witnesses and allegations in the indictment; the ability of the other party to make an effective cross-examination of the witness; and the justification offered by the party for the addition of the witness.[5]

Whether the addition of witnesses will result in "unfair surprise or prejudice" to the opposing party must be considered in light of the disclosure obligations of the moving party.[6]

(ii) Removal of Witnesses

4. The request to remove witnesses is not opposed by the Prosecution, will economize judicial resources and is obviously consistent with the effective presentation of Defence evidence. The request is, therefore, granted.[7]

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[1] Defence Motion, paras. 14-16.
[2] *Bagosora et al*., Decision on Defence Motions to Amend the Defence Witness List (TC), 17 February 2006, para. 4.
[3] *Nahimana et al*., Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses (TC), 26 June 2001, paras. 17-20 ; *Bagosora et al*., Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, paras. 13-14; *Bagosora et al*., Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) (TC), 21 May 2004, para. 8.
[4] *Ntagerura et al*., Decision on Defence for Ntagerura's Motion to Amend its Witness List Pursuant to Rule 73 *ter* (E) (TC), 4 June 2002, paras. 8, 10; *Nahimana et al*., Decision on the Defence Application Under Rule 73 *ter* (E) for Leave to Call Additional Defence Witnesses (TC), 9 October 2002.
[5] *Bagosora et al*., Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, para. 14; *Bagosora et al*., Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) (TC), 21 May 2004, paras. 8-10.
[6] *Bagosora et al*., Decision on Prosecutor's Motion For Leave to Vary the Witness List Pursuant to Rule 73*bis* (E) (TC), 21 May 2004, para. 10.

(iii) Addition of Witnesses

5. The Prosecution challenges the addition of witnesses on a number of fronts, including: (i) having "stood on its right" to request variation of the list at an earlier stage, the Defence cannot now request a variation; (ii) the Defence has not discharged its burden to show why the proposed witnesses were not contacted earlier; (iii) only one of the new witnesses is intended to replace removed witnesses; (iv) the timing of the motion amounts to unfair surprise which deprives the Prosecution of the opportunity to investigate and prepare effective cross-examinations; (v) the anticipated testimony of the new witnesses has not been demonstrated as material to the Defence case; and (vi) the witness list is already "bloated".

6. Rule 73 *ter* (B) (iii) (b) gives the Chamber discretion to

> "order that the Defence … file … [a] list of witness the Defence intends to call with … [a] summary of the facts on which each witness will testify".

This discretion was exercised on 14 October and 21 December 2004, with further explanation given on 16 May 2005, to the effect that the Defence was required to "provid[e] a factual summary and not merely the subject matter on which each witness will testify".[8] In respect of a previous amendment of the Defence witness list, the Chamber required the Defence to provide this information no later than "thirty-five days before the appearance of the witness".[9]

7. The Defence has provided a detailed summary of each witness's testimony and its relevance to the case. The matters on which they will testify are confined to well-defined material facts which are at the core of the Prosecution case. Although additional investigation into the background of the witnesses will be required, a reasonable delay in these witness's appearance will provide sufficient time for adequate preparations, particularly in light of the Prosecution's familiarity with the material facts on which they will testify, the circumscribed focus of the testimony, and the specificity of the identifying information provided. The Chamber cannot say that the failure to discover these witnesses earlier is unreasonable, or that the late-stage of the proceedings will make it more difficult for the Prosecution to conduct any necessary investigations. The addition of these witness will not extend the proceedings, in light of the Defence's undertaking to present these witnesses, whose testimony will take no more than five days, during the present session ending on 14 July. For these reasons, the Chamber considers that the interests of justice are served by permitting the addition of these twelve witnesses to the Defence witness list, with an adequate period of disclosure to permit Prosecution investigations.

(iv) Timing of Disclosure

8. No witness shall be permitted to appear less than thirty-five days after substantial disclosure of witness identifying information and a summary of their proposed testimony, unless the Prosecution waives the right to insist on this delay. In the absence of more particularized objections from the Prosecution, the Chamber is of the view that substantial disclosure was effected on 17 May 2006 in the annex to the motion.[10]

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in its entirety;

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[7] The witnesses removed are: LG-2, LB-1, NR-4, BD-2, ZM-1, GRE-1, MG-1, MG-2, ZEU-2, BE-1, XEN-2 and Setako.
[8] T. 16 May 2005 p. 31. T. 14 October 2004 p. 15; T. 21 December 2004 pp. 25-26.
[9] *Bagosora et al*., Decision on Defence Motions to Amend the Defence Witness List (TC), 17 February 2006, p. 6.
[10] Disclosure of the identities and summaries of testimony of some of the new witnesses may have been provided before 17 May 2006, according to the Defence. Motion, fn. 5.

AUTHORIZES the addition of Witnesses NATO-1, WFP, WHO-1, LIQ-1, TRA-2, LSK-1, HOP-1, HCR-1, DEF-1, ABC-1, LUXX, and OAU-1 to the witness list;

ORDERS that none of the witnesses shall appear less than thirty-five days after substantial disclosure of their identifying information and summaries of their testimony, unless this period is waived by the Prosecution.

Arusha, 6 June 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Order for Transfer of Defence Witness Jean Kambanda 15 June 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Jean Kambanda – Transfer of detained witness, Mali

International Instrument cited :

Rules of Procedure and Evidence, rule 90 bis (B)

International Cases cited :

I.C.T.R. : Trial Chamber , The Prosecutor v. Jean Kambanda, Judgement and Sentence, 4 September 1998 (ICTR-97-23) ; Appeals Chamber, The Prosecutor v. Jean Kambanda, Judgement, 19 October 2000 (ICTR-97-23) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Order for Transfer of Defence Witness Jean Kambanda, 27 February 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED of the Bagosora "*Requête en Extrême Urgence*", etc., filed on 7 June 2006;

CONSIDERING the Ntabakuze "Response to Bagosora Request to Transfer Witness Jean Kambanda", etc., filed on 13 June 2006; and the *Corrigendum* thereto, filed on 14 June 2006;

HEREBY DECIDES the motion.

1. The Bagosora Defence requests an order for the temporary transfer of one its witnesses, Jean Kambanda, to the Detention Unit of the Tribunal in Arusha for the purpose of testifying before the

Chamber. Mr. Kambanda is serving a life sentence of this Tribunal in the Republic of Mali.[1] The Bagosora Defence wishes to call Mr. Kambanda before the end of the present trial session on 14 July 2006. Mr. Kambanda has previously indicated his willingness to testify on behalf of the Accused.[2]

2. Rule 90 *bis* (B) of the Rules of Procedure and Evidence sets two conditions for such an order: first, that

> "the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal";

and second, that the "[t]ransfer … does not extend the period of his detention as foreseen by the requested State." Furthermore, Article 4 of the agreement between the United Nations and the Republic of Mali specifically provides for the temporary transfer of a detained person for the purpose of giving testimony, provided that the detainee is not required for criminal proceedings in Mali.[3]

3. The Chamber has been advised by the Registry that Mr. Kambanda is not required for criminal proceedings in Mali during the proposed period of transfer. The first condition, therefore, is satisfied. As Mr. Kambanda is serving a life sentence, there is no scope for the application of the second condition.

4. The submissions filed by the Ntabakuze Defence are not relevant to Rule 90 *bis*, which governs the conditions for ordering the physical transfer of the witness. The substance of the Ntabakuze submissions is that the testimony of the witness would be prejudicial and that, accordingly, the testimony should either be excluded as against him, or that Kambanda should not be permitted to testify at all. These questions are not properly within the scope of Rule 90 *bis* and shall be addressed in a separate decision.

FOR THE ABOVE REASONS, THE CHAMBER

ORDERS, conditional upon the agreement of the Government of Mali, that Jean Kambanda shall be temporarily transferred to the Detention Unit in on or about 15 June 2006, and returned no later than 30 July 2006, pursuant to Rule 90 *bis* of the Rules;

REQUESTS the Government of Mali to facilitate the transfer in cooperation with the Registrar and the Government of Tanzania;

INSTRUCTS the Registrar to:

(A) transmit this decision to the Governments of Mali and Tanzania;
(B) ensure the proper conduct of the transfer, including the supervision of the witnesses in the Tribunal's detention facilities;
(C) remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the timing of the temporary detention, and as soon as possible, inform the Trial Chamber of any such change.

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[1] *Kambanda*, Judgement (TC), 4 September 1998, p. 28; *Kambanda*, Judgement (AC), 19 October 2000, p. 39.
[2] *Bagosora et al*., Order for Transfer of Defence Witness Jean Kambanda (TC), 27 February 2006, paras. 1, 3. The witness was previously transferred to the Tribunal's detention facilities in anticipation of testifying during the last trial session. However, before he could testify, the Chamber was seized of a motion for severance by Kabiligi, Nsengiyumva and Ntabakuze, who opposed his appearance and requested a stay. On 27 March 2006, the Chamber issued its written reasons for denying severance. On 3 April 2006, the Defence filed a request for certification of that decision, and again requested a stay of Kambanda's testimony pending resolution of the matter. That motion was still under consideration when the trial session ended on 7 April 2006.
[3] Agreement Between the Government of the Republic of Mali and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda, 12 February 1999, registered 4 October 2000 (Reg. N°36963), <http://www.ictr.org/ENGLISH/agreements/mali.pdf>.

Arusha, 15 June 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Bagosora Request for Witness Z-06 to Give testimony by Video-Link 20 June 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Testimony by video-link, Witness protection measure, Vulnerable position of the witness due to the notoriety of his family associations – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 75 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Prosecution Motion for Special Protective Measures for Witness "A" pursuant to Rules 66 (C), 69 (A) and 75 of the Rules of Procedure Evidence, 5 June 2002 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Motion for Special Protective Measures for Witnesses A and BY, 3 October 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 October 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko, Decision on Nyiramasuhuko's Strictly Confidential Ex-Parte – Under Seal – Motion for Additional Protective Measures for Defence Witness WBNM, 17 June 2005 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. André Rwamakuba, Decision on Confidential Motion for the Testimony of Defence Witness 1.15 Be Taken By Video-Link , 8 December 2005 (ICTR-98-44C)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED of the "*Requête Confidentielle*", etc., filed by the Bagosora Defence on 12 June 2006;

HEREBY DECIDES the motion.

1. The Defence requests that Witness Z-06 be permitted to give his testimony by video-link. The witness's security situation is said to be particularly sensitive and he has refused to travel to Arusha in the absence of specific security measures which, despite efforts by the Defence, are apparently unavailable.

2. Video-link testimony may be authorized as a witness protection measure, pursuant to Rule 75 (A) of the Rules of Procedure and Evidence, where the witness is in a particularly vulnerable situation

and, on that basis, refuses to testify in Arusha.[1] In such cases, the Chamber requires the moving party to "make some showing that giving testimony [by video-link] is necessary to safeguard the witness's security".[2]

3. The Defence's confidential submissions have established to the Chamber's satisfaction that, because of the notoriety of his family associations, the witness is in a particularly vulnerable position. The Defence has made reasonable efforts to explain the security measures which would be provided, but the witness has still refused to testify here, claiming that he would be unsafe without a personal escort throughout his journey. The Chamber finds that a sufficient showing has been made that video-link testimony is necessary to safeguard the witness's security.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

DIRECTS the Registry, in consultation with the parties, to make all necessary arrangements in respect of the testimony of Witness Z-06 via video-conference, and to videotape the testimony for possible future reference by the Chamber.

Arusha, 20 June 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[1] Rule 75 (A) gives the Chamber discretion to "order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused". See *Bagosora et al*., Decision on the Prosecution Motion for Special Protective Measures for Witness A Pursuant to Rules 66 (C), 69 (A) and 75 of the Rules of Procedure and Evidence (TC), 5 June 2002; *Bagosora et al*., Decision on Prosecution Motion for Special Protective Measures for Witnesses A and BY (TC), 3 October 2003 paras. 8-10; *Rwamakuba*, Decision on Confidential Motion for the Testimony of Defence Witness 1.15 Be Taken By Video-Link (TC), 8 December 2005; *Nyiramasuhuko et al*., Decision on Nyiramasuhuko's Strictly Confidential *ex parte* Under Seal Motion for Additional Protective Measures for Defence Witness WBNM (TC), 17 June 2005. See generally *Bagosora et al*., Decision on Prosecution Request for Testimony of Witness BT via Video-Link (TC), 8 October 2004, para. 8 (distinguishing between the criteria for granting video-link testimony ordered under Rule 54 on the basis of the "interests of justice", and the standard for granting such testimony as a witness protection measure under Rule 75). The present Defence motion requests video-link testimony as a witness protection measure (para. 17).

[2] *Bagosora et al*., Decision on Prosecution Request for Testimony of Witness BT via Video-Link (TC), 8 October 2004, para. 8.

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Decision on Commencement of Kabiligi Defence and Filing of Pre-Defence Brief 21 June 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Gratien Kabiligi – Postponed presentation of the defence following the replacement of Lead Counsel, Resource constraints arising from the summer recess, Content of Kabiligi Pre-Defence Brief

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Postponement of Defence of Accused Kabiligi, 21 April 2005 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWliNDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED of the Prosecution "Motion Requesting Witness List and Pre-Defence Brief from the Kabiligi Defence", filed on 12 December 2005;

CONSIDERING the oral submissions of the parties on 20 June 2006;

HEREBY DECIDES the motion.

1. The Accused Bagosora, Nsengiyumva and Ntabakuze have been concurrently presenting their defences since 11 April 2005. Kabiligi was permitted to postpone the presentation of his defence, following the replacement of Lead Counsel on 24 January 2005[1]. As part of that decision, the Chamber ruled that Kabiligi was required to file his Pre-Defence Brief no less than 30 days before the beginning of his case. On April 2006, the Kabiligi Defence confirmed that it would be in a position to file its Pre-Defence Brief on 14 July 2006, in anticipation of the start of its defence on 14 August 2006[2]: The Prosecution submits that it needs more than thirty days to conduct its investigations before the start of the Kabiligi Defence, in light of the resource constraints arising from the summer recess.

2. The Chamber considers that it is in the interests of justice to require the Kabiligi Defence to file its Brief on Friday, 7 July 2006, being 38 days befor: the scheduled start of its case.

FOR THE ABOVE REASONS, THE CHAMBER

ORDERS that the Kabiligi Pre-Defence Brief, which shall include witness identifying information and summaries of expected testimony, shall be filed no later than 7 July 2006.

Arusha, 21 June 2006.

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[1] *Bagosora et al.,* Decision on Postponement of Defence of Accused Kabiligi (TC), 21 April 2005.
[2] T. 7 April 2006 p.16.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Ntabakuze Motion for Exclusion of Evidence 29 June 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Aloys Ntabakuze – Exclusion of Evidence, Testimony Outside the Scope of the Indictment, Relationship between the argument that evidence should be excluded on the basis of "lack of notice" and admissibility of evidence, Definition of the curing of the Indictment, Availability of curing at the Trial Chamber level, Criteria to admit evidence relating to the indictment, Absence of notice cannot be remedied by arguing that the material fact is only indirectly relevant to the case – Allegations of physical perpetration of a criminal act by an accused must appear in an indictment, Less details en case of the sheer scale of the alleged crimes – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 89 (C)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Proposed Testimony of Witness DBY, 18 September 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Motion from Casmir Bizimungu Opposing the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD, and GFA, 23 January 2004 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. André Ntagerura et al., Judgement and Sentence, 25 February 2004 (ICTR-99-46) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E), 21 May 2004 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Prosecution Interlocutory Appeals Against Decision of the Trial Chamber on Exclusion of Evidence, 25 June 2004 (ICTR-99-50) ; Appeals Chamber, The Prosecutor v. Eliezer Niyitegeka, Judgement, 9 July 2004 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and ICTR-96-17) ; Appeals Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005, 12 May 2005 (ICTR-2000-55A) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Kabiligi's Request for Particulars of the Amended Indictment, 27 September 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Protais Zigiranyirazo, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief, 30 September 2005 (ICTR-2001-73)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Mladen Naletilić and Vinko Martinović, Judgement, 3 May 2006 (IT-98-34)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Ntabakuze Defence "Motion for the Exclusion of Evidence of Allegations Falling Outside the Scope of the Indictment", filed on 28 March 2006; and the *Addendum* thereto, filed on 7 April 2006;

CONSIDERING the Ntabakuze Defence "Supplementary Notes on Jurisprudence", filed on 1 May 2006; the Prosecutor's Response, filed on 8 May 2006, and the Annex thereto, filed on 12 May 2006; and the Ntabakuze Reply, filed on 15 May 2006;

HEREBY DECIDES the motion.

Introduction

1. The Ntabakuze Defence requests that the Chamber exclude from its consideration seventeen categories of evidence, elicited from numerous witnesses, as irrelevant to the Indictment.[1] The Defence argues that the Chamber may not, consistent with the rights of the Accused and the rules governing indictments, base a conviction on any of these unpleaded matters. Notice of material facts other than through the Indictment is said to be exceptional, and not justified in the case of these seventeen categories of evidence. The Prosecution opposes the motion or, alternatively, requests that it be permitted to amend the Indictment to correct any deficiencies.

Deliberations

(I) Applicable Principles

2. The Chamber has previously addressed a similar motion in its Decision on Exclusion of Testimony Outside the Scope of the Indictment ("the *Kabiligi* Exclusion Decision").[2] The Chamber provided a framework for analyzing this type of motion, and discussed the relationship between the argument that evidence should be excluded on the basis of "lack of notice", and admissibility of evidence:

> Rule 89 (C) provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value". To be admissible, the "evidence must be in some way relevant to an element of a crime with which the Accused is charged." The present motion complains that the evidence has no relevance to anything in the Indictment, or that some paragraphs of the Indictment to which it might be relevant are too vague to be taken into account. Some recent Appeals Chamber judgements thoroughly discuss the specificity with which an indictment must be pleaded, and the significance of other forms of Prosecution disclosure of its case. Although the question addressed in those cases was whether a conviction should be quashed because of insufficient notice of a charge in the indictment, the analysis is equally relevant to the present question, namely, whether evidence is sufficiently related to some charge in the Indictment to be admissible.
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> The rights of the Accused enshrined in Article 20 of the Statute impose, according to the Appeals Chamber in *Kupreškić*, "an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven". Material facts may also be communicated to the Accused other than through the indictment:

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[1] Motion, para. 57 ("The evidence is irrelevant and of no probative value in relation to the actual charges in the Indictment. Keeping it in the record creates great prejudice to the Accused Ntabakuze because evidence of the alleged criminal conduct, or other alleged improper conduct, for which he has not been charged, is 'similar fact evidence' or 'bad character evidence,' nothing more. The prejudicial effect of such evidence must outweigh its probative value, with respect to the acts alleged in the Indictment").
[2] *Bagosora et al.*, Decision on Exclusion of Testimony Outside the Scope of the Indictment (TC), 27 September 2005.

> If an indictment is insufficiently specific, *Kupreškić* stated that such a defect 'may, in certain circumstances cause the Appeals Chamber to reverse a conviction.' However, *Kupreškić* left open the possibility that a defective indictment could be cured 'if the Prosecution provides the Accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.' The question whether the Prosecution has cured a defect in the indictment is equivalent to the question whether the defect has caused any prejudice to the Defence or, as the *Kupreškić* Appeals Judgement put it, whether the trial was rendered unfair by the defect. *Kupreškić* considered whether notice of the material facts that were omitted from the indictment was sufficiently communicated to the Defence in the Prosecution's Pre-Trial Brief, during disclosure of evidence, or through proceedings at trial. In this connection, the timing of such communications, the importance of the information to the ability of the Accused to prepare its defence, and the impact of the newly-disclosed material facts on the Prosecution case are relevant. As has been previously noted, 'mere service of witness statements by the [P]rosecution pursuant to the disclosure requirements' of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial.
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> Whether vagueness in the indictment has been cured by subsequent disclosure involves consideration of the following factors: the consistency, clarity and specificity with which the material fact is communicated to the Accused; the novelty and incriminating nature of the new material fact; and the period of notice given to the Accused. Mention of a material fact in a witness statement does not necessarily constitute adequate notice: the Prosecution must convey that the material allegation is part of the case against the Accused. This rule recognizes that, in light of the volume of disclosure by the Prosecution in certain cases, a witness statement will not, without some other indication, adequately signal to the Accused that the allegation is part of the Prosecution case. The essential question is whether the Defence has had reasonable notice of, and a reasonable opportunity to investigate and confront, the Prosecution case.[3]

As described above, "curing" is the process by which vague or general allegations in an indictment are given specificity and clarity through communications other than the indictment itself. Only material facts which can be reasonably related to existing charges may be communicated in such a manner.[4]

3. The Appeals Chamber has specifically approved the use of curative materials by a Trial Chamber in assessing whether the Defence had sufficient notice of material facts.[5] The availability of curing at the Trial Chamber level was distinctly reaffirmed in the Appeals Chamber's most recent pronouncement on this question:

> In reaching its judgement, a Trial Chamber can only convict the accused of crimes which are charged in the indictment. If the indictment is found to be defective because it fails to plead material facts or does not plead them with sufficient specificity, the Trial Chamber must consider whether the accused was nevertheless accorded a fair trial. In some instances, where the accused has received timely, clear and consistent information from the Prosecution detailing the factual basis underpinning the charges against him or her, the defective indictment may be deemed cured and a conviction may be entered.[6]

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[3] *Id*., paras. 2-3 (citations omitted).
[4] *Naletilic*, Judgement (AC), para. 26 ("a Trial Chamber can only convict the accused of crimes which are charged in the indictment"); *Zigiranyirazo*, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief (TC), 30 September 2005, para. 13 ("the process of curing an Indictment does take place only when the material fact was already in the Indictment in a certain manner, not when it was not included at all").
[5] *Ntakirutimana*, Judgement (AC), para. 101 ("The Trial Chamber concluded that sufficient information was given regarding this allegation to the summary of Witness SS's testimony in Annex B to the Pre-Trial Brief and one of SS's prior witness statements, which was disclosed on 7 February 2001. In the view of the Appeals Chamber, this conclusion was correct").
[6] *Naletilic*, Judgement (AC), para. 26.

A Trial Chamber "may", but is not required to, consider whether an indictment has been cured. Accordingly, Trial Chambers which have declined to hear evidence concerning material facts outside of the indictment have done so either because they did not believe that the Defence had sufficient notice thereof, or because they exercised their discretion not to permit the addition of material facts.[7] These decisions do not contradict the principle that a vague indictment may, in appropriate circumstances, be cured through subsequent communications.[8]

4. Curing has been described as "exceptional" where the Prosecution knows of material facts at the time the indictment is filed, but fails to plead them.[9] No such characterization has been made in respect of material facts which are subsequently discovered. Indeed, the Appeals Chamber has suggested that it is not imperative that every material fact be pleaded in an indictment. In response to an interlocutory appeal by the Prosecution requesting reversal of a Trial Chamber decision denying an amendment of an indictment so as to add material facts, the Appeals Chamber commented:

> The Appeals Chamber does not accept the Prosecution's argument that the denial of the amendments will necessarily result in the exclusion of evidence that relates to charges contained in the current indictment. If evidence is relevant to a charge in the current indictment and is probative of that charge, then subject to any other ground of exclusion that may be advanced by the Defence, that evidence should be admissible.[10]

5. Allegations of physical perpetration of a criminal act by an accused must appear in an indictment.[11] On the other hand,

> "less detail may be acceptable if the 'sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes'".[12]

Many acts attributed to an accused fall on the spectrum between these two extremes. Individual actions of an accused which contribute to crimes will require more specific notice than proof of the crimes themselves, where they are physically committed by others. The specificity of the notice required is proportional to the extent of the Accused's direct involvement.

6. Whether a defective indictment was cured depends on "whether the accused was in a reasonable position to understand the charges against him or her".[13] The presence of a material fact somewhere in

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[7] See, e.g., *Zigiranyirazo*, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief (TC), 30 September 2005; *Ntagerura et al*., Judgement (TC), 25 February 2004, paras. 29-39.

[8] *Cf*., *Bizimungu et al*., Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witness GKB, GAP, GKC, GKD and GFA (TC), 23 January 2004, para. 13 ("failure to include the facts in the Indictment cannot be cured by references to the Pre-Trial Brief"). Ntabakuze relies on the Appeals Chamber's failure to reverse this decision as confirming the correctness of this statement of law. The Appeals Chamber stated that "in finding that the failure to plead could not be remedied by the Pre-Trial Brief, disclosed witness statements or the Prosecution's opening statement, the Trial Chamber made specific reference to the jurisprudence of the Appeals Chamber". *Bizimungu et al*., Decision on Prosecution's Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence (AC), 25 June 2004, para. 18. In light of subsequent pronouncements by the Appeals Chamber, however, this statement cannot be understood as a repudiation of curing in general, and must be interpreted simply as an acceptance of the Trial Chamber's factual determination that, in the circumstances of that case, the Trial Chamber properly exercised its discretion. See e.g. *Naletilic*, Judgement (AC), paras. 26-27.

[9] *Ntakirutimana*, Judgement (AC), para. 125 ("The Appeals Chamber, having accepted many of the Appellant's complaints of a lack of notice resulting in prejudice, stresses to the Prosecution that the practice of failing to allege known material facts in an indictment is unacceptable and that it is only in exceptional cases that such a failure can be remedied, for instance, 'if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her'").

[10] *Muvunyi*, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005 (AC), 12 May 2005, para. 55. There is no suggestion earlier in the decision that the Appeals Chamber is talking only about facts which fall below the threshold of materiality.

[11] *Ntakirutimana*, Judgement (AC), para. 32; *Kupreskic*, Judgement (AC), para. 89.

[12] *Naletilić*, Judgement (AC), para. 24; *Kupreskic*, Judgement (AC), para. 89.

[13] *Naletilić*, Judgement (AC), para. 27 (with references).

the Prosecution disclosure does not suffice to give reasonable notice; what is required is notice that the material fact will be relied upon as part of the Prosecution case, and how.[14] In *Naletilic*, the Appeals Chamber distinguished between those sources of disclosure which are adequate, and those which are not:

> In assessing whether a defective indictment was cured, the issue to be determined is whether the accused was in a reasonable position to understand the charges against him or her. In making this determination, the Appeals Chamber has in some cases looked at information provided through the Prosecutor's Pre-Trial Brief or its opening statement. The Appeals Chamber considers that the list of witnesses the Prosecution intends to call at trial, containing a summary of the facts and the charges in the indictment as to which each witness will testify and including specific references to counts and relevant paragraphs in the indictment, may in some cases serve to put the accused on notice. However, the mere service of witness statements or of potential exhibits by the Prosecution pursuant to disclosure requirements does not suffice to inform an accused of material facts that the Prosecution intends to prove at trial. Finally, an accused's submissions at trial, for example, the motion for judgement of acquittal, final trial brief or closing arguments, may in some instances assist in assessing to what extent the accused was put on notice of the Prosecution's case and was able to respond to the Prosecution's allegations.[15]

The Appeals Chamber has, in effect, established a distinction between the Pre-Trial Brief and opening statement, on the one hand, which are permissible ways of giving notice of material facts; and the "mere service of witness statements", which are not.

7. Objections play an important role in ensuring that the trial is conducted on the basis of evidence which is relevant to the charges against the accused. The failure to voice a contemporaneous objection does not waive the Accused's rights, but results in a shifting of the burden of proof:

> In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also file a timely motion to strike the evidence or to seek an adjournment to conduct further investigations in order to respond to the unpleaded allegation.
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> [A]n accused person who fails to object at trial has the burden of proving on appeal that his appeal that his ability to prepare his case was materially impaired. Where, however, the accused person objected at trial, the burden is on the Prosecution to prove on appeal that the accused's ability to prepare his defence was not materially impaired.[16]

This standard applies whenever the objection is not raised contemporaneously with the introduction of the evidence.[17]

8. The Defence argues that it has already objected, in two written motions in May and August 2002, to all of the impugned evidence. These motions challenged the inclusion of "new charges" in the Pre-Trial Brief. Furthermore, the Defence claims that it "did not see great utility in delaying proceedings by repeating the objection at every possible opportunity, which would not only have been

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[14] *Muvunyi*, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005 (TC), para. 22 ("It is to be assumed that an Accused will prepare his defence on the basis of material facts contained in the indictment, not on the basis of all the material disclosed to him that may support any number of additional charges, or expand the scope of existing charges").
[15] *Naletilic*, Judgement (AC), para. 27 (citations omitted); as for the significance of submissions at trial showing that the Accused's ability to prepare was not materially impaired, see *Kvocka*, Judgement (AC), paras. 52-54; *Kordic and Cerkez*, Judgement (AC), para. 148; *Niyitegeka*, Judgement (AC), para. 198; *Kupreskic*, Judgement (AC), para. 122.
[16] *Niyitegeka*, Judgement (AC), 9 July 2004, paras. 199-200.
[17] *Ndindabahizi*, Judgement (TC), para. 29.

pointless in light of the Chamber's ruling, but ran the risk of incurring the displeasure of the new Trial Chamber, and the President of the Tribunal".[18] However, the so-called "ruling" was simply a general remark by the Presiding Judge during an informal status conference that many issues concerning admissibility of documents could be addressed as arguments concerning the weight of the evidence rather than through time-consuming challenges to admissibility.[19]

9. The written motions in 2002 do not constitute a sufficient objection to any and all evidence which the Defence now characterizes as falling outside of the Indictment. As mentioned above, the Defence's obligation is to "interpos[e] a specific objection at the time the evidence is introduced".[20] The Defence's excuse of futility is contradicted by the frequent objections lodged by the Kabiligi Defence – and by the Ntabakuze Defence itself, on occasion – of lack of notice.[21] These objections were entertained and considered impartially by the Chamber. Accordingly, to the extent that the Defence has pointed to no specific objection concerning the evidence in question, the presumption shall be that the burden rests on the Defence to show that the lack of notice has been prejudicial to its ability to understand and respond to the evidence in question.

10. The Chamber's approach in the sections which follow may be summarized as follows. Where a material fact cannot be reasonably related to the Indictment, then it shall be excluded. Where the material fact is relevant only to a vague or general allegation in the Indictment, then the Chamber will consider whether notice of the material fact was given in the Pre-Trial Brief or the opening statement, so as to cure the vagueness of the Indictment.[22] Material facts which concern the actions of the Accused personally are scrutinized more closely than general allegations of criminal conduct. Other forms of disclosure, such as witness statements or potential exhibits, are generally insufficient to put the Defence on reasonable notice. The Chamber recognizes two exceptions to this principle: first, where the Prosecution filed a motion for the addition of a witness, which was subsequently granted by the Chamber, and which stated the material facts on which the witness would testify (Witness AAA); second, where a lengthy adjournment was ordered by the Chamber for the express purpose of allowing the Defence to meet newly discovered material facts (Witness DBQ).[23]

(II) APPLICATION: SPECIFIC EXCLUSION REQUESTS BASED ON LACK OF NOTICE

(a) Death Squads: Amasasu and Related Organizations

11. The Ntabakuze Defence seeks the exclusion of the testimony of Witnesses DCH, XAQ and ZF concerning the Accused's alleged involvement in death squads and *Amasasu* in 1992 and 1993.[24] The Defence raised a contemporaneous objection to the testimony of Witness DCH, but only on the basis of temporal jurisdiction, not notice.[25] Accordingly, the burden rests with the Defence to show that it was not in a reasonable position to understand and respond to testimony of these three witnesses.

12. Witness DCH testified that in 1992 and 1993, Ntabakuze was the leader of a clandestine group of soldiers called *Amasasu* within the Para-commando Battalion, which was "responsible for

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[18] Motion, para. 52.
[19] T. 13 June 2003 pp. 25-26.
[20] *Niyitegeka*, Judgement (AC), 9 July 2004, para. 199.
[21] See *Bagosora et al*., Decision on Exclusion of Testimony Outside the Scope of the Indictment (TC), 27 September 2005, para. 8 (confirming that objections to the admission of testimony were interposed in respect of portions of the testimony of Witnesses XAI, XXH, XXQ, DCH and AAA).
[22] The Chamber shall in one case also rely on the materials supporting the Indictment itself. *Infra* para. 13.
[23] *Infra* paras. 44 (Witness AAA), 27-29 (Witness DBQ).
[24] Motion, paras. 60-68.
[25] T. 23 June 2004 pp. 45, 46, 49. Given the link that allegedly existed between the AMASASU and other clandestine organizations which may have continued their activities into 1994, the Chamber concluded at the time that the evidence regarding the AMASASU was relevant to events in 1994 and should therefore be heard. T. 23 June 2004 pp. 52, 53.

intimidating those who were opposed to the MRND".[26] Witness XAQ described the involvement of Corporal Munyankindi, a Para-commando soldier, in a death squad in 1992.[27] Witness ZF used a number of different names to describe communication networks and death squads:

> The zero network was a communications network. The death squad – rather, death squads, were small groups apparently of well-trained people who were in charge of executing the decisions of the members of these networks, while the dragons were supposed to be the names of these groups, the groups that were the masterminds – I do not know whether this word is the appropriate word – the groups that were behind those activities, that is, anti-enemy activities, activities directed against the accomplices. The groups were secret groups, closely-knit groups. The *Abakozi* was another name synonymous to dragon. The dragons and *Abakozi* meant the same thing.[28]

13. The Indictment makes no mention of these groups by name, but paragraphs 1.13 to 1.16 do refer to "prominent civilian and military figures", sharing an "extremist Hutu ideology", working together from as early as 1990 to pursue a "strategy of ethnic division and incitement to violence". Their strategy included "the preparation of lists of people to be eliminated" and "the assassination of certain political opponents".[29] The Indictment was accompanied by a document entitled "Supporting Materials" which consists of specific and focused excerpts from statements of prospective witnesses in relation to each paragraph of the Indictment. This document does not constitute a massive disclosure and would have provided the Defence with a clear indication of the material facts which it would present in relation to each paragraph of the Indictment. In relation to paragraph 1.12, an expert witness is quoted as saying that

> "one notes in particular [within the armed forces] the creation of the *Amasasu* in January 1993 which demanded the establishment of a cleansed army and the elimination of all RPF allies)".[30]

14. On this basis, the Chamber finds that the Accused was reasonably informed that this material fact was part of the case against him.

(b) Arrests in October 1990 Using Lists

15. The Defence objects to testimony of Witnesses DBQ and DBY that lists were used by Para-commando soldiers in 1990 to arrest Tutsi and perceived accomplices of the enemy.[31]

16. Paragraph 5.1 of the Indictment names Ntabakuze as part of a group of persons who, "[f]rom late 1990 until July 1994", devised a plan consisting of

> "among other things, recourse to hatred and ethnic violence, the training of and distribution of weapons to militiamen as well as the preparation of lists of people to be eliminated" (emphasis added).

The Accused clearly had notice of this material fact. The suggestion that the evidence cannot be relevant to any crime committed during the temporal jurisdiction of the Tribunal has already been

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[26] T. 23 June 2004 pp. 45, 50-53.
[27] T. 23 February 2004 pp. 17-19. The Defence also objects that this evidence of Munyankindi's alleged membership in a death squad is inextricably linked to evidence which the Chamber has decided to exclude from this trial, namely the alleged involvement of the Accused in death squads linked to the attempted abduction of Prime Minister Nsengiyaremye in October 1992. However, whether the Accused was involved in death squads in general is very different from the allegation that he was involved in a 1992 event where a death squad may have been sent to abduct the former Prime Minister. The evidence is not inadmissible on this basis.
[28] T. 27 November 2002 pp. 67-68.
[29] Indictment, para. 1.15.
[30] Supporting Materials, p. 13 (report of André Guichaoua).
[31] Motion, paras. 69-72.

specifically rejected by the Chamber, and no grounds justifying review of that decision have been presented in the motion.[32]

(c) Orders by Accused to Para-commando Battalion at an Assembly at Camp Kanombe, 6 or 7 April

17. The Defence objects to the testimony of nine witnesses placing him at an assembly of soldiers at Camp Kanombe on either 6 or 7 April 1994, where he is alleged to have issued orders to kill civilians and made other incriminating statements.[33] Witnesses XAP, XAQ, XAI, and DBQ recalled this assembly occurring on the night of 6 April; Witnesses XAB, DP, BC, LN and DBN said that it happened on the morning of 7 April. Paragraph 6.27 of the Indictment gives a different date for the event:

> On 8 April 1994, at a general assembly, the Commander of the Paracommando Battalion, Aloys Ntabakuze, ordered his soldiers to "avenge the death of President Habyarimana by killing the Tutsi". Further, he encouraged his troops by confirming that certain Tutsi and their "politician accomplices" had been killed. Indeed, several opposition leaders had been assassinated the previous day.

The Defence argues that the evidence is outside the scope of the Indictment. No latitude should be granted for such an error as the testimony concerns acts of the Accused himself.

18. There is undoubtedly a discrepancy between the date in the Indictment and the dates in the Pre-Trial Brief summaries, which give the date of the assembly attended by the Accused as either the night of 6 April or the morning of 7 April.[34] A cursory review of the summaries, however, would have revealed this discrepancy and revealed that, regardless of the date, paragraph 6.27 is alleging the same event as is mentioned in the summaries. Four of the summaries (of Witnesses DBN, XAB, XAP and XAQ) describe the Accused specifically instructing the soldiers to "revenge" the death of the President, which is the exact sentiment attributed to the Accused in paragraph 6.27. None of the summaries suggest that there was more than one meeting of this nature. Rather than being "buried under a great mass of pre-trial disclosure", as is suggested by the Defence, the discrepancy would have been obvious from reading the Pre-Trial Brief itself.[35] This is not to say that the Prosecution should not have corrected the error once it was discovered; nonetheless, the Chamber is satisfied that, based on the material before it, the Defence would have been aware of the erroneous date in the Indictment, and of the actual dates to which the witnesses would testify the event occurred. The Defence had reasonable notice of the material fact on which the Prosecution would rely, despite the discrepancy between the Indictment and the Pre-Trial Brief summaries. Accordingly, the evidence is not excluded.

(d) Massacres in Akajagali

19. Ntabakuze objects to the testimony of nine witnesses concerning alleged massacres by Para-commando soldiers in the neighbourhood of Akajagali, near Camp Kanombe, soon after the assembly described in the previous section.[36] Witnesses XAP, XAQ, XAI, DBQ and DBN gave testimony of their observations of these events. Witnesses GS and XXJ described visiting Akajagali on the morning of 7 April, and seeing indications of these massacres by Para-commando soldiers. Witness XAB recalled hearing gunshots during the night of 6 April 1994 in Akajagali, from which he inferred that a

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[32] *Bagosora et al.*, Decision on Proposed Testimony of Witness DBY (TC), 18 September 2003, para. 27 ("However, the Chamber accepts item (c) [concerning the use of lists during arrests in 1990] as admissible, because the drawing up of lists may imply some sort of concerted preparation by several individuals and it cannot, at this stage of the proceedings, be ruled out that further evidence may place this evidence in context").
[33] Motion, paras. 73-87.
[34] The only witness whose summary places the event on 8 April 1994 is Witness LN.
[35] Defence Motion, para. 87.
[36] Motion, paras. 88-94.

unit of the Para-commando Battalion was involved in killings. Witness XXY claimed to have heard of civilian killings in the area around Camp Kanombe.

20. Paragraph 6.36 of the Indictment alleges that "starting on 7 April in Kigali … elements of the Presidential Guard, Para-commando Battalion and Reconnaissance Battalion murdered political opponents. Numerous massacres of the civilian Tutsi population took place in places where they had seek [sought] refuge". The Pre-Trial Brief summary for Witness DBQ states that immediately following the assembly at which Ntabakuze had given orders to eliminate the enemy, he sent a company of soldiers to "Kajagali", where they proceeded to kill civilians. Witness DBN's summary refers to killings around Camp Kanombe immediately after the assembly of soldiers on 7 April. Killings of Tutsi "around the President's residence" on 7 April are also mentioned in Witness GS's summary. In light of these and other indications in the Pre-Trial Brief, the Accused had reasonable notice of the allegations against him and their connection to the Indictment.[37]

(e) Meetings of Officers in Camp Kanombe

21. The Defence objects to the testimony of several witnesses who alleged that Ntabakuze attended meetings with Colonel Bagosora or others at Camp Kanombe after the crash of the Presidential plane on 6 April.[38] Witness DBQ testified to two meetings of Ntabakuze with Bagosora on 6 and 7 April 1994,[39] while Witness DBN described one on 8 April 1994. Witness LN testified to meetings of military officers, including Ntabakuze and Bagosora, on 6 and 7 April at the Kanombe Hospital and at Army Headquarters, respectively. Witness GS gave testimony that on the night of 6 April, Ntabakuze met with Major Ntibihora and Lt. Colonel Baransalitse and made certain anti-Tutsi statements.[40] No contemporaneous objection was made.[41]

22. Though the Indictment makes no mention of these meetings, the Pre-Trial Brief summary for Witness LN states that, on the night of the plane crash:

> [a]round midnight, Corporal Masitumu … told the witness that a meeting chaired by Colonel Bagosora was taking place inside the hospital, with the attendance of Lt. Colonel Baransaritse; Major Ntabakuze; Major Ntibihora; Major Mutabera.[42]

The summary for Witness DBQ indicates that on 6 April "Ntabakuze came back [to Camp Kanombe] around 23h. Then he went into a meeting with the officers at the camp".[43] These references provided a reasonable indication of the evidence.[44]

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[37] Pre-Trial Brief summary for Witnesses XAQ ("Witness started hearing gunshots that night [April 6th] after soldiers from the Para Commando Battalion left the camp [Kanombe] with arms and ammunitions"), XAP ("In the morning [of April 7th] the witness saw soldiers coming back in the camp with looted items. A colleague informed witness that many Tutsi had been killed, including witness's cousin and her two children."), and XAI ("[On April 6th] Witness heard Major Ntabakuze … [ordering soldiers] ... to go in various areas of Kigali, with the mission to kill the Tutsi and their accomplices … On 7 April 1994, a colleague informed witness that Major Ntabakuze ordered his soldiers to resume the massacres during the night …").
[38] Motion, paras. 95-103.
[39] T. 23 September 2003 pp.15-17 (concerning 6 April); T. 31 March 2004 p. 77 (relating to 7 April).
[40] T. 17 February 2004 p. 42.
[41] A contemporaneous objection was made by the Kabiligi Defence to the evidence of Witness DBQ, but only on the basis of lack of notice concerning a meeting on 6 April 1994 attended by Ntabakuze, Bagosora and others. T. 23 September 2003 p. 17.
[42] Pre-Trial Brief, p. 6558.
[43] Pre-Trial Brief, p. 6608.
[44] The Ntabakuze Defence itself suggests that there may be non-incriminating explanations for these meetings. Referring to Witness DBQ's testimony of a 1 a.m. meeting in Ntabakuze's office, including Colonel Bagosora and other officers, the Defence writes, "there is no evidence of any relationship between this meeting and alleged criminal conduct, since all involved were military officers with legitimate reasons to confer following the apparent assassination of the President." Defence Motion, para. 97.

(f) Failing to Punish Nzabonariba and Handing Nyabyenda Over to Interahamwe

23. Ntabakuze objects to testimony by Witnesses DBN, XAP, LN and XAB concerning his alleged failure to punish one of his subordinates, Second Lieutenant Sylvestre Nzabonariba, for killing a Tutsi soldier.[45] Witness XAP also alleged that Ntabakuze handed a soldier named Nyabyenda to the *Interahamwe* to be killed for having protected Tutsi. No general or specific reference to this event is to be found in the Indictment or the Pre-Trial Brief. The event is described in the written statements of Witnesses XAP, LN and XAB.

24. The Prosecution responds that these incidents "do not constitute material facts of the prosecution case" and that they "do not go to any specific crime charged in the indictment".[46] Instead they were adduced to "to prove other facts at issue", in particular the "prevailing situation within the Para-commando Battalion" and the "state of mind of the soldiers of the Para-commando Battalion".[47] The Prosecution also argues that notice was given through disclosure of witness statements and that any claim of prejudice is contradicted by Defence submissions in its Pre-Defence Brief, in particular the summaries of Witnesses DH-51 and DH-62, which correctly identifies and contradicts this incident.[48] The Prosecution's argument may be understood to mean that the evidence should be considered admissible only in respect of the criminal conduct of the Para-commando soldiers, not the Accused himself.

25. The Chamber finds that for the purpose of demonstrating criminal conduct by Para-commando soldiers, the evidence is admissible. The general allegation concerning the criminal conduct of Para-commando soldiers in Kigali would encompass the incident described by these witnesses. The Defence registered no contemporaneous objection to the evidence on the basis of lack of notice and, accordingly, now bears the burden of showing that it was not in a reasonable position to understand the nature of the allegations being made by the witness, and that it suffered prejudice as a result.[49] That burden has not been discharged. For the purpose of showing the criminal conduct of soldiers of the Para-commando Battalion, the evidence is admissible. Based on the Prosecution's own submissions, the Chamber accepts that the evidence is not admissible, however, in respect of specific orders or knowledge of the Accused.

(g) Rape

26. The Defence argues that it had no notice of allegations by Witness DBQ that Para-commandos committed rape about fifty metres from IAMSEA, in Kajagali, and at the Christus Centre in April and May 1994, and by Witness XAB that such rapes were committed at Sobolirwa on or before 12 April 1994.[50] The Prosecution responds that the Chamber's Decision on Admissibility of Evidence of Witness DBQ, dated 18 November 2003 ("the DBQ Decision"), has already addressed the question of notice of these allegations. The Defence replies that the issue in that decision was only the admissibility of the evidence, not whether the Indictment could be informally amended.

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[45] Motion, paras. 104-111.
[46] Response, paras. 62-63.
[47] Prosecution Response, para. 63.
[48] Prosecution Response, paras. 65-66.
[49] The Ntabakuze Defence did make an objection during the testimony of Witness LN as regards the shooting of Nzabonariba, but did not interpose a specific objection on the basis of notice to the general evidence of criminal conduct by Para-commando soldiers. T. 30 March 2004 p. 67 ("Mr. President, in the statement of the witness, Witness LN, the incident being testified to by the witness at present, that incident covers five lines, not more than five lines. And the time devoted to the examination-in-chief is totally disproportionate to the five lines that appear in the statement.")
[50] Motion, paras. 112-118.

27. The DBQ Decision squarely addressed the sufficiency of the Indictment and whether any vagueness had been cured by subsequent communications to the Defence. The DBQ Decision starts by analyzing the Indictment itself, finding that there were

> "broad allegations of criminal conduct throughout Kigali and the rest of Rwanda, including direct and superior responsibility for massacres and rapes".[51]

Paragraph 6.47 of the Indictment is quoted as saying that

> "rapes, sexual assaults and other crimes of a sexual nature were widely and notoriously committed throughout Rwanda … perpetrated by, among others, soldiers, militiamen and gendarmes …".

The Chamber proceeded to consider whether subsequent notice had cured this general allegation in the Indictment. Notice could be provided "in the Prosecution Pre-Trial Brief, opening statement or witness statements".[52] Having found no references to Witness DBQ's specific allegations of rape in the Indictment or Pre-Trial Brief, the Chamber held that the will-say statements could provide adequate notice of the allegations, as long as the witness's appearance was postponed for a significant period.[53]

28. Since the DBQ Decision, the Appeals Chamber has held that

> "'mere service of witness statements by the [P]rosecution pursuant to the disclosure requirements' of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial".[54]

On the other hand, those same Appeals Chamber decisions have affirmed that where "the evidence turns out differently than expected", the possible remedies include

> "amendment of the indictment, an adjournment, or the exclusion of evidence outside the scope of the indictment".[55]

This would seem to suggest that notice of a material fact may be conveyed through a witness statement, such as a will-say, provided that it is coupled with "an adjournment" of sufficient duration to allow the Defence to meet the charge. The key question is whether the Defence had clear and unambiguous notice that the material fact would be relied upon as part of the Prosecution case, and had sufficient opportunity to respond to the charge.

29. Although the law on notice may have shifted slightly since the DBQ Decision was rendered, the Chamber nevertheless finds that its conclusions were sound and that the Defence had adequate notice of these material facts. Not every new material fact need be incorporated into the indictment or excluded: a third option, as expressly recognized by the Appeals Chamber, is adjournment. As long as the Defence has unambiguous notice that the Prosecution proposes to rely on the new material fact, and that the adjournment is granted to give the Defence an opportunity to defend against the new material fact, then the fairness of the trial is preserved without sacrificing a reasonable measure of flexibility which can be important in lengthy and complex trials. Although no request was made to amend the Indictment, the Chamber exercised judicial control over the addition of these new material facts to the Prosecution case. The DBQ Decision carefully considered the relevance of the new material facts to the Indictment; its significance to the charges in the Indictment; the possible prejudice to the Accused; and the length of the adjournment which would be required.

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[51] DBQ Decision, para. 15.
[52] DBQ Decision, para. 12.
[53] DBQ Decision, para. 11 ("Given the number of new incidents raised in the will-say statements, the seriously incriminating nature of the conduct alleged, and the remoteness of the new factual allegations from any incidents of which the Defence had notice, the Defence needed more time to be prepared than remained in that trial session").
[54] *Ntakirutimana*, Judgement (AC), para. 27; *Naletilic*, Judgement (AC), para. 27.
[55] *Ntakirutimana*, Judgement (AC), para. 26; *Naletilic*, Judgement (AC), para. 25.

30. Under these circumstances, and for the reasons more fully set out in the DBQ Decision, the material facts concerning rape, as introduced through Witness DBQ, are properly admissible as relevant to the Indictment.[56] The DBQ Decision was specifically concerned with the admission of material facts through that witness, on the basis of the disclosure and the specific submissions by the Prosecution in relation to that witness.

31. The Chamber did not, by virtue of the DBQ Decision, authorize the admission of Witness XAB's testimony. The Defence, having failed to cite any contemporaneous objection to the testimony of Witness XAB, bears the burden of showing that it was not in a reasonable position to understand the charges and that it was materially impaired in its preparations.[57] The Defence argues that the failure to plead these material facts in the Indictment or other materials deprived it of notice, and that the facts alleged are incriminating of the Accused. The Prosecution made no submissions in response, other than relying on the DBQ Decision, to show that the Defence had notice of this evidence and was not materially impaired in its preparation. The Chamber finds that the Defence has discharged its burden, and that the evidence must be excluded.

(h) Killings By Para-commando Soldiers at IAMSEA, Remera, Kabeza and Environs

32. The Defence claims that Ntabakuze had insufficient notice of the testimony of seven witnesses concerning killing of civilians in Kigali by Para-commando soldiers, in particular at IAMSEA, Remera, and Kabeza.[58]

33. Paragraph 6.36 of the Indictment is, in itself, too vague to give sufficient notice of these events. It describes "elements of the Rwandan Army" committing massacres "in Kigali", and to the "Para-Commando Battalion" murdering political opponents. This vagueness is cured, however, by repeated references in the Pre-Trial Brief to specific crimes by Para-commando soldiers in and around Kigali. Witness XAB's summary refers to involvement by a Para-commando unit in massacres at Kicukiro. Killings at Kabeza are mentioned in Witness AH's summary, which also indicates that the witness met Ntabakuze on 8 April near Kabeza while "his troops were searching for and killing civilians". The Accused is alleged in Witness DBQ's summary to have told his men that "the enemy was there just outside the camp and that they should go and eliminate the enemy". One company of soldiers was sent to Kajagali, Kabeza, and Remera, respectively, and the soldiers went "house to house, checking ID's and any mention of Tutsi meant immediate death". Witness XAP's summary speaks generally of soldiers returning to the camp after looting and killing, implying that they were returning from the nearby neighbourhood of Remera.

34. The summary of Witness WB gives a detailed description of the killings at IAMSEA including the presence and orders of the Accused. The events at IAMSEA and conduct of Ntabakuze are also part of the DBQ Decision, whose significance was discussed in the previous section.[59]

35. Accordingly, the Chamber finds, on the basis of the Pre-Trial Brief and the DBQ Decision, that the Accused had timely, clear and consistent notice of these events and that he was in a position to reasonably understand that these material facts were relevant to paragraph 6.36 of the Indictment.

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[56] The Chamber emphasizes that the disclosure of the will-say statements alone would not, in principle, be sufficient to put the Defence on notice of these new material facts. In the particular circumstances of Witness DBQ's testimony, however, the Defence did have sufficient notice because of, among other factors: the judicial oversight exercised by the Chamber; the unequivocal and specific submissions from the Prosecution as to the nature and use of the material facts; and the express purpose and duration of the adjournment which was granted.
[57] Motion, paras. 112-118; T. 6 April 2004 pp. 34-40. An objection was interposed concerning killings at IAMSEA, but not the nearby rapes.
[58] Motion, paras. 119-128.
[59] DBQ Decision, para. 16.

(i) ETO Refugees at Sonatube Intersection

36. The Defence objects to testimony that Para-commando soldiers at Sonatube intersection, in Ntabakuze's presence, re-directed refugees who were fleeing from the *Ecole Technique Officielle* ("ETO") towards Nyanza, where they were later killed.[60] Alison Des Forges' testimony indicated that the Accused was at Sonatube during the event.[61] Witnesses AFJ and Ruggiu gave evidence that Ntabakuze ordered his soldiers at Sonatube to send the refugees back to ETO.

37. Paragraph 6.19 of the Indictment states that Para-commandos in Kigali "set up roadblocks, reinforced with armoured vehicles, on the major roads, controlling people's movements". Paragraph 6.34 refers to Kigali as the place where the "elite units of the Rwandan Army were based" and that, consequently,

> "several of the military and civilian figures who had planned and organized the massacres played a leading role in carrying out the massacres in Kigali".

Paragraph 6.37 alleges that on 11 April,

> "soldiers, including elements of the Presidential Guard, and *Interahamwe* rounded up a group of refugees [from ETO] and moved them to Nyanza",

where they were massacred. The summary of Witness XAB's testimony in the Pre-Trial Brief says that he was "told by elements of CRAP that they had taken part in massacres at the Ecole Technique Officielle".[62]

38. Although the Indictment is perhaps not as crystalline as it could be in relation to this event, the Chamber finds that the notice provided by the Indictment and Pre-Trial Brief was sufficient. Paragraph 6.37 does not mention Para-commando soldiers by name, but the reference to "soldiers" includes Para-commandos. The inclusive reference to Presidential Guard soldiers does not exclude Para-commando soldiers, particularly in light of other paragraphs of the Indictment, including paragraph 6.19, which indicate clearly that the Para-commandos were in Kigali at this time, and that they committed crimes. The reference in the Pre-Trial Brief would have made it clear that the "soldiers" in paragraph 6.37 of the Indictment included Para-commandos. The failure to assert a contemporaneous objection may suggest that the incident was not as surprising as the Defence now claims. In any event, in the absence of such an objection, the Defence bears the burden of showing that it was not in a reasonable position to understand the material facts. In the Chamber's view, this burden has not been discharged by the generalized claims of lack of notice and prejudice. For these reasons, the exclusion of the evidence is not justified.

(j) Kabuga Mosque, Ruhanga Church and Masaka Incidents

39. Witness DCH's testimony describing the involvement of the Accused and Para-commando soldiers in killings at the Mosque and Brigade of Kabuga in June 1994, and at Ruhanga Church in April 1994 is challenged for lack of notice.[63] The Defence also objects to the testimony of Witness DBN describing a platoon of soldiers being sent to kill Tutsi at Masaka at the request of Anatole Nsengiyumva. The events are said to fall outside the scope of the Indictment, which mentions none of these locations by name.

40. Paragraph 6.36 of the Indictment refers generally to Para-commando soldiers massacring Tutsi at places where the latter had sought refuge. The Pre-Trial Brief summary for Witness DCH indicates

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[60] Motion, paras. 129-138.
[61] T. 18 September 2002 p. 54.
[62] Prosecution Response, para. 103.
[63] T. 22 June 2004 pp. 83-96; T. 23 June 2004 pp. 25-26; Motion, paras. 139-146.

that he would give testimony of massacres by soldiers in and around Kabuga in April 1994.[64] The Prosecution's opening statement, similarly, gave notice of the allegations of killings by soldiers at Ruhanga church.[65] Witness DBN's Pre-Trial Brief summary describes the mission to Masaka in detail.[66]

41. The Chamber finds that the Indictment and Pre-Trial Brief, taken together, reasonably informed the Defence that these material facts were relevant to paragraph 6.36 of the Indictment.

(k) Ntabakuze Ordering Killings at Kabusunzu; Para-commandos Loading Bodies at Kabusunzu; Misconduct of Soldiers at Nyakabanda and Knowledge of the Accused

42. Witness DBN testified that, during the period that the Para-commando Battalion was stationed at Kabusunzu, Ntabakuze ordered that a group of three Tutsis be taken away and killed.[67] He saw the three being led behind a building and then heard gunshots. The witness also saw Para-commando soldiers loading around fifteen dead bodies onto a truck while Ntabakuze stood ten metres away.[68]

43. Neither the Indictment nor the Pre-Trial Brief make any mention of these events, nor do they name the Kabusunzu area. The general allegation in paragraph 6.36 of the Indictment, standing alone, does not provide sufficient notice of this material fact. The Prosecution has failed to point to any curative references to this event in the Pre-Trial Brief or opening statement. On the other hand, the Defence has failed to cite any contemporaneous objection to the admission of this evidence on the basis of lack of notice, and the Prosecution did disclose a will-say statement some months before the witness's testimony which made direct reference to his testimony. The Pre-Defence Brief summaries of no less than seven witnesses directly contradict the allegation that Para-commando soldiers engaged in any criminal conduct.[69] Under the circumstances, the Chamber finds that the Defence has not discharged its burden of showing that it did not understand the material facts alleged against him and that the preparation of Ntabakuze's defence was materially impaired.

44. The Defence also objects to the testimony of Witness AAA alleging that Para-commando soldiers were involved in indiscriminate killings and rape of civilians in Nyakabanda sector in May and June 1994. The witness further testified that he had complained about the misconduct of the soldiers to Ntabakuze, who did nothing to intervene.[70] Though there is no mention of this event in the Indictment or Pre-Trial Brief, the Chamber authorized the addition of Witness AAA to the Prosecution Witness List on 21 May 2004, accepting the Prosecution's submission that the testimony would be material to the case against Ntabakuze.[71] The Prosecution motion, followed by the Chamber's ruling, was sufficient to clearly inform the Accused that the testimony of Witness AAA would be part of the case against him. The period during which the motion was pending, and between the date of the decision and the witness's appearance, constituted a *de facto* adjournment which gave the Defence

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[64] Pre-Trial Brief, p. 6603.
[65] T. 2 April 2002, p. 186 ("In the Kigali Rural *préfecture* soldiers and *Interahamwe* killed Tutsi refugees in the following places, among others: Ruhanga church …").
[66] Pre-Trial Brief, p. 6609 ("[witness] [s]aw NSENGIYUMVA at the camp. He came to ask Ntabakuze for some soldiers to eliminate some people suspected of being Inkontanyi in Masaka forest. Few minutes later soldiers went to Masaka forest. On their return soldiers said they had found Tutsi in the banana plantation and that they were killed by soldiers.").
[67] T. 1 April 2004 p. 68 ("Q. And what did Ntabakuze say? A. He said that the dirt should be taken away and killed.")
[68] T. 1 April 2004 p. 66.
[69] Witnesses DH-63, DH-66, DH-67, DH-68, DK-12, DK-39 and DK-120.
[70] T. 15 June 2004 pp. 7-8; T. 17 June 2004 p.14.
[71] *Bagosora et al*., Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) (TC), 21 May 2004, para. 16 ("The Chamber has weighed the lateness of the application against the materiality of the evidence and the disclosure of the statements to the Defence in July 2003. Taking these factors into account, the Chamber considers that it would be in the interests of justice to add Witness AAA to the list of Prosecution witnesses."). *Bagosora et al*., Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E), filed 24 March 2004, paras. 12-14 (after describing Witness AAA's evidence of Ntabakuze's activities in Nyakabanda *secteur,* "[t]he Prosecution submits that the expected testimony of witness AAA is material to the prosecution case …").

sufficient time to investigate and challenge the witness's testimony, in accordance with the rights of a fair trial. The failure of the Prosecution to amend the Indictment in accordance with this newly discovered evidence did not render its admission unfair, in the circumstances.

(l) Rwampara

45. The Ntabakuze objects to the testimony of Witness DBQ describing killings by Para-commandos at St. André College and Nyamirambo in Rwampara.[72] For the reasons discussed in section (g) above in respect of alleged incidents of rape, the Chamber considers that the Defence had sufficient notice of these material facts and that they were properly admitted by the Chamber in accordance with the rights of the Accused.

(m) Kabgayi

46. The testimony of Witnesses XAI and XXY regarding events in Kabgayi is challenged for lack of notice.[73] They testified that Ntabakuze came to Kabgayi and encouraged soldiers to collaborate with the *Interahamwe* to kill refugees in the Kabgayi hospital. The Defence objects that none of these events are pleaded in the Indictment.

47. Though the Indictment makes no mention of this event, the Pre-Trial Brief summary for Witness XAI states that the witness heard Ntabakuze telling his soldiers to use *Interahamwe* to kill Tutsi at the Kabgayi hospital.[74] In the Chamber's view, this was sufficient to put the Defence on notice of killings at the hospital.

48. Witness XXY also claimed to have heard that Ntabakuze had sent Para-commando soldiers to reinforce *Interahamwe* at Gitarama, Kibuye and Ngororero. The Prosecution has failed to identify any curative references to these events in the Pre-Trial Brief or opening statement; on the other hand, having failed to interpose a specific contemporaneous objection, the Defence bears the burden of demonstrating that it did not understand the material facts alleged, and that its preparation was materially impaired. As no such showing has been made, the evidence cannot be excluded.

49. The Chamber does not accept the Prosecution argument that the evidence would be admissible, in the absence of adequate notice, under Rule 93 as establishing a "consistent pattern of conduct". Even assuming that the evidence could be relevant under Rule 93, this would not diminish the specificity with which a material fact must be pleaded.

(n) Planning of Guerrilla Warfare, August 1994

50. The Defence seeks to exclude the testimony of Witness ZF describing a post-war gathering of officers at Lac Vert in Goma, where the Accused took part in planning guerrilla warfare in Rwanda.[75] The challenge is based not on lack of notice or sufficient precision in pleading, but on manifest irrelevance to any of the crimes charged. The Prosecution argues that the events in Goma do not constitute crimes with which the Accused is charged; rather, the evidence is relevant as post-crime conduct to establish the Accused's intent for earlier crimes.

51. The Chamber cannot categorically exclude the relevance of this event and will defer consideration of this question until closing submissions.

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[72] Motion, paras. 155-158.
[73] Motion, paras. 159-165.
[74] Pre-Trial Brief, p. 6514 ("At Kabgayi (Gitarama), witness heard Major Ntabakuze … telling soldiers from his escort to use the *Interahmawe* to kill the Tutsi at the hospital.").
[75] T. 28 November 2002 p. 67; Motion, paras. 166-169.

(o) Allegations of Weapons and Ammunition Supply

52. Ntabakuze seeks to exclude the testimony of Witnesses XAB, DP, XAP, XAQ and XAI that he was involved in the distribution of fuel and weapons to the *Interahamwe*, often at Camp Kanombe.[76] Timely objections were raised with regard to Witnesses DP[77] and XAQ,[78] though in the latter case the Defence only objected to the reference to guns, not ammunition and fuel.

53. At paragraph 5.22, the Indictment pleads that Ntabakuze was generally involved in weapons distribution:

> Aloys Ntabakuze [and others] … distributed weapons to the militiamen and certain carefully selected members of the civilian population with the intent to exterminate the Tutsi population and eliminate its "accomplices".

Paragraph 6.45 also refers to the provision of weapons by soldiers to militiamen. The Supporting Materials to the Indictment specify that:

> After the presidential plane was shot down, a Warrant Officer called Rudakangwa distributed weapons to the *Interahamwe* at the roadblock on the Kanombe-Kigali road via Rubirizi. They distributed generally grenades and kakashnikovs [*sic*] along with ammunition. These weapons came from the Kanombe camp and were ordered by Ntabakuze.[79]

Finally, the Pre-Trial Brief summaries of Witnesses XAQ and XAB describe distribution of supplies and ammunitions to *Interahamwe* at Camp Kanombe or by the Para-commando Battalion, and mention specifically the involvement of Ntabakuze. As such, testimony concerning distribution of weapons to Interahamwe is properly admissible.

54. The testimony of Witness DCH concerning two specific incidents of weapons distribution is also challenged. The witness testified that the Accused gave a pistol to a certain Maga at a roadblock, who then killed the owner of a Mazda car. Ntabakuze then took the Mazda. On another occasion, the Accused gave weapons to the witness, Gasana, and Mwongereza for use in an attack on Ruhanga church. The Defence objected contemporaneously to the first of these incidents, concerning Maga, but not the distribution to Gasana. The summary of Witness DCH's testimony in the Pre-Trial Brief states that he

> "saw Ntabakuze in a vehicule Mazda, transporting weapons which were distributed by Adjutant Gasana".

55. The Prosecution bears the burden of showing that the Defence had reasonable notice of the first event, and that its preparations were not materially impaired; the Defence bears the burden in relation to the second event. Neither party has discharged its burden. The Prosecution has failed to show that the Defence was not materially impaired. Even if such a showing had been made, an act of the Accused which constitutes part of the physical commission of a crime, as the Defence has argued here, must be pleaded in the Indictment. In the absence of such pleading, evidence of the distribution of weapons to Maga, and the Accused's alleged presence while the weapon was used to kill someone, is inadmissible.

56. The evidence of distribution of weapons to Gasana, however, did not constitute part of the physical commission of a crime by the Accused. In the absence of a contemporaneous objection, the

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[76] *Addendum*, paras. 8-18. The Defence also objects to the testimony of Witness DBN which indicates that Para-commandos were receiving supplies from the Transport Company of the Army Base in Camp Kanombe. Given the non-incriminating nature of the evidence, the Chamber sees no reason to exclude it.
[77] T. 2 October 2003 pp. 46-47 (referring to objection first stated at pp. 1-5).
[78] T. 23 February 2004 p. 23 ("MR. TREMBLAY: Mr. President, that is absolutely new. The statement mentions provision of ammunition and fuel, but it does not mention guns. / MR. PRESIDENT: That's true. It's noted.").
[79] Supporting Material to Ntabakuze and Kabiligi Indictment, 3 August 1998, p. 741.

Defence has failed to discharge its burden of showing that it was not on reasonable notice of this evidence, and that its preparations were materially impaired. The evidence is not excluded.

(p) Meetings Before 6 April 1994

57. Ntabakuze objects to the testimony of three witnesses who allege that he participated in meetings with Bagosora and others before 6 April 1994 whose purpose was to plan the extermination of the Tutsi population.[80] Witness ZF referred to a clandestine meeting in 1992 at the Butotori Camp in Gisenyi Prefecture, attended by numerous officers and civilians. Witness DCH described Ntabakuze's participation in five meetings of *Interahamwe* at the house of Bagaragaza in Kabuga between March 1993 and 4 April 1994. Witness DBQ referred to a meeting of high-ranking officers, including Ntabakuze, at Camp Kanombe in 1993.

58. Paragraph 5.1 of the Indictment states that between late 1990 and 1994, Ntabakuze conspired with his co-accused and others "to work out a plan with the intent to exterminate the Tutsi population". The Defence argues that in the absence of dates and locations of meetings, and a correct list of participants, the Defence does not have adequate notice of this material fact. The Prosecution also points to paragraph 5.10, however, which alleges that several meetings of army officers including Ntabakuze and Bagosora took place "notably at Kanombe military camp" between 1 May 1992 and 31 August 1993.

59. Paragraphs 5.1 and 5.10, taken together, gave reasonable notice of Witness DBQ's testimony.[81] The Prosecution's opening statement also put the Defence on notice of Witness ZF's testimony that "certain clandestine meetings were held in Gisenyi".[82] No specific criminal conduct of the Accused is alleged. In these circumstances, the notice provided was sufficient.

60. No reasonable notice was given, however, of the five meetings involving *Interahamwe* leaders. This evidence is of a different character than meetings between the accused and his fellow military officers and could, in itself, be incriminating. The Prosecution has been unable to point to any references in the opening statement or Pre-Trial Brief concerning this event which would clarify the very general allegations in paragraph 5.1 of the Indictment. The Defence failed to interpose any objection and, accordingly, bears the burden of showing that it was not on reasonable notice of this evidence, and that its preparations were materially impaired by that lack of notice.[83] The Defence argues that the failure to plead these material facts in the Indictment or other materials deprived it of notice, and that the facts alleged are incriminating of the Accused.[84] The Prosecution has not shown that the Defence reasonably understood the nature of the allegations, or that it was not materially impaired in its preparations.[85] For these reasons, the Chamber finds that Witness DCH's evidence of Ntabakuze's participation in meetings with *Interahamwe* leaders at Kabuga's house before April 1994 is excluded.

(III) REMEDIES OTHER THAN EXCLUSION

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[80] *Addendum*, paras. 19-24.
[81] Notice of Camp Kanombe meetings were given in the Pre-Trial Brief, e.g. the summary for Witness DQ ("Witness will state that while Camp MAYUYA (KANOMBE) was under the authority of BAGOSORA, meetings were organized by Bagosora attended by Unit Chiefs of Camp MAYUYA … Unit Chiefs that participated regularly were ... Major NTABAKUZE, Commander of the Paratrooper Commando Battalion …").
[82] T. 2 April 2002 p. 174.
[83] T. 23 June 2004 pp. 1-3 (Witness DCH).
[84] *Addendum*, paras. 19-24.
[85] Prosecution Response, para. 168.

61. The Prosecution requests that evidence of which the Defence has had insufficient notice should be admitted as corroborative of other evidence which has been properly admitted. Alternatively, it requests permission to amend the Indictment to conform to the evidence presented.

62. The absence of notice cannot be remedied by arguing that the material fact is only indirectly relevant to the case, for example, through the doctrine of "similar fact evidence". Whether directly or indirectly relevant, the absence of notice of a material fact requires its exclusion.

63. Permitting amendment of the Indictment would, at this stage, be prejudicial to the Accused. This alternative remedy is rejected.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part;

DECLARES the following evidence inadmissible:

1. Witness XAB's testimony of rape committed by Para-commando soldiers at Sobolirwa on or before 12 April;
2. Witness DCH's testimony that the Accused distributed weapons to Maga;
3. Witness DCH's testimony that the Accused participated in five meetings with *Interahamwe* leaders in Kabuga.

Arusha, 29 June 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Request to Direct Registry to Comply with Order Concerning Witness Protection
3 July 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Witness Protection Mesures, No possible voluntary waiver of protected status, Only the Chamber is competent to change the status of a protected witness – Motion denied

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Modification of Special Protective Measures for Witness BY, 15 March 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagasora et al., Decision on Motion to Harmonize and Amend Witness Protection Orders, 1 June 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision Amending Defence Witness Protection Orders, 2 December 2005 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED of the Nsengiyumva "Motion Seeking a Directive to the Registry", etc., filed on 1 June 2006;

CONSIDERING the Registrar's Submission, filed on 9 June 2006 ; and the Defence Response thereto, filed on 15 June 2006;

HEREBY DECIDES the motion.

Introduction

1. Before the beginning of the testimony of Witness BRA-1 on 5 and 6 April 2006, the Chamber heard oral submissions on a motion filed by the Nsengiyumva Defence requesting that the witness be permitted to stay at a place of his own choosing rather than at the safe house provided by the Tribunal for the accommodation of protected witnesses. The Chamber ruled that a protected witnesses was entitled to make such a choice without thereby altering his or her protected status. However, the protected witness must be advised that, in so choosing, the Tribunal would not be in a position to provide the level of security that would be afforded at the safe house.[1] Witness BRA-1 then entered the courtroom; was advised by the Presiding Judge of the legal and factual situation; and then unequivocally indicated that he wished to remain a protected witness, even though he wished to stay elsewhere.[2] On 29 May 2006, after a period of adjournment, Witness BRA-1 completed his testimony.

2. The Defence submits that, after the completion of Witness BRA-1's testimony, the Registry violated this order by asking the witness to sign a form, attached to the motion as Annex-3, purporting to waive his protected status. The Defence asks the Chamber to direct the Registry to withdraw the use of the form and pay him the "full subsistence allowance", although without further defining how much that should be.

3. The Registry claims that before the end of his stay in Arusha, Witness BRA-1 requested that he receive the allowance to which unprotected witnesses are entitled, which is significantly higher than that received by protected witnesses. The Registry advised him that he would not be entitled to that sum unless he signed a form waiving his protected status. The witness refused to sign the form. On 2 June 2006, he was offered the sum to which he was entitled as a protected witness, except for expenses. The witness refused the amount, claiming that his request for the full subsistence allowance was before the Chamber. On 6 June 2006, the Registry went to the place where the witness had been staying to pay him the subsistence rate for protected witnesses plus expenses, in accordance with United Nations regulations. The witness was not found at that location.

Deliberations

4. The Defence witness protection orders do not provide for the voluntary waiver of protected status.[3] That status was originally invoked when the Nsengiyumva Defence designated Witness BRA-1 as a protected witness, in accordance with operative paragraph 1 of the witness protection order, and then reaffirmed by the witness himself before the beginning of his testimony. Only the Chamber is

[1] T. 5 April 2006 pp. 53-54.
[2] T. 5 April 2006 p. 56.
[3] On 1 June 2005, the Chamber ordered that the Ntabakuze witness protection order applied to all Nsengiyumva witnesses. *Bagosora et al.*, Decision on Motion to Harmonize and Amend Witness Protection Orders (TC), 1 June 2005; *Bagosora et al.*, Decision on Ntabakuze Motion for Protection of Witnesses (TC), 15 March 2004. The orders were modified again, but not in any manner relevant to the present motion, by *Bagosora et al.*, Decision Amending Defence Witness Protection Orders (TC), 2 December 2005.

competent to change the status of a protected witness, and the Chamber made clear in its oral decision on 5 April 2006 that the witness's protected status was unchanged. Neither the Registry nor the witness himself may alter that legal status. Witness BRA-1 remains a protected witness and must be treated accordingly. This said, the risk arising from the witness's decision not to stay at the safe house cannot be attributed the Registry. The Registry has made clear that it cannot provide the same level of security for witnesses outside of the safe house, and that it advises any witness who makes such a decision of the increased risk that they are running.[4]

5. The exact sum to which witnesses are entitled under United Nations regulations falls primarily within the purview of the Registry. The Defence has not shown that the present application of these regulations is impairing the fairness of trial proceedings. In the absence of such showing, the Chamber has no basis for reviewing the Registry's interpretation thereof.

FOR THE ABOVE REASONS, THE CHAMBER

DECLARES that Witness BRA-1 remains a protected witness;

DENIES the motion in all other respects.

Arusha, 3 July 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[4] T. 5 April 2006 p. 53.

Decision on Protected Status of Witness YD-1
3 July 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Witness Protection Mesures, No possible voluntary waiver of protected status, Only the Chamber is competent to change the status of a protected witness

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Modification of Special Protective Measures for Witness BY, 15 March 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagasora et al., Decision on Motion to Harmonize and Amend Witness Protection Orders, 1 June 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision Amending Defence Witness Protection Orders, 2 December 2005 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED of the Nsengiyumva "Motion to Confirm the Status of Witness YD-1", etc., filed on 2 June 2006;

HEREBY DECIDES the motion.

Introduction

1. Upon arrival in Arusha, Witness YD-1 indicated to the Registry that he did not wish to stay at the place normally used for the accommodation of protected witnesses. The Registry acceded to the request, but only on condition that the witness signs a form purporting to waive his status as a protected witness.[1] The Defence subsequently sought the assistance of the Registry on behalf of the witness, who complained that he was encountering security problems. The Registry declined to intervene in the matter on the basis that, by signing the form, the witness had waived his protected status.

2. The Defence seeks a declaration that Witness YD-1 is a protected witness, and a direction to the Registry to treat the witness accordingly.

Deliberations

3. The Defence witness protection orders do not provide for the voluntary waiver of protected status.[2] That status was originally invoked when the Nsengiyumva Defence designated Witness YD-1

[1] The form signed by the witness is attached to the motion as Annex 1.

[2] On 1 June 2005, the Chamber ordered that the Ntabakuze witness protection order applied to all Nsengiyumva witnesses. *Bagosora et al*., Decision on Motion to Harmonize and Amend Witness Protection Orders (TC), 1 June 2005; *Bagosora et al*., Decision on Ntabakuze Motion for Protection of Witnesses (TC), 15 March 2004. The orders were modified again, but

as a protected witness, in accordance with operative paragraph 1 of the witness protection order, and then reaffirmed by the witness himself before the beginning of his testimony. Two days after the purported waiver was signed, the Presiding Judge advised the witness before the beginning of his testimony that "you will be referred to as witness YD-1 in these proceedings".[3] Far from authorizing any waiver of the witness's protected status, the Chamber acknowledged that he was a protected witness and heard parts of his testimony in closed session. Only the Chamber is competent to change the status of a protected witness, and it did not do so in this case. Furthermore, the Chamber has held that refusal to stay in the accommodation provided by the Registry for protected witnesses does not alter their protected status.[4]

FOR THE ABOVE REASONS, THE CHAMBER

DECLARES that Witness YD-1 remains a protected witness;

DIRECTS the Registry to treat him accordingly.

Arusha, 3 July 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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not in any manner relevant to the present motion, by *Bagosora et al*., Decision Amending Defence Witness Protection Orders (TC), 2 December 2005.

[3] T. 12 December 2005 p. 36.

[4] T. 5 April 2006 pp. 53-54.

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Decision on Ntabakuze request for Exclusion of testimony of Witness Jean Kambanda
6 July 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Aloys Ntabakuze – Jean Kambanda – Exclusion of testimony, Grounds of the request litigated, Suppression of the testimony against Théoneste Bagosora – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 95

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Severance of Three Accused, 27 March 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Certification of Request for Severance of the Three Accused, 22 May 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Order for Transfer of Defence Witness Jean Kambanda, 15 June 2006 ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Ntabakuze "Response to Bagosora Request to Transfer Witness Jean Kambanda, and Ancillary Request for Exclusion of Evidence", filed by the Ntabakuze Defence on 13 June 2006; and the *Corrigendum* thereto, filed on 14 June 2006;[1]

CONSIDERING the Prosecution Response, filed on 15 June 2006;

HEREBY DECIDES the motion.

Introduction

1. Ntabakuze requests that the anticipated testimony of Jean Kambanda, a prospective Bagosora witness, be excluded as against him. The witness's testimony is "Prosecution-oriented", and would not be heard but for the fact that Ntabakuze is being tried jointly with a co-accused who has a different view of the desirability of calling the witness. In any event, the witness is so devoid of credibility that his testimony will be of little or no evidentiary value. Having denied a previous request for severance, the Chamber must grant exclusion as the only possible way to mitigate the prejudicial effect of the witness's testimony, and to preserve the Accused's right under Rule 82 (A) to be accorded the "same rights as if he were being tried separately".

[1] The request for the witness's transfer was granted by *Bagosora et al.*, Order for Transfer of Defence Witness Jean Kambanda (TC), 15 June 2006.

Deliberations

2. The grounds for the present request have, to a substantial degree, already been litigated. In denying a request for severance based on the alleged serious prejudice that the three accused other than Bagosora would suffer from Kambanda's testimony, the Chamber held:

> No such "serious prejudice" has been established. The fact that more evidence will be heard than would be the case if the three co-Accused had absolute control over the presentation of the defence does not constitute "serious prejudice", as is amply demonstrated by the jurisprudence concerning antagonistic defences. This is a normal incident of a joint trial which, in other respects, may be beneficial to the three co-Accused or to the administration of justice. The proposed testimony of Jean Kambanda is not even alleged to concern any of the co-Accused individually. Indeed, the motion emphasizes that the testimony is prejudicial to all four accused, demonstrating that there is a disagreement between the three co-Accused and the Bagosora Defence, rather than a conflict of interest. If evidence is adduced which, in the opinion of the co-Accused, is prejudicial to their interest, then they will have the opportunity, subject to the Chamber's control, to cross-examine the witness on any matter raised by the Prosecution and, where legally justified, to call additional rebuttal evidence. In short, the co-Accused have not demonstrated that there is any specific aspect of the witnesses' testimony which is particularly or unusually prejudicial so as to justify severance.[2]

Nothing in the present submissions alters the Chamber's view of the nature of the testimony, or the need to suppress it as against the accused other than Bagosora.

3. The Defence has made no showing that the evidence is irrelevant; falls within Rule 95 as having been "obtained by methods which cast substantial doubt on its reliability" or as being "antithetical to, and would seriously damage, the integrity of the proceedings"; or should for any other reason be excluded. Lack of credibility is not a basis for excluding a witness's testimony, nor is disagreement with the decision of another counsel to call a witness.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 6 July 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[2] *Bagosora et al*., Decision on Request for Severance of Three Accused (TC), 27 March 2006 para. 8. A request for certification of this decision was denied by *Bagosora et al*., Decision on Certification of Request for Severance of the Three Accused (TC), 22 May 2006.

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Decision on Request for Certification of Decision on Exclusion of Evidence 14 July 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Certification of appeal, Central importance of proper notice of material facts, Any convictions based on improperly admitted evidence risk re-trial, Clarification of the principles applicable to exclusion of would materially advance the proceedings – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rule 73 (B)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Eliezer Niyitegeka, Judgement, 9 July 2004 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004 (ICTR-98-42) ; Appeals Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 (ICTR-98-42) ; Appeals Chamber, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and ICTR-96-17) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Certification Of Appeal Concerning Access To Protected Defence Witness Information, 29 July 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Certification of lnterlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements, 22 May 2006 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Ntabakuze Motion for Exclusion of Evidence, 29 June 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Ntabakuze "Motion for Certification", etc., filed on 6 July 2006;

HEREBY DECIDES the motion.

Introduction

1. On 29 June 2006, the Chamber granted in part a motion by the Ntabakuze Defence for the exclusion of seventeen categories of evidence.[1] The Chamber partially excluded three of the

[1] *Bagosora et al*., Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006.

challenged categories, but denied the request for exclusion in respect of the remaining fourteen areas.[2] Ntabakuze now requests leave to file an interlocutory appeal from the decision.

Deliberations

2. Leave to file an interlocutory appeal of a decision may be granted under Rule 73 (B) where it "involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial" and where "immediate resolution may materially advance the proceedings".

(i) Fair and Expeditious Conduct of Proceedings

3. The Defence argues the fairness of the proceedings has been jeopardized because the Chamber has allowed the Prosecution

> "*ex post facto*, to amend its indictment, implicitly, as it went along with the presentation of its evidence".[3]

Although the Defence concedes in this request for certification that "it might have been possible to 'cure' the defect in the Indictment" to some extent, the Chamber has improperly permitted such curing in respect of the "vast majority of specific allegations of the against the Accused".[4] In the absence of clear guidance in the Indictment as to the purpose for which material facts are presented, the Accused remains in doubt as to the nature of the charges against him. This uncertainty places the Accused in the position of being "guided more by intuition and guesswork than juridical decision-making" in the presentation of his Defence, and leads to an unfair and unfocused trial.[5] This is said to interfere with both the fairness and expeditiousness of proceedings.

4. The Chamber disagrees that its decision authorizes *ex post facto* amendments of the Indictment. The question of proper notice of material facts is, however, of central importance to the fairness of trial proceedings. In light of the importance of the principles on which the decision is based, and the extent of the evidence whose exclusion is at stake,[6] the Chamber is convinced that the decision does involve an issue that would significantly affect the fair and expeditious conduct of proceedings.

(ii) Materially Advance the Proceedings

5. The Defence argues that the decision places it in the position of not clearly and unambiguously knowing the Prosecution case, or the purpose for which certain material facts have been presented. This is said to prejudice the Defence, and is likely to lead to an unfocused presentation of the Defence case. The prejudice arises immediately, during trial proceedings, and cannot be subsequently remedied. Similar motions by other Defence teams are also pending, and would be similarly benefited by immediate resolution by the Appeals Chamber. Any convictions based on this improperly admitted evidence would risk re-trial – a risk which can be obviated by an interlocutory appeal.[7] Furthermore, the Defence asserts that there is serious doubt as to the correctness of the legal principles applied by the Chamber, resolution of which would allow the remainder of the trial to proceed on a correct legal footing.[8]

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[2] The Chamber also observed that the Prosecution had conceded the partial exclusion of a fourth category. *Id*., para. 25.
[3] Motion, para. 6.
[4] Motion, para. 7.
[5] Motion, paras. 10-13, 18.
[6] Certification may be appropriate where, in particular, "broad categories of evidence" are affected by a decision. *Bagosora et al*., Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements (TC), 17 March 2006; *Bagosora et al*., Certification of Appeal Concerning Access to Protected Defence Witness Information (TC), 29 July 2005, para. 2.
[7] Motion, para. 16.
[8] Motion, paras, 17-24.

6. Some of the evidence which the Chamber has declined to exclude may form the basis of specific and distinct factual findings which could be quashed on a final appeal if the evidence is found to have been improperly considered.[9] On the other hand, some of the evidence may be considered together with other evidence, whose admissibility has not been challenged, to nourish broader factual findings. The Chamber accepts that if it were to base a conviction partly on evidence which is found on a subsequent appeal to have been inadmissible, and partly on admissible evidence, then finding an appropriate remedy at that stage might pose significant difficulties for the Appeals Chamber. In light of the complexity and importance of the issues involved, clarification of the principles applicable to this type of motion would materially advance the proceedings.

(iii) Precise Scope of Questions Certified

7. In light of the detailed factual questions involved in assessing each of the seventeen categories of evidence, the Chamber declines to certify the decision in its entirety. As the Appeals Chamber has stated, matters of admissibility of evidence are primarily for the trier of fact to determine, and should not be certified for interlocutory appeal.[10] On the other hand, the legal principles by which the Trial Chamber has been guided are an appropriate matter for the Appeals Chamber. Accordingly, the Chamber will certify the legal propositions in paragraph 10 of its decision, which reads as follows:

> The Chamber's approach in the sections which follow may be summarized as follows. Where a material fact cannot be reasonably related to the Indictment, then it shall be excluded. Where the material fact is relevant only to a vague or general allegation in the Indictment, then the Chamber will consider whether notice of the material fact was given in the Pre-Trial Brief or the opening statement, so as to cure the vagueness of the Indictment. Material facts which concern the actions of the Accused personally are scrutinized more closely than general allegations of criminal conduct. Other forms of disclosure, such as witness statements or potential exhibits, are generally insufficient to put the Defence on reasonable notice. The Chamber recognizes two exceptions to this principle: first, where the Prosecution filed a motion for the addition of a witness, which was subsequently granted by the Chamber, and which stated the material facts on which the witness would testify (Witness AAA); second, where a lengthy adjournment was ordered by the Chamber for the express purpose of allowing the Defence to meet newly discovered material facts (Witness DBQ).[11]

Certification is also appropriate in respect of the standard for determining whether an objection has been made, as set out in paragraph 7 of the decision. The Appeals Chamber may, of course, consider it necessary to evaluate these propositions in light of other portions of the decision; but these propositions of law are the matters certified for interlocutory appeal under Rule 73 (B).

8. The Defence argues that the Chamber failed to consider the "Defence Reply to the Prosecutor's Annex", filed on 29 May 2006 ("the Reply"). This is not correct. The Chamber did, in fact, take into account the Reply to the Prosecutor's Annex, as is clearly demonstrated by the Chamber's extensive

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[9] *Niyitegeka*, Judgement (AC), paras. 235, 247, 248; *Ntakirutimana*, Judgement (TC), paras. 71, 79, 81, 85, 88, 91, 99, 112, 115.

[10] *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5 ("It is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of the trial; it is not for the Appeals Chamber to assume this responsibility. As the Appeals Chamber previously underscored, certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence. Consequently, as the matters in the Appeal are clearly for the Trial Chamber, as trier of fact, to determine in the exercise of its discretion, in the view of the Appeals Chamber, it does not justify such an exception and should not have been certified") (citations omitted).

[11] *Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006, para. 10. The Chamber possesses a discretion under Rule 73 (B) to certify only a portion of a decision for interlocutory appeal: *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004 para. 7; *Karemera et al.*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2006, para. 13.

analysis of whether "curing" is open to a trial chamber, or whether it is reserved the Appeals Chamber.[12] That argument is to be found only in the Reply, not the original motion.[13] The failure to mention the Reply in the preamble of the decision was a simple oversight. In any event, as the consideration of replies is purely discretionary, failure to consider such a submission does not constitute an error of law or fact.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part;

CERTIFIES for interlocutory appeal the propositions of law articulated in paragraphs 7 and 10 of the "Decision on Ntabakuze Motion for Exclusion of Evidence", filed on 29 June 2006.

Arusha, 14 July 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[12] *Bagosora et al*., Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006, para. 3.
[13] Reply, para. 16. Indeed, the original motion implicitly accepts that curing in some degree is, indeed, open to a Trial Chamber. Ntabakuze Defence Motion for the Exclusion of Evidence, etc., filed on 28 March 2006, paras. 23-29.

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Decision on Request for a Subpoena for Major Jacques Biot 14 July 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Issuance of a subpoena ad testificandum, Testimony substantial or of considerable assistance to the Accused in relation to a clearly identified issue relevant to the trial, No immunity from a subpoena for Government officials even where the subject-matter of their testimony was obtained in the course of government service – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 54

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Bagosora Defence's Request for a Subpoena Regarding Mamadou Kane, 22 October 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Motion Requesting Subpoenas to Compel the Attendance of Defence Witnesses DK 32, DK 39, DK 51, DK 52, DK 31 1 and DM 24, 26 April 2005 (ICTR-98-41)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Radoslav Brđanin, Decision on Interlocutory Appeal, 11 December 2002 (IT-99-36) ; Appeals Chamber, The Prosecutor v. Radislav Krstić, Decision on Application for subpoenas, 1 July 2003 (IT-98-33) ; Appeals Chamber, The Prosecutor v. Sejér Halilović, Decision on Issuance of Subpoenas, 21 June 2004 (IT-01-48) ; Trial Chamber, The Prosecutor v. Milan Martić, Decision on the Prosecution's Additional Filing Concerning 3 June 2005 Prosecution Motion for Subpoena, 16 September 2005 (IT-95-11); Trial Chamber, The Prosecutor v. Slobodan Milošević, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Shröder, 9 December 2005 (ICTR-02-54)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Urgent Motion Requesting the Chamber to Issue a *Subpoena* Compelling Major Jacques Biot to Appear Before the Trial Chamber for Oral Testimony", filed by the Nsengiyumva Defence on 7 July 2006;

HEREBY DECIDES the motion.

Introduction

1. The Nsengiyumva Defence requests that a *subpoena* be issued to compel the appearance of Major Jacques Biot, who was a UNAMIR observer based in Gisenyi in April 1994. On 21 April 2006,

the Chamber granted the Defence's Article 28 request for assistance from the Kingdom of Belgium in order to interview Major Biot.[1] Based on that interview, which took place on 27 June 2006, the Defence submits that Major Biot has valuable information which is exculpatory of the Accused. Major Biot has, according to the Defence, refused to testify on the basis that he had "said all he could before the Examining Judge and had nothing to add".[2]

Deliberations

2. Rule 54 permits the issuance of a *subpoena* where "necessary for the purposes of an investigation or for the preparation or conduct of the trial". In the case of a *subpoena* to a prospective witness:

> The applicant seeking a *subpoena* must make a certain evidentiary showing of the need for the *subpoena*. In particular, he must demonstrate a reasonable basis for his belief that the prospective witness is likely to give information that will materially assist the applicant with respect to clearly identified issues in the forthcoming trial. To satisfy this requirement, the applicant may need to present information about such factors as the position held by the prospective witness in relation to the events in question, any relation the witness may have had with the accused which is relevant to the charges, any opportunity the witness may have had to observe or learn about those events, and any statements the witness made to the Prosecution or others in relation to them. The Trial Chamber is vested with discretion in determining whether the applicant succeeded in making the required showing, this discretion being necessary to ensure that the compulsive mechanism of the *subpoena* is not abused. As the Appeals Chamber has emphasized, "*Subpoenas* should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction".[3]

In considering whether the prospective testimony will materially assist the applicant,

> "it is not enough that the information requested may be 'helpful or convenient' for one of the parties: it must be of substantial or considerable assistance to the Accused in relation to a clearly identified issue that is relevant to the trial".[4]

In this regard, the Chamber shall consider the specificity with which the prospective testimony is identified; whether the information can be obtained by other means;[5] and whether the party seeking the *subpoena* has made reasonable attempt to secure the voluntary cooperation of the prospective witness.[6]

3. The Defence submits that Major Biot is able to testify that he witnessed no killings while he was in Gisenyi from 6 to 13 April 1994; that the Butotori training facility was not used to train *Interahamwe* militia; and that the Accused was not involved in training or otherwise associated with militia groups.[7] Although the Defence could have described the position of the proposed witness with greater specificity, the Chamber accepts that Major Biot, as a member of the UNAMIR force, was in a

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[1] *Bagosora et al*., Decision on Request to the Kingdom of Belgium for Assistance Pursuant to Article 28 of the Statute (TC), 21 April 2006.
[2] Defence Motion, para. 9.
[3] *Halilovic*, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 6; *Brdanin and Talic*, Decision on Interlocutory Appeal (TC), 11 December 2002, para. 31; *Milosevic*, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Shröder (TC), 9 December 2005 ("*Milosevic* Decision"), para. 35.
[4] *Milosevic* Decision, para. 39; *Martic,* Decision on the Prosecution's Additional Filing Concerning 3 June 2005 Prosecution Motion for *Subpoena* (TC), 16 September 2005, para. 12; *Krstic*, Decision on Application for *Subpoenas* (AC), 1 July 2003 ("*Krstic* Appeal Decision"), para. 11.
[5] *Halilovic*, Decision on the Issuance of *Subpoenas* (AC), 21 June 2004, para. 7; *Krstic* Appeal Decision, para. 10; *Milosevic* Decision, paras. 36, 40.
[6] *Bagosora et al*., Decision on Motion Requesting *Subpoenas* to Compel the Attendance of Defence Witnesses DK32, DK39, DK51, DK52, DK311, and DM24 (TC), 26 April 2005, para. 3; *Bagosora et al*., Decision on Bagosora Defence's Request for a *Subpoena* Regarding Mamadou Kane (TC), 22 October 2004, para. 2; *Bagosora et al*., Decision on Request for *Subpoena* of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4.
[7] Defence Motion, paras. 5-8.

position to neutrally observe events which are relevant to the present trial. Not only would his testimony be relevant, but it may be particularly valuable. In these circumstances, the Chamber finds that a sufficient showing has been made that the prospective witness's testimony would materially assist the Defence.

4. Government officials enjoy no immunity from a *subpoena*, even where the subject-matter of their testimony was obtained in the course of government service.[8] As the Defence has made reasonable efforts to secure the witness's voluntary appearance, a *subpoena ad testificandum* is both necessary and appropriate for the fair conduct of trial.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Registrar to prepare a *subpoena* in accordance with this decision, addressed to Major Jacques Biot, requiring his appearance before this Chamber to give testimony in the present case, and to communicate it, with a copy of the present decision, to the Kingdom of Belgium;

DIRECTS the Registry to communicate the *subpoena* to Major Jacques Biot through appropriate diplomatic channels, accompanied by a copy of this Decision.

Arusha, 14 July 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[8] *Krstic* Appeal Decision, para. 27 ("But it is abundantly clear from the passages already quoted from the Blaskic *Subpoena* Decision, and from paras. 23-24, supra, that the statement made in par 38 of that Decision – that "The Appeals Chamber dismisses the possibility of the International Tribunal addressing *subpoenas* to State officials acting in their official capacity" – can be justified only in relation to the production of documents in their custody in their official capacity. The Appeals Chamber did not say that the functional immunity enjoyed by State officials includes an immunity against being compelled to give evidence of what the official saw or heard in the course of exercising his official functions. Nothing which was said by the Appeals Chamber in the Blaskic *Subpoena* Decision should be interpreted as giving such an immunity to officials of the nature whose testimony is sought in the present case. No authority for such a proposition has been produced by the prosecution, and none has been found. Such an immunity does not exist. No issue arises for determination in this case as to whether there are different categories of State officials to whom any such immunity may apply, and it is unnecessary to determine such an issue here"). Judge Shahabuddeen issued a dissenting opinion, but only on the issue of whether such a *subpoena* could be issued for a pre-testimonial interview with the Defence. No such issue arises in the present case. *Milosevic* Decision, para. 16 ("a *subpoena* is the correct procedural mechanism for seeking to compel a state official to testify").

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Decision on Nsengiyumva Request for Access to Protected Material 14 July 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge

Anatole Nsengiyumva – Jean Bosco Barayagwiza et al. – Jurisdiction of the Trial chamber of all matters not related to the appeal during the pendency of an appeal, Party in receipt of the confidential material shall be bound mutatis mutandis by the applicable witness protection orders, Same access of each co-accused – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 68, 73 (A) and 75 (G)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Motion by Nzirorera for Disclosure of Closed Session Testimony of Witness ZF, 11 November 2003 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Nzirorera Request for Access to Protected Material, 19 May 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Disclosure of Prosecution Informant, 24 May 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on Disclosure of Sealed Exhibits of Witness DM-12, 25 May 2006 (ICTR-99-52)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Decision on Momcilo Perisic's Motion Seeking Access to Confidential Material in the Blagojevic and Jokic Case, 18 January 2006 (IT-02-60) ; Appeals Chamber, The Prosecutor v. Stanislav Galić, Decision on Momcilo Perisic's Motion Seeking Access to Confidential Material in the Galic Case, 16 February 2006 (IT-98-29)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, designated by the Chamber in accordance with Rule 73(A) of the Rules of Procedure and Evidence;

BEING SEIZED of the "Extremely Urgent Confidential Motion for Disclosure of Closed Session Testimony of Witnesses RM-14 and Unredacted Statements and Closed Session Testimony of AHB in *Prosecutor v. Nahimana Ferdinand et al.* (ICTR-99-52-T)", filed by the Defence for Nsengiyumva on 2 June 2006;

HEREBY DECIDES the motion.

Introduction

1. Anatole Nsengiyumva, an Accused in the *Bagosora et al.* trial, requests access to confidential material associated with the testimony of Witness RM-14 and Witness AHB, two protected witnesses in the *Nahimana et al.* trial. Nsengiyumva submits that their testimony is temporally and

geographically connected to the events at issue in the *Bagosora et al*. case, and that the testimony would be of material assistance to his case, or would be exculpatory[1]. The Nsengiyumva Defence agrees to comply with the terms of the relevant Prosecution witness protection orders issued in *Nahimana et al*[2].

Deliberations

(i) Jurisdiction

2. Rule 75 (G) of the Rules of Procedure and Evidence provides that:

> (G) A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply:
>
> (i) to any Chamber, however constituted, remaining seised of the first proceedings; or
>
> (ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings.

3. Contrary to the Defence submission, there is a trial chamber which is still seized of the *Nahimana et al*. case. An appeal from the judgment in that case is still pending. During the pendency of an appeal, the trial chamber before which the trial was conducted remains seized of all matters not related to the appeal, including requests to modify witness protection orders[3]. Accordingly, the present application is properly before this Chamber under Rule 75 (G) (i).

(ii) Merits

4. Confidential inter partes material from one case may be disclosed to a party in another case, where the applicant demonstrates that the material sought "is likely to assist that applicant's case materially, or at least that there is a good chance that it would."[4] This standard can be met by showing that there is a factual nexus between the two cases, for example, if the cases stem from events alleged to have occurred in the same geographical area at the same time[5]. The Defence also requests disclosure of the material on the basis that it is exculpatory under Rule 68.

(a) Witness RM-14

5. Witness RM-14 testified about an occasion on which soldiers saved people at Umuganda stadium. Although the Defence has not made detailed submissions on the nature of the testimony or its precise overlap with the *Bagosora et al*. case, the Chamber is satisfied, in light of the position alleged to have been held by the Accused, that a sufficient temporal and geographic overlap does exist to say that there is a good chance that the witness's testimony would materially assist the Defence in the preparation of its case. The confidential materials may be relevant to understanding the publicly available testimony[6].

(b) Witness AHB

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[1] Motion, paras. 10-14.
[2] Motion, para. 19.
[3] *Prosecution v. Nahimana et al*., Decision on Disclosure of Sealed Exhibits of Witness DM-12 (TC), 25 May 2006, paras. 3-6.
[4] *Prosecutor v. Galic*, Decision on Momcilo Perisic's Motion Seeking Access to Confidential Material in the Galic Case (AC), 16 February 2006, para. 3 (citations omitted); *Prosecutor v. Blagojevic and Jokic*, Decision on Momcilo Perisic's Motion Seeking Access to Confidential Material in the Blagojevic and Jokic Case (AC), 18 January 2006, para. 4.
[5] *Id.; Bagosora,* Decision on Nzirorera Request for Access to Protected Material, 19 May 2006, para. 2.
[6] *Bagosora et al*., Decision on Disclosure of Prosecution Informant (TC), 24 May 2006 para. 5.

6. Nsengiyumva submits that the testimony of Witness AHB contradicts that of Witness XBM, a witness in the *Bagosora et al*. trial, in respect of two specific incidents. The overlap in the subject matter of their testimony relates to: the alleged distribution of weapons by Jean Bosco Barayagwiza in Mutura Commune, and the allegation that Witness AHB saw Barayagwiza coming to Mount Muhe on the occasion of the installation of the RTLM antenna in 1993. The Chamber accepts that, on this basis, there is a good chance that the testimony of Witness AHB would materially assist the Defence.

(iii) Modalities

7. Disclosure orders of this kind routinely require that the party in receipt of the confidential material shall be bound, *mutatis mutandis*, by the applicable witness protection orders[7]. The Chamber finds, however, that, in the absence of submissions as to whether any particular sensitivities or witness protection interests might be engaged by broader disclosure of these two witnesses' identities, those conditions may not be sufficient.

8. In such circumstances, the Appeals Chamber has additionally required that the party in receipt of the confidential material:

> shall not, without express leave of the Appeals Chamber based on a finding that it has been sufficiently demonstrated that third-party disclosure is necessary for the preparation of the defence of the Applicant: … (c) contact any witness whose identity was subject to protective measures[8].

9. The Chamber authorizes the other Accused in the *Bagosora et al*. trial to have the same access to this material, on the same conditions[9].

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Prosecution to immediately identify and disclose to the Defence any confidential transcripts of, or exhibits entered during, the testimony of Witnesses RM-14 and AHB in the *Nahimana et al*. case;

DECLARES that the Nsengiyumva Defence and the Accused personally, and any other Accused and Defence team, shall be bound *mutatis mutandis* by the terms of the applicable witness protection orders upon receipt of the confidential material;

ORDERS that in addition to the existing witness protection measures, parties in receipt of material under this order shall not, without express leave of this Chamber based on a finding that it has been sufficiently demonstrated that third-party disclosure is necessary for the preparation of the defence of the Applicant, contact any witness whose identity was subject to protective measures.

Arusha, 14 July 2006

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[7] See e.g., *Nahimana et al*., Decision on Disclosure of Sealed Exhibits of Witness DM-12 (TC), 25 May 2006, p.3; *Bagosora et al*., Decision on Motion by Nzirorera for Disclosure of Closed Session Testimony of Witness ZF (TC), 11 November 2003, p. 3.

[8] *Blagojevic and Jokic*, Decision on Momcilo Perisic's Motion Seeking Access to Confidential Material in the Blagojevic and Jokic Case (AC), 18 January 2006, para. 9.

[9] The Prosecution already has such access, on the basis of an Appeals Chamber decision: *Bagosora et al*., Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005.

[Signed] : Erik Møse

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Order Assigning Judges to a Case Before the Appeals Chamber 14 August 2006 (ICTR-98-41-AR73)

(Original: English)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Assignement of judges before the Appeals Chamber

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (B) and 73 (C) ; Statute, art. 11 (3) and 13 (4)

I, FAUSTO POCAR, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

NOTING the "Decision on Request for Certification of Decision on Exclusion of Evidence" rendered by Trial Chamber I on 14 July 2006;

NOTING the "Ntabakuze Interlocutory Appeal On Questions of Law Raised by the 29 June 2006 Trial Chamber I 'Decision on Ntabakuze Motion for Exclusion of Evidence'" filed by the Defence on 20 July 2006;

CONSIDERING Articles 11 (3) and 13 (4) of the Statute of the International Tribunal and Rules 73 (B) and (C) of the Rules of Procedure and Evidence of the International Tribunal;

CONSIDERING the composition of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia as set out in document IT/245 issued on 12 May 2006;

HEREBY ORDER that the Bench in *Prosecutor v. Bagosora et al.,* Case N° ICTR-98-41-AR73 shall be composed as follows:

Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron

Done in English and French, the English version being authoritative.

Done this 14th day of August 2006, At The Hague, The Netherlands.

[Signed]: Fausto Pocar

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Decision on Nsengiyumva's Extremely Urgent and Confidential Motion for Disclosure of Closed Session Testimony of Witness OX and the Witness' Unredacted Statements and Exhibits
23 August 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

Judge : Seon Ki Park

Anatole Nsengiyumva – Disclosure of Closed Session Testimony, Protective measures ordered in any proceedings before the Tribunal shall continue to have effect in any other proceedings before the Tribunal, Factual nexus between the two cases – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A), 74 (F) (i), 75 (F) (i) and 75 (G) (i)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Nzirorera Request for Access to Protected Material, 19 May 2006 (ICTR-98-41)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the Blagojevic and Jokic Case, 18 January 2006 (IT-02-60) ; Appeals Chamber, The Prosecutor v. Stanislav Galić, Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the Galic Case, 16 February 2006 (IT-98-29)

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

SITTING as Trial Chamber II, composed of Judge Seon Ki Park (the "Chamber");

BEING SEISED OF the "Extremely Urgent Confidential Motion for Disclosure of Closed Session Testimony of Witness OX and Witness Unredacted Statements and Exhibits in *Prosecutor v. Ndindiliyimana* (ICTR-00-56-T)" filed by the Defence for Anatole Nsengiyumva on 28 July 2006 (the "Motion");

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 74 (F) (i) of the Rules;

NOTING that the Prosecution has not filed a response;

HEREBY DECIDES the Motion on the basis of the written submissions filed by the Defence for Nsengiyumva pursuant to Rule 73 (A) of the Rules.

1. Anatole Nsengiyumva, an Accused in the trial of *The Prosecutor v. Bagosora et al.* (also known as the Military I case), requests disclosure of the closed session transcripts, unredacted statements and exhibits in respect of protected Witness OX, who testified for the Prosecution in the present case. The Motion is brought pursuant to Rule 75 (G) (i)

2. The Chamber notes Rule 75 (F) (i) which provides that once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal, such protective measures shall continue to have effect in any other proceedings before the Tribunal unless and until they are rescinded, varied or augmented in accordance with the procedure set out in the Rules.

3. The Chamber further notes that confidential *inter partes* material may be disclosed to a party in another case provided that the applicant demonstrates that it "is likely to assist that applicant's case materially, or […] there is a good chance that it would." This standard can be met by showing that there is a factual nexus between the two cases.[1]

4. Nsengiyumva wishes to have access to the said material in order to prepare his defence. He submits that the testimony of Witness OX contradicts the testimony of several witnesses, who appeared as Prosecution witnesses in the Military I case. For instance, one witness in the Military I case maintained that he had stayed home between 7 and 13 April 1994, whereas Witness OX places him at an alleged meeting in the bus park in Gisenyi. Nsengiyumva therefore submits that it would be of interest not only to the Defence but also to the Trial Chamber in the Military I case to evaluate the testimony of the said witness in the context of other testimonies on related matters.

5. The Chamber is satisfied that the issues raised by the Nsengiyumva defence establish a sufficient factual nexus between the Military I case and the present case.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion;

ORDERS the Prosecution and the Registry to transmit to the Nsengiyumva Defence the closed session transcripts of Witness OX's testimony, his unredacted statements and any exhibit filed under seal during his testimony before this Chamber;

DECLARES that the Nsengiyumva Defence and the Accused shall be bound *mutatis mutandis*, upon receipt of the confidential material, by the terms of the witness protection orders issued in the present case[2];

ORDERS the Nsengiyumva Defence and the Accused not to disclose the closed session transcripts, unredacted statements or exhibits under seal, or any other potentially identifying information about the witness, to any third parties, including other Defence teams and witnesses at this Tribunal.

Arusha, 23 August 2006.

[Signed]: Seon Ki Park

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[1] *Blagojević and Jokić*, IT-02-60-A, Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the *Blagojević and Jokić* Case, 18 January 2006, para. 4; *Prosecutor v. Galić*, IT-98-29-A, Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the *Galić* Case, 16 February 2006, para. 3 (with further references). See also *The Prosecutor v. Bagosora et al.*, Case N°ICTR-98-41-T, Decision on Nzirorera Request for Access to Protected Material, 19 May 2006, para. 2.

[2] The Prosecutor v. Augustin Ndindiliyimana, Innocent Sagahutu, François-Xavier Nzuwonemeye, ICTR-2000-56-I, Order for Protective Measures for Witnesses, 12 July 2001; Le Procureur contre Augustin Bizimungu, Augustin Ndindiliyimana, Innocent Sagahutu, François-Xavier Nzuwonemeye, Affaire N°ICTR-2000-56-I, Décision sur la Requête du Procureur aux Fins de Modification et d'Extension des Mesures de Protection des Victims et des Témoins, 19 March 2004.

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Decision on Defence request to Correct Errors in Decision on Subpoena for Major Biot
29 August 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Request to the Kingdom of Belgium, Error on the status and name of the person requested, Good Subpoena already issued – Motion moot

International Instrument cited :

Statute, art. 28

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request to the Kingdom of Belgium for Assistance Pursuant to Article 28 of the Statute, 21 April 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for a Subpoena for Major Jacques Biot, 14 July 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Urgent *Memorandum* to the Chamber to Correct Material Errors in Decision on Request for a *Subpoena* for Major Biot", filed by the Nsengiyumva Defence on 20 July 2006;

HEREBY DECIDES the Motion.

1. On 7 April 2006, the Nsengiyumva Defence filed an application for the Chamber to issue a request to the Kingdom of Belgium, pursuant to Article 28 of the Statute, to facilitate contact with a Belgian national identified as "Commander Biot Marc". The Chamber granted the application on 21 April 2006.[1] The Defence then filed a motion on 7 July 2006 requesting the Chamber to issue a *subpoena* compelling "Major Jacques Biot" to appear before the Chamber for oral testimony. On 14

[1] *Bagosora et al*., Decision on Request to the Kingdom of Belgium for Assistance Pursuant to Article 28 of the Statute (TC), 21 April 2006.

July 2006, the Chamber granted the motion and ordered the Registrar to issue a *subpoena* addressed to "Major Jacques Biot".[2]

2. The Defence subsequently filed a "memorandum" requesting the Chamber to amend its decision so as to identify the addressee of the *subpoena* as "Major Marc Biot". The Defence also claims that the decision incorrectly summarizes the nature of the evidence to be given by Major Biot, and that he was not a member of UNAMIR, but a "Belgian military technical assistant".[3] On 25 July 2006, the Chamber was informed by the Defence, through the Registry, that the correct name of the prospective witness was "Willy Biot".

3. On 20 July 2006, the Registry issued a *subpoena* addressed to "Major Willy Biot", which was transmitted to the Belgian authorities on 21 July 2006. The *subpoena* having now been issued to the properly identified addressee, the request to alter the Chamber's decision in this respect is moot. Furthermore, none of the alleged errors identified by the Defence are, at this stage, material.

FOR THE ABOVE REASONS, THE CHAMBER

DECLARES the request moot.

Arusha, 29 August 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[2] *Bagosora et al*., Decision on a Request for Subpoena for Major Jacques Biot (TC), 14 July 2006.
[3] Motion, p. 4.

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Decision on Motion for Deposition of Joseph Serugendo 29 August 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Anatole Nsengiyumva – Joseph Serugendo – Testimony, Witness in treatment in Hospital – Motion moot

International Instrument cited :

Rules of Procedure and Evidence, rule 71 (A)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Anatole Nsengiyumva's Extremely Urgent Motion for the Testimony of Mr. Joseph Serugendo Taken by Deposition", filed on 20 July 2006;

CONSIDERING the Response thereto, filed by the Prosecution on 25 July 2006;

HEREBY DECIDES the motion.

1. The Nsengiyumva Defence requests the taking of testimony from Mr. Joseph Serugendo by deposition, pursuant to Rule 71 (A) of the Rules of Procedure and Evidence. On 22 August 2006 the Public Affairs and Information Unit of the ICTR issued a press release indicating that Mr. Serugendo, who was in the Tribunal's custody having been convicted on 12 June 2006, had passed away while receiving treatment at the Nairobi Hospital.[1] Accordingly, the motion is moot.

FOR THE ABOVE REASONS, THE CHAMBER

DECLARES the motion moot.

Arusha, 29 August 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[1] ICTR/INFO-9-2-488.EN, Arusha, 22 August 2006.

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Decision on the Bagosora Defence request for Subpoena of Ambassador Mpungwe and Cooperation of the United Republic of Tanzania 29 August 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Issuance of subpoena to an Ambassador, Cooperation of the States, Tanzania – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rule 71 (A) ; Statute, art. 28

International Case cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute, 31 October 2005 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Bagosora Defence Amended Strictly Confidential and *Ex Parte* Request for *Subpoena* of Ambassador Mpungwe and Cooperation of the United Republic of Tanzania", filed on 7 July 2006, and the "Bagosora Defence Further Request for Timely Decision on Bagosora Defence Amended Motion Filed 7 July 2006", filed on 24 August 2006;

HEREBY DECIDES the motion.

1. The Bagosora Defence wishes to interview Ambassador Ami R. Mpungwe, a former official of the Tanzanian government who is said to have acted as a facilitator in the negotiations leading to the Arusha Accords. The Bagosora Defence submits that it has reasonable grounds to believe that Ambassador Mpungwe may have information concerning Colonel Bagosora's attitude at the peace talks, which has been the object of potentially incriminating testimony by Prosecution witnesses. The motion details extensive efforts dating back to 28 April 2005 by both the Defence and the Registrar to arrange a meeting with Ambassador Mpungwe.[1] The remedy sought is a request to the Government of Tanzania to facilitate a meeting with the Ambassador and, "if necessary", the issuance of a *subpoena* to compel his attendance. The most recent information communicated to the Chamber is that the Ambassador is willing to meet with the Bagosora Defence, but believes that he must receive prior authorization from government authorities to do so.[2]

2. Article 28 of the Statute imposes an obligation on States to

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[1] Motion, paras. 13-43; Further Request, para. 4.
[2] Further Request, para. 4.

> "cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violation of international humanitarian law".

This obligation extends not only to efforts by the Prosecution to obtain inculpatory evidence, but also efforts by the Defence to obtain exculpatory information. A request to a Chamber to make a request under Article 28 must set forth the nature of the information sought, its relevance to the trial, and the efforts that have been made to obtain it. The type of assistance requested should also be defined with particularity.[3]

3. The conditions for issuance of a request under Article 28 are satisfied. Both the Defence and the Registry have undertaken significant efforts to arrange the meeting requested. A sufficient basis has been established to suggest that Mr. Mpungwe may have information concerning the conduct of Colonel Bagosora during the Arusha negotiations, on which this Chamber has heard direct and potentially incriminating evidence. Further, the evidence relates to a specific allegation in paragraph 5.10 of the Indictment that the Accused

> "openly manifested his opposition to the concessions made by the Government representative … to the point of leaving the negotiation table. Colonel Théoneste Bagosora left Arusha saying that he was returning to Rwanda to 'prepare the apocalypse'".

The Defence has a reasonable basis to believe that Ambassador Mpungwe may have information which could be material to these allegations.

4. The Chamber does not consider it necessary, at this stage, to issue a *subpoena* addressed to Ambassador Mpungwe. It appears that he is willing to attend a meeting voluntarily, provided that he is given authorization to do so by the Tanzanian government. The Chamber observes, however, that the meeting must be held expeditiously. The trial is in its closing stages, and the Defence must be given a reasonable opportunity to ascertain the nature of the witness's knowledge and, if necessary, to call him as a witness.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part;

RESPECTFULLY REQUESTS the United Republic of Tanzania to give its permission to allow Ambassador Mpungwe to meet with the Bagosora Defence, and to otherwise provide any relevant assistance that may reasonably be required to facilitate this meeting as soon as possible;

DIRECTS the Registry to transmit this decision to the relevant authorities of the United Republic of Tanzania.

Arusha, 29 August 2006

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[3] *Bagosora et al*., Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute (TC), 31 October 2005, para. 2.

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Decision on Testimony of Witness Amadou Deme by Video-Link 29 August 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Video-Link testimony, Interests of justice, Refusal of the witness based on advice from his lawyer not to undertake foreign travel, Genuine believes of the Accused that he has good reason not to travel – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 54 and 90 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 October 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Testimony by Video-Conference, 20 December 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Aloys Simba, Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link, 4 February 2005 (ICTR-2001-76)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Ntabakuze Defence "Request to Allow Witness Amadou Deme to Give Testimony via Video-Link", filed on 12 July 2006;

CONSIDERING the Prosecution Response, filed on 20 July 2006; and the Defence Reply, filed on 31 July 2006;

HEREBY DECIDES the motion.

Introduction

1. The Ntabakuze Defence requests the Chamber to allow Defence Witness Amadou Deme to give testimony by video-conference. The Defence states that the witness, a former information officer with UNAMIR, is primarily concerned that he will be denied re-entry to his country of residence and has received legal advice that he should not travel.[1] The Defence submits that the testimony of the witness is important, as it will address, among other issues, the existence of an alleged conspiracy to commit genocide, and whether killings of civilians took place near the airport in Kigali where Para-commando troops were stationed.[2]

[1] Motion, paras. 7-9; Ntabakuze Reply, para. 4.
[2] Motion, para. 10.

2. The Prosecution opposes the motion, arguing that the circumstances of this witness do not fulfil the criteria for authorization of testimony via video-conferencing.

Deliberations

3. Rule 90 (A) of the Rules of Procedure and Evidence provides that "witnesses shall, in principle, be heard directly by the Chambers". A Chamber may nevertheless order under Rule 54 that testimony be heard by video-conference provided that it is in the interests of justice to do so.[3] In making such an evaluation, the Chamber must weigh the importance of the testimony, the witness's inability or unwillingness to attend, and whether a good reason has been adduced for that inability or unwillingness.[4]

4. Mr. Deme, according to the Defence, will testify that he knows of no credible evidence that a conspiracy existed in January 1994 to commit genocide against Tutsis in Rwanda; that an informant who provided information that such a conspiracy existed was not credible; and that he received no reports of killings of civilians near Kigali airport, despite the presence of UNAMIR observers in the area. The testimony would, if credible, contradict Prosecution evidence which potentially incriminates the Accused.

5. The Defence has established that Mr. Deme genuinely refuses to travel and that this refusal is based, at least in part, on advice from his lawyer not to undertake foreign travel. Although the Defence has not particularized the issues which may imperil the witness's residency status, the Chamber accepts that a sufficient showing has been made that the witness genuinely believes that he has good reason not to travel, and that these reasons are objectively supported, in particular, by advice from his attorney.

6. The Chamber finds, having considered the totality of the circumstances, that it is in the interests of justice to permit the witness to testify by video-conference.

FOR THE ABOVE REASONS, THE CHAMBER

AUTHORIZES the taking of the testimony of Witness Amadou Deme by video-conference from his country of residence;

INSTRUCTS the Registry, in consultation with the parties, to make all necessary arrangements in respect of the testimony of Witness Deme by video-conference during the upcoming trial segment from 4 September to 13 October 2006, and to videotape the testimony for possible future reference by the Chamber.

Arusha, 29 August 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[3] *Bagosora et al*., Decision on Prosecution Request for Testimony of Witness BT via Video-Link (TC), 8 October 2004.
[4] *Id*., para. 6; *The Prosecutor v. Aloys Simba*, Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link (TC), 4 February 2005, para. 4; *Bagosora et al*., Decision on Testimony by Video-Conference (TC), 20 December 2004, para. 4.

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Decision on Nsengiyumva Motion for Witness Higaniro to Testify by Video-Conference
29 August 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Video-Conference testimony, Witness detained abroad, Interests of justice, Belgium – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 54 and 90 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 October 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Testimony by Video-Conference, 20 December 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Aloys Simba, Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link, 4 February 2005 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. Aloys Simba, Decision on the Defence Request for Taking the Evidence of Witness FMP1 by Deposition, 9 February 2005 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Ntabakuze Motion to Allow Witness DK-52 to Give Testimony By Video-Conference, 22 February 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED of "Anatole Nsengiyumva's Extremely Urgent Motion for the Testimony of Mr. Alphonse Higaniro to be Taken by Video-Conference", etc., filed by the Nsengiyumva Defence on 3 July 2006;

HEREBY DECIDES the motion.

Introduction

1. The Nsengiyumva Defence requests that the testimony of one of its witnesses who is currently in detention in Belgium, Alphonse Higaniro, be heard by video-conference. Although Mr. Higaniro has expressed his willingness to testify, the Belgian authorities have indicated that Belgian law prohibits his physical transfer to give testimony in Arusha.

Deliberations

2. Under Rule 54 of the Rules of Procedure and Evidence, a Chamber may authorize the hearing of testimony by video-conference in lieu of a physical appearance where it is "in the interests of justice".[1] In making this determination, the Chamber must consider: the importance of the testimony; the inability or unwillingness of the witness to attend; and whether good reason has been adduced for that inability or unwillingness.[2]

3. Mr. Higaniro's testimony is said to rebut the testimony of Witness XBH that the Accused met in Butare with Colonel Bagosora and others to discuss plans for genocide against the Tutsis, in particular, by preparing lists of prominent persons to be killed. Mr. Higaniro himself is alleged by Witness XBH to have been present at a meeting in Butare with the Accused during which an operation to kill Tutsis was discussed.[3] Accordingly, the Chamber accepts that the testimony is of potential importance. Further, the letter from the Belgian authorities annexed to the motion indicates that transfer of the witness to Arusha is not possible because of his detention in Belgium. In light of these considerations, the Chamber considers that it is in the interests of justice to permit Mr. Higaniro to testify by video-conference.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Registry, in consultation with the Defence, to make all necessary arrangements to facilitate the testimony of Witness Alphonse Higaniro via video-conference, and to videotape the testimony for possible future reference by the Chamber.

Arusha, 29 August 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[1] *Bagosora et al*., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004, paras. 5-8. Video-conference testimony may also be authorized for witness protection purposes, but no such application had been made in the present motion.

[2] *Bagosora et al*., Decision on Ntabakuze Motion to Allow Witness DK-52 to Give Testimony By Video-Conference (TC), 22 February 2006; *Simba*, Decision on the Defence Request for Taking the Evidence of Witness FMP1 by Deposition (TC), 9 February 2005; *Simba*, Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link (TC), 4 February 2004, para. 4; *Bagosora et al*., Decision on Testimony by Video-Conference (TC), 20 December 2004; *Bagosora et al*., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004.

[3] T. 3 July 2003 p. 27.

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Decision on Disclosure of Closed Session Testimony of BDR-1 and LK-2 29 August 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Disclosure of Closed Session Testimony, Witness protection measures : non-disclosure to the public of information that could permit the identification of the witness, Witness having revealed themselves their status –Motion granted

International Instruments cited :

Rules of Procedure and Evidence, rule 75 (G) ; Statute, art. 21

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Ntabakuze Motion for Protection of Witnesses, 15 March 2004 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision Amending Defence Witness Protection Orders, 2 December 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. André Rwamakuba, Decision on Bagosora Motion for Disclosure of Closed Session Testimony of Defence Witness 3/13, 24 February 2006 (ICTR-98-44C) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Zigiranyirazo Motion for Disclosure of Closed Session Testimony of DM-190, 16 may 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Nzirorera Request for Access to Protected Material, 19 May 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on Disclosure of Sealed Exhibits of Witness DM-12, 25 May 2006 (ICTR-99-52)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the « Requête de la défense du Dr. Casmir Bizimungu en communication des audiences à huis clos et des exhibits des témoins protégés de la défense BDRl et LK2 », filed by the Bizimungu Defence on 10 July 2006;

HEREBY DECIDES the motion.

Introduction

1. The Defence of Casimir Bizimungu, currently being tried before Trial Chamber II, requests the disclosure of closed session transcripts and sealed exhibits pertaining to the testimony of Witnesses BDR-1 and LK-2. They appeared for the Nsengiyumva Defence in the *Bagosora et al.* trial on 14 and

15 April 2005 and 19, 20 and 21 April 2005, respectively[1]. The request is based on Rule 75 (G) of the Rules of Procedure and Evidence.

2. The Bizimungu Defence submits that the two witnesses revealed that they testified before this Chamber in the *Bagosora et al*. case and have given their consent to disclosure of any confidential material arising therefrom[2]. The confidential information is said to be necessary to decide whether to call these witnesses and, if need be, in the preparation and presentation of their testimony[3]. The Defence agrees to comply with the relevant Defence witness protection orders issued in *Bagosora et al*[4].

Deliberations

3. In accordance with Article 21 of the Statute and Rule 75, the Chamber issued witness protection orders in the *Bagosora et al*. trial which authorizes non-disclosure to the public of any information that could be used to identify them[5]. Portions of the testimony of Witnesses BDR-I and LK-2 were so categorized and were, accordingly, held in closed Session[6]. Rule 75 (G) permits any party to a proceeding seeking to vary protective measures ordered in a different proceeding to apply to the Chamber "seised of the first proceeding".

4. Witnesses BDR-I and LK-2 have revealed to the Bizimungu Defence their status as protected witnesses in this case, and have furthermore apparently consented to the disclosure of the protected information. In these circumstances, no witness protection purpose would be sewed by denying the Defence access to the witnesses' confidential testimony. Indeed, since any person within the Office of the Prosecution may be designated to have access to protected information in any case before this Tribunal, such disclosure enhances trial fairness[7]. The Defence should not be denied similar access in respect of witnesses who have revealed their status[8].

5. The Bizimungu Defence and the Accused Bizimungu shall be bound, *mutatis mutandis,* by the terms of the witness protection orders for Nsengiyumva Defence witnesses in respect of Witnesses BDR-1 and LK-2[9].

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

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[1] Motion, para. 7.
[2] Motion, paras. 13-14.
[3] Motion, paras. 15-16.
[4] Motion, para. 19.
[5] *Bagosora et al.,* Decision on Ntabakuze Motion for Protection of Witnesses (TC) 15 March 2004, paras. 1-9. The *Bagosora et al*. Decision on Motion to Harmonize and Amend Witness Protection Orders (TC), 1 June 2005, para. 22, superseded the 15 March 2004 Nsengiyumva witness protection decision and replaced it, *mutatis mutandis,* with the Decision on Ntabakuze Motion for Protection of Witnesses (TC) 15 March 2004). See also *Bagosora et al.,* Decision Amending Defence Witness Protection Orders (TC), 2 December 2005 (modifying all previous witness protection orders in *Bagosora et al*. case to take into account Prosecution's discretion to access confidential information).
[6] For Witness BDR-1: T. 14 April 2005 pp. 62-81; 15 April 2005 pp. 31-40. For Witness LK-2: T. 19 April 2006 pp. 1-8.
[7] *Bagosora et al*., Decision on Interlocutory Appeals of Decisions on Witness Protection Orders (AC), 6 October 2005, at paras. 44-46.
[8] *Bagosora et al*., Decision on Disclosure of Sealed Exhibits of Witness DM-12 (TC), 25 May 2006, para. 9; *Bagosora et al*., Decision on Nzirorera Request for Access to Protected Material, 19 May 2006, para. 3. See also *Bagosora et al*., Decision on Zigiranyirazo Motion for Disclosure of Closed Session Testimony of DM-190 (TC), 16 May 2006, para. 5; *Rwamakuba*, Decision on Bagosora Motion for Disclosure of Closed Session Testimony of Defence Witness 3/13 (TC), 24 February 2006, para. 5.
[9] Above, note 5.

ORDERS the Registry to disclose the closed session transcripts and sealed exhibits of Witnesses BDR-1 and LK-2 to the Bizimungu Defence;

ORDERS that the Bizimungu Defence, including the Accused, is bound *mutatis mutatis* by the terms of the Nsengiyumva Defence Witness Protection Orders in respect of Witnesses BDR-1 and LK-2.

Arusha , 29 August 2006

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on request for a Subpoena compelling Witness DAN to attend for Defence Cross-Examination
31 August 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Issuance of subpoena, Reasonable attempts to obtain Witness voluntary cooperation, Materiality of the testimony, No danger of the Prosecution case being re-opened or enlarged – Cooperation of the States, Rwanda – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 54 ; Statute, art. 28

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Requests for Subpoena, 10 June 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Subpoena for Witness BW (TC), 24 June 2004(ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Request for a Subpoena Regarding Witness BT, 25 August 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3, 12 July 2006 (ICTR-98-44)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Radislav Krstić, Decision on Application for subpoenas, 1 July 2003 (IT-98-33) ; Appeals Chamber, The Prosecutor v. Sejér Halilović, Decision on Issuance of Subpoenas, 21 June 2004 (IT-01-48) ; Trial Chamber, The Prosecutor v. Slobodan Milošević, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Shröder, 9 December 2005 (ICTR-02-54)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Prosecution "Confidential Motion Requesting a *Subpoena* Compelling Witness DAN to Attend for Defence Cross-Examination", filed on 19 June 2006;

CONSIDERING the Responses filed by the Ntabakuze and Bagosora Defence on 27 and 29 June 2006, respectively; and Replies filed by the Prosecution on 29 June 2006 and 4 July 2006; and the further Reply filed by the Bagosora Defence on 3 July 2006;

HEREBY DECIDES the motion.

Introduction

1. The Prosecution requests a *subpoena* for the appearance before the Chamber of one of its witnesses, Witness DAN. The Chamber admitted a written statement of the witness in lieu of oral testimony, as is permitted under Rule 92 *bis* where the statement does not concern "acts and conduct of the accused", but required her to appear for cross-examination.[1] Having failed to secure the witness's voluntary attendance, the Prosecution now requests a *subpoena*. Ntabakuze and Bagosora oppose the motion, arguing that the witness should have appeared before the close of the Prosecution case on 14 October 2004. Permitting the witness to testify at this stage would, according to the Defence, effectively allow the Prosecution to re-open its case.

Deliberations

2. Rule 54 of the Rules of Procedure and Evidence authorizes a Trial Chamber to issue

> "orders, summonses, *subpoenas*, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial".

The applicant for a *subpoena* must show that (i) reasonable attempts have been made to obtain the voluntary cooperation of the witness; (ii) the witness's testimony can materially assist the applicant in respect of clearly identified issues; and (iii) the witness's testimony must be necessary and appropriate for the conduct and fairness of the trial.[2] It has been said that "*subpoenas* should not be issued lightly" and that a Chamber must consider "not only the usefulness of the information to the applicant but … its overall necessity in ensuring that the trial is informed and fair". [3]

3. The attempts to obtain Witness DAN's voluntary cooperation, as described in the Motion, have been reasonable. The first criterion is satisfied.

4. The witness's testimony concerns events at the *Centre Christus* between 6 April and 12 April 1994. In particular, her statement indicates that she saw civilians being attacked by men in military uniform using guns and grenades.[4] This information could, potentially corroborate Prosecution evidence of criminal acts by subordinates of the Accused. Under these circumstances, the witness's testimony is not only material to clearly identified issues in the trial, but is also necessary and appropriate for its conduct.

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[1] *Bagosora et al*., Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 *bis* (TC), 9 March 2006, para. 25 ("the Chamber considers that fairness dictates that the statement be admitted with cross-examination").
[2] *Karemera et al*., Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3 (TC), 12 July 2006, para. 9; *Prosecutor v. Krstic,* Case N°IT-98-33-A, Decision on Application for Subpoenas (AC), 1 July 2003, para. 10; *Prosecutor v. Milosevic*, Case N°IT-02-54-T, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder (TC), 9 December 2005, para. 36.
[3] *Prosecutor v. Halilovic,* Case N°IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 7.
[4] Written statement of Witness DAN, *Bagosora et al*., doc. K0275572-K0275576.

5. The Chamber finds no merit in the Defence's argument that the issuance of a *subpoena* at this juncture would constitute a re-opening of the Prosecution case. The witness is being called for cross-examination by the Defence. Such cross-examinations have been permitted in the past at the request of the Defence.[5] Under these circumstances, there is no danger of the Prosecution case being re-opened or enlarged by requiring the witness to appear for cross-examination.

6. Although *subpoenas* are addressed to the prospective witness, the Chamber notes that the assistance of the Government of Rwanda may be desirable in order to facilitate the service of the *subpoena* and to secure the appearance of the witness.[6] Under Article 28 of the Statute of the Tribunal, the Chamber is empowered to solicit the cooperation of a state for the

> "investigation and prosecution of persons accused of committing serious violations of international humanitarian law".

Thus, the Chamber requests the Government of Rwanda to assist, if necessary, in the service of the *subpoena* on the addressee, and to provide any assistance that may be requested by the Registry to facilitate the attendance of the witness.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Registry to prepare a *subpoena* addressed to Witness DAN in accordance with this decision, and to transmit it to the Government of Rwanda, along with a copy of the present decision;

REQUESTS the Government of Rwanda to serve the *subpoena* on the addressee as soon as possible, and to provide any other assistance that may be requested by the Registry to facilitate the attendance of the witness.

Arusha, 31 August 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[5] As was the case for Witnesses DO and XBH. See *Bagosora et al.,* Nsengiyumva Defence Extremely Urgent Request to Recall Prosecution Witness DO for further Cross-Examination and for Urgent Translation into French and English, of Documents from Rwanda, Relevant to Witness DO, filed on 9 July 2004; T. 14 October 2004 p. 23; *Bagosora et al.,* Anatole Nsengiyumva's Extremely Urgent Motion to Recall Prosecution Witness XBH for further Cross-Examination Pursuant to Rules 54, 90 (G), 73 (A), and 91 (B) of the Rules of Procedure and Evidence and Articles 19 and 20 of the Statute, filed on 6 April 2005; T. 18 May 2005 p. 7.

[6] *Bagosora et al.*, Decision on Prosecutor's Request for a Subpoena Regarding Witness BT (TC), 25 August 2004, para. 8; *Bagosora et al.,* Decision on Request for Subpoena for Witness BW (TC), 24 June 2004, para. 4; Bagosora et al., Decision on Request for Subpoenas (TC), 10 June 2004, para. 5.

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Decision on Kabiligi Motion for the Exclusion of Portions of Testimony of Prosecution Witness Alison Des Forges 4 September 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Exclusion of portions of Testimony of an expert witness, Hearsay evidence, Contemporaneously objections to the admissibility of the testimony, Appropriate remedy – Motion granted

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89 (C), 14 October 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Motions for Judgement of Acquittal, 2 February 2005 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Kabiligi Motion for the Exclusion of Evidence in the Testimony of Prosecution Witness Alison des Forges", filed on 10 May 2006;

CONSIDERING the Prosecution Response, filed on 16 May 2006; and the Defence Reply, filed on 29 May 2006;

HEREBY DECIDES the motion.

Introduction

1. Dr. Alison Des Forges, an expert witness for the Prosecution, testified at the beginning of the present trial before any factual evidence had been heard or admitted. Portions of her testimony were based on, and provided a description of, an interrogation of the Accused Kabiligi by Prosecution investigators in July 1997. When the Prosecution subsequently sought to introduce transcripts of this interrogation, the Chamber found that Kabiligi had not been properly informed of his rights to the assistance of counsel and to remain silent. The remedy ordered was the exclusion of the transcripts.[1] The Defence argues that the expert testimony which is based on statements of the Accused during the interrogation must also be excluded. The motion requests the exclusion of eight specific excerpts of the expert's testimony.[2]

[1] *Bagosora et al.*, Decision on the Prosecutor's Motion For the Admission of Certain Materials Under Rule 89 (C) (TC), 14 October 2004.
[2] Motion, para. 20.

Deliberations

2. This Chamber has already ruled that admission of the transcripts of the Kabiligi interview from July 1997 would be "antithetical to, and would seriously damage, the integrity of the proceedings".[3] The same logic must apply in respect of hearsay evidence as to the contents of the interview. Accordingly, the Chamber is of the view that expert testimony which describes the content of that interview must be excluded.

3. The Prosecution argues that objections to the admissibility of the testimony should have been made contemporaneously, and that the present motion is untimely.[4] The Chamber disagrees. The Defence did object to expert testimony being given before the factual basis for such testimony had been established by Prosecution evidence.[5] The Chamber permitted the expert witness to testify over these objections, noting that the procedure

> "in no way diminishe[d] [the Prosecution's] burden of proving all the facts substantiating the crime with which [it] has charged the Accused beyond a reasonable doubt".[6]

The Defence was entitled to defer its objection to the factual basis underpinning the expert's opinions until such time as the Prosecution sought to introduce the evidence upon which it was based.[7]

4. The parties disagree on the appropriate remedy. The Prosecution argues that the Chamber should not exclude expert opinions which are based partially on the Kabiligi interview and partially on other information.[8] The complexity of drawing such a distinction, it argues, requires the Chamber to defer consideration of the weight of that testimony until the end of the case, rather than to categorically exclude certain parts thereof.[9] The Defence responds that the expert gave specific conclusions based on the Kabiligi interview, and that no ambiguity or complexity exists which could justify allowing those conclusions, which are based on inadmissible evidence, to remain part of the record.[10] Accordingly, the Defence requests that the Chamber exclude "all references … to the 19 July 1997 interview … including, but not limited to" eight distinct excerpts from the transcripts.[11]

5. In the excerpts identified by the Defence, the expert witness gives clear indications as to the basis for her opinions or information. On occasion, her propositions are based not only on the Kabiligi interview, but also on some other source.[12] It would not be appropriate to categorically exclude propositions which are based, at least in part, on admissible evidence.[13] As the basis for the expert opinions are evident from the record, the Chamber considers it unnecessary to categorically exclude specific sections of the expert's testimony. It is more convenient and equally effective to simply declare, as in the Chamber's previous decision, that statements by the Accused during his custodial

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[3] *Bagosora et al.,* Decision on the Prosecutor's Motion For the Admission of Certain Materials Under Rule 89 (C) (TC), 14 October 2004. The transcripts of the interview, conducted by ICTR investigators on 19 July 1997, are referenced as *Bagosora et al.,* Prosecutor's Motion for the Admission of Certain Materials Under Rule 89 (C) of the Rules of Procedure and Evidence, 28 April 2004, Appendix KABIGRA-01, KABIGRA-02 ["the Kabiligi Interview"].
[4] Response, para 115.
[5] *Bagosora et al.,* Defence Motion Seeking an Order from the Tribunal to Prevent Expert Witness Alison Des Forges from Testifying as First Prosecution Witness, filed on 26 August 2002, paras. 19-20. See also, T. 3 September 2002 pp. 9, 22, 28-29, 37, 53-54.
[6] T. 4 September 2002 p. 10.
[7] The Prosecution did not attempt to introduce the transcripts of the Kabiligi interview through the expert. They were tendered by written procedure approximately 17 months after her testimony. *Bagosora et al.,* Prosecutor's Motion for the Admission of Certain Materials Under Rule 89 (C) of the Rules of Procedure and Evidence, filed on 28 April 2004.
[8] Response, para. 117.
[9] Response, para. 116.
[10] Reply, para. 45.
[11] *Id.*, para. 46.
[12] E.g. T. 17 September 2002 p. 23 (indicating that Colonels Nsengiyumva, Bagosora and Nsabimana were members of a group called AMASASU).
[13] *Bagosora et al.,* Decision on Motion for Judgement of Acquittal (TC), 2 February 2005, para. 10.

interview in July 1997 are excluded. It follows, without the need for any specific order, that any opinions based exclusively on this interview will be accorded no weight by the Chamber.

FOR THE ABOVE REASONS, THE CHAMBER

DECLARES that the portions of the testimony of Witness Alison Des Forges which describe the content of statements of the Accused Kabiligi during an interview with Prosecution investigators in July 1997 are excluded.

Arusha, 4 September 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Kabiligi Motion for Exclusion of Evidence 4 September 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Gratien Kabiligi – Exclusion of evidence, Standard applicable, Curing of the Indictment, Discretionary power of the Trial chamber to cure an Indictment, Failure to plead the physical perpetration of a criminal act by an accused under a count of the Indictment constitutes a defect, Condition to cure : reasonable position of the Accused to understand the charges against him or her, Condition of contemporaneous objection to the testimony, Prejudice arising from the fact that the witnesses is deceased – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rule 89 (C)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Sylvestre Gacumbitsi, Judgement, 17 June 2004 (ICTR-2001-64) ; Appeals Chamber, The Prosecutor v. Eliezer Niyitegeka, Judgement, 9 July 2004 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and ICTR-96-17) ; Trial Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision, 23 February 2005 (ICTR-2000-55) ; Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgement, 23 May 2005 (ICTR-98-44A) ; Appeals Chamber, The Prosecutor v. Jean de Dieu Kamuhanda, Judgement, 19 September 2005 (ICTR-99-54) ; Trial Chamber, The Prosecutor v. Protais Zigiranyirazo, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief, 30 September 2005 (ICTR-2001-73) ; Appeals Chamber, The Prosecutor v. André Ntagerura et al., Judgement, 8 February 2006 (ICTR-96-10A) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Ndindiliyimana's Extremely Urgent Motion to Prohibit the Prosecution From Leading Evidence on Important Material Facts Not Pleaded in the Indictment Through Witness ANF, 15 June 2006 (ICTR-99-50) ; Appeals Chamber, The Prosecutor v. Sylvestre Gacumbitsi, Judgement, 7 July 2006 (ICTR-2001-64)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Zoran Kupreškić, Judgement, 23 October 2001 (IT-95-16) ; Appeals Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Judgement, 17 December 2004 (IT-95-14/2) ; Appeals Chamber, The Prosecutor v. Mladen Naletilić and Vinko Martinović, Judgement, 3 May 2006 (IT-98-34)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Kabiligi Defence "Motion on the Prejudice Caused by the Testimony of Prosecution Witnesses on Facts not Included in the Amended Indictment", filed on 5 April 2006;

CONSIDERING the Prosecution Response, filed on 16 May 2006; and the Kabiligi Reply, filed on 29 May 2006;

HEREBY DECIDES the motion.

Introduction

1. The Accused Kabiligi requests that the Chamber exclude from its consideration portions of the testimony of seven Prosecution witnesses: XAI, XXH, XXQ, AAA, ZF, XXY and LAI. The material facts in the testimony were not, according to the Defence, adequately pleaded in the Indictment or otherwise communicated so as to provide proper notice in accordance with the rights of the Accused and the Rules of Procedure and Evidence.

2. The present motion is, in effect, a request for reconsideration of the Chamber's "Decision on Exclusion of Testimony Outside the Scope of the Indictment", filed on 27 September 2005 ("the Kabiligi Exclusion Decision"). That decision excluded a portion of the testimony of Witness XAI and Witness DCH, but denied all the other requests for exclusion. Kabiligi now offers additional arguments favouring exclusion, in particular, the specific prejudice which the Defence has suffered as a result of the alleged lack of notice.

Deliberations

(I) APPLICABLE PRINCIPLES

3. The legal framework for determining whether evidence is inadmissible based on alleged lack of notice of a material fact was set out at length in the Kabiligi Exclusion Decision:

> Rule 89 (C) provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value". To be admissible, the "evidence must be in some way relevant to an element of a crime with which the Accused is charged." The present motion complains that the evidence has no relevance to anything in the Indictment, or that some paragraphs of the Indictment to which it might be relevant are too vague to be taken into account. Some recent Appeals Chamber judgements thoroughly discuss the specificity with which an indictment must be pleaded, and the significance of other forms of Prosecution disclosure of its case. Although the question addressed in those cases was whether a conviction should be quashed because of insufficient notice of a charge in the indictment, the analysis is equally relevant to the present question, namely, whether evidence is sufficiently related to some charge in the Indictment to be admissible.
>
> The rights of the Accused enshrined in Article 20 of the Statute impose, according to the Appeals Chamber in *Kupreškić*, "an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such

material facts are to be proven". Material facts may also be communicated to the Accused other than through the indictment:

If an indictment is insufficiently specific, *Kupreškić* stated that such a defect 'may, in certain circumstances cause the Appeals Chamber to reverse a conviction.' However, *Kupreškić* left open the possibility that a defective indictment could be cured 'if the Prosecution provides the Accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.' The question whether the Prosecution has cured a defect in the indictment is equivalent to the question whether the defect has caused any prejudice to the Defence or, as the *Kupreškić* Appeals Judgement put it, whether the trial was rendered unfair by the defect. *Kupreškić* considered whether notice of the material facts that were omitted from the indictment was sufficiently communicated to the Defence in the Prosecution's Pre-Trial Brief, during disclosure of evidence, or through proceedings at trial. In this connection, the timing of such communications, the importance of the information to the ability of the Accused to prepare its defence, and the impact of the newly-disclosed material facts on the Prosecution case are relevant. As has been previously noted, 'mere service of witness statements by the [P]rosecution pursuant to the disclosure requirements' of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial.

> Whether vagueness in the indictment has been cured by subsequent disclosure involves consideration of the following factors: the consistency, clarity and specificity with which the material fact is communicated to the Accused; the novelty and incriminating nature of the new material fact; and the period of notice given to the Accused. Mention of a material fact in a witness statement does not necessarily constitute adequate notice: the Prosecution must convey that the material allegation is part of the case against the Accused. This rule recognizes that, in light of the volume of disclosure by the Prosecution in certain cases, a witness statement will not, without some other indication, adequately signal to the Accused that the allegation is part of the Prosecution case. The essential question is whether the Defence has had reasonable notice of, and a reasonable opportunity to investigate and confront, the Prosecution case.[1]

As described above, "curing" is the process by which vague or general allegations in an indictment are given specificity and clarity through communications other than the indictment itself. Only material facts which can be reasonably related to existing charges may be communicated in such a manner.[2]

4. Kabiligi asserts that the Trial Chamber erred in holding that it was permitted to consider whether the vagueness of a material fact had been cured by reference to communications other than the Indictment, such as the Pre-Trial Brief. He argues that the Appeals Chamber has reserved to itself the possibility of relying on curative communications in order to determine whether a conviction was fair. This option is not open to the Trial Chamber, which is bound to either exclude the evidence or to order that the Indictment be amended.[3]

5. A trial chamber not only has the power, but an obligation, to consider whether a vague provision in an indictment has been cured by timely, clear and consistent communications.[4] As stated by the Appeals Chamber in *Naletilić*:

> In reaching its judgement, a Trial Chamber can only convict the accused of crimes which are charged in the indictment. If the indictment is found to be defective because it fails to plead

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[1] *Id*., paras. 2-3 (citations omitted).
[2] *Naletilić*, Judgement (AC), para. 26 ("a Trial Chamber can only convict the accused of crimes which are charged in the indictment"); *Zigiranyirazo*, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief (TC), 30 September 2005, para. 13 ("the process of curing an Indictment does take place only when the material fact was already in the Indictment in a certain manner, not when it was not included at all").
[3] Motion, paras. 15-17.
[4] *Ntagerura et al*., Judgement (AC), para. 65 (holding that the Trial Chamber had committed an error of law in failing to consider whether defects in the Indictment had been cured).

> material facts or does not plead them with sufficient specificity, the Trial Chamber must consider whether the accused was nevertheless accorded a fair trial. In some instances, where the accused has received timely, clear and consistent information from the Prosecution detailing the factual basis underpinning the charges against him or her, the defective indictment may be deemed cured and a conviction may be entered.[5]

In appropriate circumstances, Trial Chambers have exercised their discretion in favour of curing.[6] Decisions to do so have been expressly upheld by the Appeals Chamber.[7]

6. Failure to plead the physical perpetration of a criminal act by an accused under a count of the Indictment constitutes a defect.[8] On the other hand,

> "less detail may be acceptable if the 'sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes'".[9]

Many acts attributed to an accused fall on the spectrum between these two extremes. Individual actions of an accused which contribute to crimes will require more specific notice than proof of the crimes themselves, where they are physically committed by others. The specificity of the notice required is proportional to the extent of the Accused's direct involvement.[10]

7. Whether a defective indictment has been cured depends on "whether the accused was in a reasonable position to understand the charges against him or her".[11] The presence of a material fact somewhere in the Prosecution disclosure does not suffice to give reasonable notice; what is required is notice that the material fact will be relied upon as part of the Prosecution case, and how.[12] In *Naletilić*,

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[5] *Naletilić*, Judgement (AC), para. 26.
[6] *Kajelijeli*, Judgement (TC), para. 408 (Trial Chamber II); *Gacumbitsi*, Judgement (TC), para. 191 (Trial Chamber III); *Kamuhanda*, Judgement (TC), paras. 59-60 (Trial Chamber II); *Bizimungu et al*., Decision on Ndindiliyimana's Extremely Urgent Motion to Prohibit the Prosecution From Leading Evidence on Important Material Facts Not Pleaded in the Indictment Through Witness ANF (TC), 15 June 2006, para. 32 (Trial Chamber II).
[7] *Ntakirutimana*, Judgement (AC), paras. 94 ("In light of the principles discussed above, the Trial Chamber's conclusion was correct. Although the allegation of an attack at Gitwe Hill could and should have been specifically pleaded in the Indictment, the Defence was subsequently informed in a clear, consistent, and timely manner that it had to defend against this allegation"), 101 ("The Trial Chamber concluded that sufficient information was given regarding this allegation to the summary of Witness SS's testimony in Annex B to the Pre-Trial Brief and one of SS's prior witness statements, which was disclosed on 7 February 2001. In the view of the Appeals Chamber, this conclusion was correct"), 108 ("The details in Annex B and the statement of Witness CC notified the Defence that the Prosecution would allege that Elizaphan Ntakirutimana transported attackers and pointed out Tutsi refugees near the Gishyita-Gisovu road. The Trial Chamber therefore committed no error in concluding that the Bisesero Indictment's failure to allege these facts was cured"), 119 ("The Appeals Chamber therefore finds that the failure in the Bisesero Indictment to allege with specificity that Elizaphan Ntakirutimana was in a convoy which included attackers was cured by subsequent information communicated to the Defence); *Niyitegeka*, Judgement (AC), paras. 225 ("it was clear from the Prosecution's Pre-Trial Brief that the Prosecution intended to charge the Appellant with participation in an attack on that date and at that location, and that testimony would be adduced stating that the Appellant was armed and shot at Tutsi refugees … Accordingly, the Prosecution gave the Appellant clear, consistent and timely information"), 228 ("Accordingly, the Appeals Chamber finds that the Trial Chamber did not err in finding that the Appellant had sufficient notice of the material facts"), 237 ("the failure [to plead the material fact in the Indictment] was cured by information in the Pre-Trial Brief. The Trial Chamber therefore committed no error in relying on this evidence and, consequently, this ground of appeal is dismissed").
[8] *Ntakirutimana*, Judgement (AC), para. 32; *Kupreskic*, Judgement (AC), para. 89.
[9] *Naletilić*, Judgement (AC), para. 24; *Kupreskic*, Judgement (AC), para. 89.
[10] *Gacumbitsi*, Judgement (AC), para. 49 ("The Appeals Chamber has held that 'criminal acts that were physically committed by the accused personally must be set forth in the indictment specifically, including where feasible "the identity of the victim, the time and place of the events and the means by which the acts were committed"'. An indictment lacking this precision may, however, be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charge").
[11] *Naletilić*, Judgement (AC), para. 27 (with references).
[12] *Muvunyi*, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005 (TC), para. 22 ("It is to be assumed that an Accused will prepare his defence on the basis of material facts contained in the indictment, not on the basis of all the material disclosed to him that may support any number of additional charges, or expand the scope of existing charges").

the Appeals Chamber distinguished between those sources of disclosure which are adequate, and those which are not:

> In assessing whether a defective indictment was cured, the issue to be determined is whether the accused was in a reasonable position to understand the charges against him or her. In making this determination, the Appeals Chamber has in some cases looked at information provided through the Prosecutor's Pre-Trial Brief or its opening statement. The Appeals Chamber considers that the list of witnesses the Prosecution intends to call at trial, containing a summary of the facts and the charges in the indictment as to which each witness will testify and including specific references to counts and relevant paragraphs in the indictment, may in some cases serve to put the accused on notice. However, the mere service of witness statements or of potential exhibits by the Prosecution pursuant to disclosure requirements does not suffice to inform an accused of material facts that the Prosecution intends to prove at trial. Finally, an accused's submissions at trial, for example, the motion for judgement of acquittal, final trial brief or closing arguments, may in some instances assist in assessing to what extent the accused was put on notice of the Prosecution's case and was able to respond to the Prosecution's allegations.[13]

The Appeals Chamber has, in effect, established a distinction between the Pre-Trial Brief and opening statement, on the one hand, which are permissible ways of giving notice of material facts; and the "mere service of witness statements", which are not.

8. The Appeals Chamber has also recognized that

> "defects in an indictment … may arise at a later stage of the proceedings because the evidence turns out differently than expected".

Where this is the case, the Chamber must

> "consider whether a fair trial required an amendment of the indictment, an adjournment, or the exclusion of the evidence outside the scope of the indictment".[14]

In accordance with this reasoning, the Chamber will also entertain the possibility that the filing of a motion for the addition of a witness provides adequate notice, provided that the motion is granted and there was a sufficient delay between the filing of the motion and the appearance of the witness.[15]

9. Objections play an important role in ensuring that the trial is conducted on the basis of evidence which is relevant to the charges against the accused. The failure to voice a contemporaneous objection does not waive the Accused's rights, but results in a shifting of the burden of proof:

> In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also file a timely motion to strike the evidence or to seek an adjournment to conduct further investigations in order to respond to the unpleaded allegation.
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> …
>
> [A]n accused person who fails to object at trial has the burden of proving on appeal that his ability to prepare his case was materially impaired. Where, however, the accused person objected at trial, the burden is on the Prosecution to prove on appeal that the accused's ability to prepare his defence was not materially impaired.[16]

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[13] *Naletilić*, Judgement (AC), para. 27 (citations omitted); as for the significance of submissions at trial showing that the Accused's ability to prepare was not materially impaired, see *Kvocka*, Judgement (AC), paras. 52-54; *Kordic and Cerkez*, Judgement (AC), para. 148; *Niyitegeka*, Judgement (AC), para. 198; *Kupreskic*, Judgement (AC), para. 122.
[14] *Naletilić*, Judgement (AC), para. 25.
[15] See *Bagosora et al*., Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006, paras. 10, 44.
[16] *Niyitegeka*, Judgement (AC), 9 July 2004, paras. 199-200.

The present motion is, in substance, an attempt by the Kabiligi Defence to discharge this burden.

(II) GROUNDS RAISED FOR REVIEWING PREVIOUS DECISION

(a) General Prejudice Suffered Due to Death of Potential Witnesses

10. Almost every material fact which the Chamber did not exclude in the Kabiligi Exclusion Decision is to be found in the Prosecution Pre-Trial Brief, filed on 21 January 2002. This was four months before opening statements in the trial; almost eight months before the first witness; and more than seventeen months before any witness was heard other than the expert Alison Des Forges and Witness ZF.[17] Under these circumstances, to the extent that a material fact was disclosed in the Pre-Trial Brief, the Chamber reaffirms its previous finding that the Defence was in a reasonable position to understand the charges and material facts against him.

11. The Defence claims, however, that it has suffered general prejudice because a number of potential Defence witnesses died during the interval between the filing of the Indictment in August 1999 and

> "the first mention of some of the additional facts and allegation in the Prosecution case in 2003 and 2004".[18]

12. The prejudice of which the Defence complains is not related to vagueness in the Indictment. Any prejudice, if it can be so characterized, arises from the fact that the witnesses in question died before the beginning of the Kabiligi Defence. The interval between the filing of the allegedly vague Indictment in August 1999 and the filing of the curative Pre-Trial Brief in January 2002 has had no effect on delaying the beginning of the Defence. Nor is it clear how the taking of statements during that period would have assisted the Defence, as such statements would not, barring exceptional circumstances, have been admissible at trial as evidence. Accordingly, the alleged lack of notice has had no impact on the Defence's ability to call witnesses, and does not justify reconsideration of the Chamber's previous findings.

(b) Witness ZF

13. Kabiligi objects to testimony of Witness ZF naming the Accused as a member of a communications network called the "zero network", arguing that this evidence is nowhere to be found in the Pre-Trial Brief or the witness's statement. The first time the Defence had knowledge of this allegation is said to be during the witness's testimony.[19]

14. No contemporaneous objection was made to this testimony, in which the Accused was named as a member of the zero-network along with many other military and political figures.[20] Witness ZF used a number of different names to describe communication network, and to relate it to other organizations:

> The zero network was a communications network. The death squad – rather, death squads, were small groups apparently of well-trained people who were in charge of executing the decisions of the members of these networks, while the dragons were supposed to be the names of these groups, the groups that were the masterminds – I do not know whether this word is the

[17] Opening arguments were made on 2 April 2002. Proceedings were then adjourned until 2 September 2002, when Prosecution expert witness Alison Des Forges took the stand. The first factual witness, Witness ZF, started his testimony on 26 November 2002. The second factual witness was not heard until 16 June 2003, when the Trial Chamber was re-constituted after the non-re-election of one judge, and the retirement of another.
[18] Motion, para. 29.
[19] Motion, paras. 35-37.
[20] T. 27 November 2002 pp. 36-37, 61-66.

> appropriate word – the groups that were behind those activities, that is, anti-enemy activities, activities directed against the accomplices. The groups were secret groups, closely-knit groups. The Abakozi was another name synonymous to dragon. The dragons and Abakozi meant the same thing.[21]

15. The Indictment makes no mention of these groups by name, but paragraphs 1.13 – 1.16 do refer to "prominent civilian and military figures", sharing an "extremist Hutu ideology", working together from as early as 1990 to pursue a "strategy of ethnic division and incitement to violence". Their strategy included

> "the preparation of lists of people to be eliminated" and "the assassination of certain political opponents".[22]

Although the Accused is not expressly identified as a member of any group preparing such a strategy, the fact that the Accused is the indictee would reasonably suggest that he had some connection to an organization named in his indictment.

16. On this basis, and in light of the rather general character of the evidence, the Chamber finds that the Accused was reasonably informed that this material fact was part of the case against him.

(c) Witness XXH

17. The Kabiligi Defence objects to evidence that the accused personally shot and killed an unidentified military deserter at a roadblock in May 1994.[23] During XXH's testimony, the Defence raised a timely objection to the evidence on the basis that it fell outside the scope of the Indictment.[24] In the Kabiligi Exclusion Decision, the Chamber held:

> The testimony concerning a sixth element – that the Accused himself shot dead a suspected deserter – is not to be found in the Pre-Trial Brief or the witness statement disclosed to the Defence. As proof that the Accused committed a crime by killing the specified individual, the evidence is highly incriminating. On the other hand, the Prosecution argued that this evidence was relevant only to "the ability and willingness of this particular Accused to effect disciplinary measures upon soldiers". The Chamber is not satisfied, based on the submissions of the parties at this stage, that this testimony cannot be relied upon for lack of notice.

The Defence argues that this fact is not to be found in the Indictment, Pre-Trial Brief, or in any written statement of the witness. In its present submissions, the Defence emphasizes that this is the only evidence that the Accused personally killed anyone and is, for that reason, particularly prejudicial. The Prosecution responds that adequate notice of this event was provided by Witness XXH's Pre-Trial Brief summary, which says that "military deserters were killed on Kabiligi's orders in front of Kabiligi".[25] A will-say statement was disclosed the day before the witness's testimony to the effect that the accused "shot" soldiers.[26] The purpose of the evidence is to show the Accused's "ability and willingness … to effect disciplinary measures upon soldiers".[27] The Prosecution also argues that "the fact that [the Accused] selectively punished soldiers is highly relevant".[28]

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[21] T. 27 November 2002 pp. 67-68.
[22] Indictment, para. 1.15.
[23] T. 4 May 2004 pp. 57-58.
[24] T. 4 May 2004 pp. 58-59.
[25] Prosecution Response, para. 87.
[26] *Id*., para. 88.
[27] T. 4 May 2004 p. 59 ("… the relevance of this particular testimony goes to the ability and willingness of this particular Accused to effect disciplinary measures upon soldiers, and that is relevant to the issue of whether any soldiers under his command were disciplined in 1994 for the killing or the raping or any of the other crimes that took place; in other words, it's a failure-to-punish issue, a willingness to punish for certain things, a failure to punish for other things."); Prosecution Response, para. 91.
[28] Prosecution Response, para. 91.

18. Although the Prosecution does not intend to use the testimony as direct evidence that the Accused physically committed a crime charged in the Indictment, the evidence is nevertheless highly prejudicial. If true, it would demonstrate brutality and zeal in punishing his soldiers, not merely that he had the means to do so. More broadly, the incident could be used to invite the inference that the Accused was undisciplined and erratic in discharging his duties as a senior officer. Even if not used as evidence of direct commission of a crime, the effect of the evidence is sufficiently incriminating and serious that the Defence ought to have had a reasonable opportunity to investigate and refute the evidence. Disclosure of a will-say the day before the testimony did not afford such an opportunity. Under these circumstances, the evidence is inadmissible.

(d) Witness XXQ

19. The Defence argues that Witness XXQ was improperly added to the Prosecution witness list without leave of the Chamber and that his testimony should be excluded on that basis in its entirety.[29] The Chamber rejects this argument. Any remedy for improperly adding a witness to the witness list should have been requested before the witness's appearance. Exclusion at this stage of the proceedings on the basis of adequacy of notice, is not an appropriate remedy for the procedural impropriety alleged by the Defence.

20. In the Kabiligi Exclusion Decision, the Chamber held:

> The Pre-trial Brief gives clear notice of Witness XXQ's testimony that Mr. Kabiligi, during a meeting over which he presided in February 1994, rejected the Arusha Accords and outlined various "strategies to win the war", which included "to arm civilians and incite them to fight against Tutsi and moderate Hutu". The testimony goes further, alleging that the Accused "told us that they had envisaged that war had to resume on the 23rd February", which was less than two weeks after the meetings. The witness elaborated that "this is a date that had been settled on, that had been fixed a long time before. It was the date on which the Rwandan government and the Burundian government had agreed to launch the genocide in the two countries."
>
> The allegation that the Accused was involved in fixing a specific date for the resumption of war, and that there was a conspiracy between the Rwandan and Burundian governments to initiate a genocide on that date, is not mentioned in the Pre-Trial Brief. One of the witness's prior statements does say "it was resolved to resume war and put an end to the Arusha Peace Accords" during the meeting. The prejudicial impact of the witness's use of the term "genocide" is ambiguous. On the basis of the information before the Chamber on this motion, the Chamber cannot be satisfied that no notice of this material fact has been given.[30]

21. The Accused had general notice that the witness would testify that he was somehow aware of a plot to recommence the war against the RPF, and that he announced the existence of this plan at a meeting in February 1994. The added elements that a specific date had been set, and that a genocide was planned, are ancillary to the more general allegation that the Accused was somehow aware of these plans. Accordingly, sufficient notice was given of the general allegation to place the Defence in a reasonable position to understand the material facts. Although the use of the term "genocide" is more prejudicial than the references in the Pre-Trial Brief and the witness's prior statement to "resuming the war", the Chamber finds that these are details which are best evaluated on the merits.

(e) Other Witnesses

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[29] Motion, para. 41.
[30] Kabiligi Exclusion Decision, paras. 13-14.

22. No other grounds have been raised to suggest that the Chamber erred in law or failed to appreciate the relevant facts in the Kabiligi Exclusion Decision. Accordingly, there is no basis to reconsider any other legal or factual finding made therein.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part;

DECLARES inadmissible Witness XXH's testimony that the Accused shot dead a suspected deserter.

Arusha, 4 September 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on the Nsengiyumva Motion to Add Six Witnesses to its Witness List 11 September 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Anatole Nsengiyumva – Addition of witnesses on the witness list, Condition : no effect of unfair surprise or prejudice on the opposing party, Evident potential importance of the witnesses – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 73 ter (E)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E), 26 June 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Nsengiyumva Motion for Leave to Amend Its Witness List, 6 June 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Confidential and Extremely Urgent Motion for Leave to Amend the List of Defence Witnesses", filed on 1 September 2006, and the Corrigendum thereto, filed on 7 September 2006;

HEREBY DECIDES the motion.

Introduction

1. The Nsengiyumva Defence requests leave to add six witnesses to its list of witnesses: ICJ-1, EAC-1, DEF-2, ICC-1, HQ-1 and USA-1. The Defence states generally that it has been obliged to seek out new witnesses to replace others who have died, disappeared, or refuse to testify. The witnesses are all residents of Rwanda, which makes them difficult to contact, according to the Defence. The motion gives a detailed summary of each witness's testimony, the Prosecution evidence which they are expected to rebut, and indicates, in many cases, that the witnesses are not duplicating the testimony of Defence witnesses already heard. The Prosecution has made no submissions.

Deliberations

(i) Applicable Standard

2. Rule 73 *ter* (E) of the Rules provides that:

> After commencement of the Defence case, the Defence, if its considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decisions as to which witnesses are to be called.

This standard has been previously been discussed in this case:

> In interpreting a similarly worded provisions applicable to Prosecution witnesses, this Trial Chamber has held that amendments of a witness list must be supported by "good cause" and be in the "interest of justice." Similar principles have been applied in assessing Defence motions to vary a witness list. The determination of whether to grant a request to vary a witness list requires a close analysis of each witness, including the sufficiency and time of disclosure of the witness's information; the materiality and probative value of the proposed testimony in relation to existing witnesses and the allegations in the indictment; the ability of the other party to make an effective cross-examination of the witness; and the justification offered by the party for the addition of the witness.[1]

Whether the addition of witnesses will result in "unfair surprise or prejudice" to the opposing party must be considered in light of the disclosure obligations of the moving party.[2]

(ii) Addition of Witnesses

3. The Defence has failed to offer specific justifications explaining when these witnesses were first discovered, or which witnesses they have replaced. The failure to do so makes it difficult to determine whether the attempt to add these witnesses at this late stage of the proceedings is justified. The lack of specificity in this respect weighs against the granting of the motion.

4. On the other hand, the potential importance of these witnesses is evident to the Chamber. Their testimony, as described in the motion, responds directly to Prosecution evidence of the conduct of the Accused. Some of the witnesses appear to be the only ones to rebut some elements of the Prosecution case. At least one of them, Witness HQ-1, knew the Accused well during the events in question and may be in a position to offer relevant evidence. Furthermore, the expected testimony appears to be well-defined and narrowly-circumscribed, and the Defence expects that the examination-in-chief of all six witnesses could be completed in nine hours.

5. The Defence submits that it disclosed the identity of five of these witnesses to the Prosecution on 24 August 2006, and that that concerning the sixth is disclosed with the motion. Previous decisions which have granted amendments of Defence witness lists have required a minimum notice of thirty-

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[1] *Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, para. 14 (references omitted).
[2] *Bagosora et al.*, Decision on Nsengiyumva Motion for Leave to Amend Its Witness List (TC), 6 June 2006, para. 3.

five days to the Prosecution. Accordingly, sufficient time remains before the close of the Nsengiyumva Defence case to hear these witnesses with adequate notice to the Prosecution. On the other hand, the inability to call these witnesses within the remaining time can in no way be used to justify a prolongation of the Defence case. The deadline for the close of the Nsengiyumva Defence case, including the testimony of the Accused should he choose to testify, is 13 October 2006. The opportunity to call these additional witnesses depends on the Defence's own ability to fit them within the existing judicial calendar.

6. In light of all the circumstances, an appropriate period of notice requires that these witnesses be called no earlier than 2 October 2006, subject to any waiver by the Prosecution.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the request of the Nsengiyumva Defence to add witnesses ICJ-1, EAC-1, DEF-2, ICC-1, HQ-1 and USA-1 to the witness list;

ORDERS, to the extent that it has not yet been provided, that any identifying information and summaries of their testimony be disclosed to the Prosecution;

DECLARES, subject to any waiver by the Prosecution, that the witnesses may not testify before 2 October 2006.

Arusha, 11 September 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Severance or Exclusion of Evidence Based on Prejudice Arising from Testimony of Jean Kambanda
11 September 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Jean Kambanda – Parameters of the Prosecution cross-examination, Order of proof, Inadmissability of the testimony which broadens the facts imputed to the Accused or the nature of his culpability – Remedy, No severance, Exclusion of the improper evidence – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rule 85

International and National Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision of 9 May 2003 on the Prosecutor's Application for Rebuttal Witnesses as Corrected According to the Order of 13 May 2003, 13 May 2003 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. André Ntagerura et al., Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rules 54, 73 and 85 (A) (iii) of the Rules of Procedure and Evidence, 21 May 2003 (ICTR-99-46) ; Trial Chamber,

The Prosecutor v. Théoneste Bagosora et al, Decision on Request for Severance of Three Accused, 27 March 2006 (ICTR-98-41)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Zejnil Delalić et al., Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, 19 August 1998 (IT-96-21) ; Appeals Chamber, The Prosecutor v. Zejnil Delalić, Judgment, 8 April 2003 (IT-96-21) ; Trial Chamber, The Prosecutor v. Fatmir Limaj et al., Decision on Prosecution's Motion to Admit Rebuttal Statements Via Rule 92 bis, 7 July 2005 (IT-03-66) ; Trial Chamber, The Prosecutor v. Naser Orić, Decision on the Prosecution Motion With Addendum and Urgent Addendum to Present Rebuttal Evidence Pursuant to Rule 86 (A) (iii), 9 February 2006 (IT-03-68)

Australia : High Court of Australia, Shaw v. The Queen, 85 C.L.R. 365, 379 (1952)

United States of America : Supreme Court of Indiana, Griffith v. State, 157 N.E.2d 191 (1959) ; Maryland Court of Appeals, State v. Booze, 334 Md. 64 (1994)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion for Severance on the Grounds of Serious Prejudice Caused By the Testimony of Bagosora Witness Jean Kambanda", filed jointly by Kabiligi, Nsengiyumva and Ntabakuze on 14 July 2006;

CONSIDERING the Prosecution Response, filed on 2 August 2006; the joint Reply, filed on 15 August 2006; and the submissions of the Bagosora Defence, filed on 21 August 2006;

HEREBY DECIDES the motion.

Introduction

1. On 11, 12 and 13 July 2006, Jean Kambanda, testified before this Chamber as a witness for Colonel Bagosora. Mr. Kambanda, who was the Prime Minister of Rwanda during the period from April to July 1994, is currently serving a life sentence of this Tribunal, having been convicted of genocide and other crimes.[1] In the course of his cross-examination by the Prosecution, Mr. Kambanda offered testimony to which the Kabiligi, Nsengiyumva and Ntabakuze Defences objected on the ground that it improperly re-opened the Prosecution case and, therefore, went beyond the proper scope of cross-examination as prescribed by the Rules and a previous decision of the Chamber concerning Mr. Kambanda's testimony. After several oral rulings allowing the testimony, the Kabiligi, Nsengiyumva and Ntabakuze Defence teams made an oral motion for severance from the joint trial, arguing that they had been irremediably prejudiced. Exclusion of the testimony was requested as an alternative remedy. After hearing the parties' oral arguments, the Chamber adjourned the remainder of Mr. Kambanda's testimony, and requested further submissions in writing on all of the areas of disputed evidence.

Deliberations

[1] *The Prosecutor v. Kambanda*, Case N°ICTR-97-23-S, Judgement and Sentence (TC), 4 September 1998. Mr. Kambanda contests the validity of the plea agreement on which the judgement was based; nevertheless, the judgement was confirmed on appeal. *Kambanda v. The Prosecutor*, Case N°ICTR 97-23-A, Judgement (AC), 19 October 2000.

(I) GENERAL PRINCIPLES

2. The parameters of the Prosecution cross-examination of Mr. Kambanda have already been addressed by the Chamber in its decision of 27 March 2006, in response to a previous motion for severance on the basis of his appearance ("the Kambanda Severance Decision"):

> The suggestion that the Prosecution case can be re-opened through cross-examination is unfounded. Rule 90 (G) (i) [of the Rules of Procedure and Evidence ("the Rules)] constrains the scope of cross-examination to three areas: the subject-matter of the examination-in-chief; matters affecting credibility; and, "where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of the case". This last category must [be] read in light of Rule 85 (A) (i), which prescribes that "the trial shall be presented in the following sequence: (i) Evidence of the prosecution; (ii) Evidence for the defence; (iii) Prosecution evidence in rebuttal; (iv) Defence evidence in rejoinder …" This sequence implies that … matters on which no evidence was led during the Prosecution case do not form part of that case. Accordingly, the "case for the cross-examining party" must now be understood as defined and limited by the evidence presented during the Prosecution case. The Prosecution may adduce evidence during its cross-examination which corroborates or reinforces evidence presented during the presentation of its case, but may not, at this stage, venture into new areas.[2]

The parties do not contest this standard, but disagree as to its application in respect of the specific questions asked, or proposed, by the Prosecution. The Defence argues that the questions enter into new areas on which no evidence was led during the Prosecution case; the Prosecution responds that the questions merely corroborate or reinforce evidence heard during the case-in-chief. Furthermore, the Prosecution contends that its questions are proper to test the witness's credibility.

3. In the Chamber's view, no unfairness arises as long as the evidence adduced through Mr. Kambanda has already been substantially presented during the Prosecution's case. Testimony which broadens the facts imputed to the Accused or the nature of his culpability, are inadmissible as they deviate from the order of proof prescribed by Rule 85. Such evidence would require the Defence to engage in additional investigations and the production of additional evidence which, in the context of this very complex and lengthy trial, would not be in the interests of justice. Whether a question broadens the facts imputed to the Accused or the nature of his culpability is, of necessity, a fact-specific inquiry and requires a close comparison of the evidence which was presented during the Prosecution case with the proposed evidence. The party seeking to cross-examine the witness bears the burden of showing by specific references to the case-in-chief that the proposed questions do not broaden the facts imputed to the Accused or the nature of his culpability.[3]

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[2] *Bagosora et al*., Decision on Request for Severance of Three Accused (TC), 27 March 2006, para. 7 (citations omitted).

[3] The Chamber's view is supported by principles developed by trial chambers in deciding whether to allow the Prosecution to adduce rebuttal evidence under Rule 85 (A) (iii) of the Rules. Albeit not an identical situation, the general rule is that the Prosecution must present all of its evidence against the Accused by the close of its case. *Ntagerura et al*., Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rule 54, 73, and 85 (A) (iii) of the Rules of Procedure and Evidence (TC), 21 May 2003, para. 38 ("To permit the Prosecutor to supplement evidence she should have presented in her case-in-chief would be to violate one of the cardinal precepts preventing the prosecutor from splitting her proofs and condone the practice of presenting cases piecemeal for the Defence to answer. In such circumstances, the Chamber should exercise its discretion to exclude such evidence when offered in rebuttal."); *Nahimana et al*., Decision of 9 May 2003 on the Prosecutor's Application for Rebuttal Witnesses As Corrected According to the order of 13 may 2003 (TC), para. 50 (referring to the English Court of Appeal holding that if the Prosecution could reasonably have foreseen that a particular piece of evidence was necessary to prove its case it should have put it before the court as part of its case). See also *Delalic et al*., Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case (TC), 19 August 1998, paras. 18-22; *Delalic et al*., Judgement (AC), para. 275; *Limaj et al*., Decision on Prosecution's Motion to Admit Rebuttal Statements Via Rule 92 bis (TC), 7 July 2005, para. 6; *Oric*, Decision on the Prosecution Motion With Addendum and Urgent Addendum to Present Rebuttal Evidence Pursuant to Rule 86 (A) (iii) (TC), 9 February 2006. Similar principles follow from the practice of common law jurisdictions. *R. v. Krause*, [1986] 2 S.C.R. 466, para. 15 ("The general rule is that the Crown … will not be allowed to split its case. The Crown … must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in … the

(II) APPLICATION

(a) Command of Troops By Kabiligi

4. The Kabiligi Defence objects to a line of questioning which yielded, in its view, three distinct propositions. The transcripts reflect these three elements to be: that the real command of the Army was in the hands of General Kabiligi, rather than another officer, General Bizimungu;[4] that the powers of the office of G3 entailed commanding troops;[5] and that General Kabiligi, in his capacity as the G3, commanded "all troop movements".[6] The Prosecution argues that the testimony is not new, relying on the testimony of Witness XXJ who testified during the case-in-chief that:

> Yes, the G-3 superiors supervise all military operations on the national territory and, in view of the situation that prevailed, I believe that in his capacity as G-3 he was following even the events that were taking place elsewhere. But he was based in Kigali and he was, more specifically, in charge of the operations that took place in the city of Kigali, but he could also give orders for operations that were taking place elsewhere as he coordinated operations. He coordinated all the operations but, more specifically, he was in charge of operations in the city of Kigali.[7]

Reference is also made to the testimony of Witness XAI that

> "there was someone in charge of the chief of operations in the war front, and that person's name was Gratien Kabiligi",

and that "Gratien Kabiligi was in charge of the entire city of Kigali".[8]

5. The Chamber has carefully considered Mr. Kambanda's testimony in comparison with evidence introduced during the Prosecution case and finds that, in most respects, he merely repeats information which has already been substantially introduced during the case-in-chief. In one respect, the testimony does introduce a new element: that General Kabiligi had more power than General Bizimungu. This element of testimony does broaden the facts imputed to the Accused.

(b) General Kabiligi Was Informed That Solders Were Committing Massacres

6. The Defence objects to Kambanda's testimony that Kabiligi "was regularly told that soldiers were taking part in the massacres".[9] More accurately, the testimony was that Kambanda had, during some meetings with Generals Kabiligi and Bizimungu, informed them that soldiers or deserters were committing massacres. The Prosecution cites no evidence during its case reflecting this testimony. In the Chamber's view, the fact that the Prime Minister at the time informed the Accused of such actions would broaden the facts imputed to the Accused or the nature of his culpability, even if there was evidence during the Prosecution case that others had provided such information.

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indictment and any particulars … This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence – as much as it deemed necessary at the outset – then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it the full case for the Crown so that it is known from the outset what must be met in response.') *Shaw v. The Queen*, 85 C.L.R. 365, 379 (High Court of Australia, 1952); Archbold, *Criminal Pleading, Evidence and Practice* (London: Sweet and Maxwell, 2002), s. 4-335 (England); *Griffith v. State*, 157 N.E.2d 191 (Supreme Court of Indiana, 1959); *State v. Booze*, 334 Md. 64 (Maryland Court of Appeals, 1994).

[4] Motion, p. 10; Reply p. 3; T. 13 July 2006 pp. 10, 15, 16.

[5] Motion, p. 10; Reply p. 3; T. 13 July 2006 pp. 10, 16.

[6] Motion, p. 10; T. 13 July 2006 p. 16.

[7] Response, para. 16; T. 14 April 2004 p. 45.

[8] Response, para. 15, T. 9 September 2003 pp. 1, 2.

[9] Motion, p. 10.

(c) General Kabiligi Created a Brigade to Control Renegade Soldiers

7. Mr. Kambanda testified that he was informed that

> "in Kigali town a special brigade had been set up specifically to control those so-called uncontrolled elements of the army"

which were committing massacres of civilians.[10] The Prosecution has failed to refer to any such evidence during its case.

(d) General Kabiligi Exercised Command After Fleeing Into Exile

8. Mr. Kambanda testified that after the flight of the interim government into exile, "practically the same command structure was maintained in exile", implying that General Kabiligi continued to exercise command over troops.[11] The Prosecution relies on the testimony of Witness ZF, who said that after General Kabiligi fled into exile, he lived in south Goma "where a division he was commanding was. It was the southern Division". The testimony of Mr. Kambanda would, in effect, potentially broaden the command responsibility of the Accused beyond the southern Division, mentioned by Witness ZF, to a larger number of troops. Accordingly, the testimony broadens the facts imputed to the Accused or the nature of his culpability.

(e) The Military Had More Power Than Politicians

9. Mr. Kambanda testified that "in any situation of war, it is the people who bear arms who have the real power, that is true".[12] The Defence teams object to this testimony as new evidence. In the Chamber's view, this is not a fact which broadens the facts imputed to the Accused or the nature of their culpability. It constitutes no more than an inference or an opinion based upon unspecified facts or information.

(f) Procurement of Arms in Goma for "Into Gisenyi and Into the Rest of Rwanda", and the Transfer of Weapons From Gisenyi Military Camp To Butare Military Camp, June 1994

10. The Prosecution has indicated that it wishes to elicit testimony from the witness concerning "the procurement of arms and the movement of arms into Rwanda from – from Goma into Gisensyi and the rest of Rwanda" by the Accused Nsengiyumva.[13] It also did lead evidence that weapons were transferred from Gisenyi Military Camp to the Butare Military Camp in June 1994, for subsequent distribution as part of the civil defence program.[14] The Prosecution argues that evidence was led during its case concerning Nsengiyumva's involvement in the distribution of arms in Gisenyi, and his role in bringing weapons from Goma across the border into Rwanda. The Prosecution has failed, however, to point to any evidence during its case that the Accused was involved in the distribution of weapons to civilians or soldiers throughout Rwanda, or that he obtained weapons in Goma for that purpose. The testimony that he was involved in supplying weapons to civilians in Gisenyi does not justify the introduction of evidence that he was involved in a national scheme to supply a national civil defence program. The testimony introduces new elements which broaden the facts imputed to the Accused and the nature of his culpability.

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[10] T. 13 July 2006 p. 21.
[11] T. 13 July 2006 p. 22.
[12] T. 13 July 2006 p. 22.
[13] T. 13 July 2006 p. 27.
[14] T. 12 July 2006 pp. 41-50.

(g) Paracommando Soldiers Killings Opponents of the MRND Using a List Given by the Accused Ntabakuze

11. The Prosecution relies on evidence that Paracommando soldiers committed massacres of civilians an area adjacent to Camp Kanombe on the night of 6 April 1994 as justification for leading evidence from Mr. Kambanda that Paracommando soldiers killed opponents of the MRND party on the night of 6 April 1994 on the basis of a list of a names given to them by the Accused Ntabakuze.[15]

12. As characterized by the Prosecution, the testimony which it seeks to adduce through Mr. Kambanda introduces several new elements: that the Accused personally distributed a list of names of civilian targets to his soldiers; that the targets were specifically identified as opponents of the MRND political party; and that his soldiers committed massacres on the basis of this particular list. The Prosecution has failed to offer specific references from its case showing that this evidence would not broaden the facts imputed to the Accused or the nature of his culpability.

(III) REMEDY

13. The Defence requests three alternative remedies: severance of the trial of the three co-Accused; exclusion of the entirety of Jean Kambanda's testimony from consideration as against the three co-Accused; or exclusion of the specifically impugned portions of testimony as against the three co-Accused.[16]

14. The Chamber observes that severance and exclusion do not represent sharply different alternatives in the circumstances of the present case. Even after severance, the three Accused would continue to be tried by the same bench, and on the basis of all of the evidence which has been heard in the joint trial up until the moment of severance. On the other hand, severance now would have the unfortunate and potentially anomalous effect of bifurcating the evidence heard between now and end of the case, including those other than Kambanda. The Chamber has previously discussed the benefits of a joint trial.[17] Where a less drastic remedy is available, it should be chosen. Excluding the improper evidence offers a remedy which is no less effective than the alternatives available in the present case. Accordingly, the Chamber shall declare inadmissible evidence which broadens the facts imputed to the Accused or the nature of his culpability.

(IV) EVIDENCE INTRODUCED FOR CREDIBILITY

15. The Prosecution argues that the matters on which it has asked, or wishes to ask, questions are independently justified by the need to test the witness's credibility, and are "built upon the prior statements" of the witness.[18]

16. In order for questions on cross-examination to be permitted on this basis, there must be some basis to believe that the prior statements are, in fact, inconsistent with the witness's testimony. None of the questions can be so justified. As an initial matter, of the testimony which has been elicited so far, only the proposition about the setting up of a special brigade in Kigali is arguably inconsistent

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[15] Response, para. 30 ("The Prosecution submits that issue of Para Commando soldiers killings opponents of the MRND on the night of 6 to 7 April using a list of names Ntabakuze gave his soldiers is not a "new" area or "new" evidence. Trial Chamber has head evidence of the killings perpetrated by members of the Para Commando Battalion during the night of 6 to 7 April 1994 in the Akajali neighbourhood near the Kanombe Military Camp").
[16] Motion, p. 8.
[17] Kambanda Severance Decision, para. 3 ("A joint trial relieves the hardship that would otherwise be imposed on witnesses, whose repeated attendance might not be secured; enhances fairness as between the accused by ensuring a uniform presentation of evidence and procedure against all; and minimizes the possibility of inconsistencies in treatment of evidence, sentencing, or other matters, that could arise from separate trials").
[18] Response, para. 33.

with Mr. Kambanda's prior statements.[19] In all other respects, the testimony given by the witness appears to be consistent with his prior statements. As to the areas on which questions have not yet been asked, there is no indication that the witness gave inconsistent testimony in respect of those matters during his examination-in-chief by the Defence, either expressly or implicitly. Indeed, his testimony did not venture close to the matters on which the Prosecution wishes to pose questions to test the witness's credibility. Allowing the Prosecution to venture into any matter discussed by the witness in his voluminous prior statements to the Prosecution would, in effect, lead to an unlimited cross-examination whose effect is to introduce substantive evidence on a wide range of matters. Such an approach would undermine the order of proof prescribed by Rule 85 and, as the questioning on that basis so far indicates, has little value in establishing the witness's credibility. The probative value of questions which are unrelated the examination-in-chief, or for which there is no indication of a potential inconsistency, are outweighed by their prejudicial effect.

FOR THE ABOVE REASONS, THE CHAMBER

EXCLUDES the evidence of Mr. Kambanda that: (i) General Kabiligi had more power than General Bizimungu as a commander in the Rwandan Army during the period at issue in this trial; (ii) Kabiligi and General Bizimungu were informed by Kambanda that active or deserting soldiers were committing massacres; (iii) Kabiligi set up a special brigade to discipline uncontrolled elements of the Rwandan Army which were committing massacres; (iv) Kabiligi was in charge of all troops of the Rwandan Army after the flight of those forces from Rwanda; (v) Nsengiyumva procured weapons in Goma for national distribution throughout Rwanda; (vi) Paracommando soldiers killed opponents of the MRND party on the night of 6 April 1994 on the basis of a list of a names given to them by the Accused Ntabakuze.

Arusha, 11 September 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[19] T. 13 July 2006 p. 21.

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Decision on Request for a Subpoena 11 September 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Issuance of subpoena, Necessary and appropriate for the conduct of the trial, Limited to the Prosecutor's cross-examination of the witness to matters which were raised during the examination-in-chief, Inadmissibility of testimony which broadens the facts imputed to the Accused or the nature of his culpability, No immunity from the normal legal processes available to compel the testimony of a private individual to government official, No difference whether the official's knowledge was obtained in the course of official duties or not – Motion granted

International Instruments cited :

Rules of Procedure and Evidence, rule 54 ; Statute, art. 28

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al, Decision on Request for Severance of Three Accused, 27 March 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3, 12 July 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Severance or Exclusion of Evidence Based on Prejudice Arising From Testimony of Jean Kambanda, 11 September 2006 (ICTR-98-41)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Radislav Krstić, Decision on Application for subpoenas, 1 July 2003 (IT-98-33) ; Appeals Chamber, The Prosecutor v. Sejér Halilović, Decision on Issuance of Subpoenas, 21 June 2004 (IT-01-48) ; Trial Chamber, The Prosecutor v. Slobodan Milošević, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Shröder, 9 December 2005 (ICTR-02-54)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "*Requête de la défense de Bagosora visant l'émission d'un* subpoena", including its confidential annex, filed by the Bagosora Defence on 6 June 2006;

CONSIDERING the Ntabakuze Response, including the *Corrigendum* thereof, filed on 12 and 14 June 2006 respectively; the Prosecution "Response to Various Bagosora Defence Motions", filed on 15 June 2006; and the Nsengiyumva "Reply to Bagosora's Request", filed on 26 June 2006;

HEREBY DECIDES the motion.

Introduction

1. The Bagosora Defence requests that a *subpoena* be issued to the current Minister of Defence of the Government of Rwanda, General Marcel Gatsinzi, requiring his appearance before the Chamber as a witness. The Defence claims that General Gatsinzi was the *Chef d'Etat-Major de l'Armée Rwandaise* between 7 and 17 April 1994 and that, accordingly, he has unique and specific knowledge concerning certain material facts relevant to the case against the Accused.[1]

2. The Ntabakuze and Nsengiyumva Defence oppose the granting of a *subpoena*, arguing that the witness will give unreliable testimony which is favourable to the Prosecution. Any probative value that the witness's testimony might have will be outweighed by its prejudicial effect. Ntabakuze also argues that he is entitled to same rights as if were being tried separate from the other Accused and that, accordingly, this testimony, which would not have been elicited in a trial of his own, should be excluded as against him.

Deliberations

(i) Alleged Prejudicial Effect of the Testimony

3. The Chamber has ruled twice on arguments similar to those now presented by Ntabakuze and Nsengiyumva in relation to a different Bagosora Defence witness, Jean Kambanda. In those decisions, the Chamber has ruled that the rights of one Accused are not violated merely because another Accused calls a witness whom the first Accused would not wish to appear in the joint trial.[2] However, the Prosecution is limited in its cross-examination to matters which were raised during the examination-in-chief of the witness or which were already substantially presented during the Prosecution's case-in-chief. Testimony which broadens the facts imputed to the Accused or the nature of his culpability, are inadmissible.[3] Within these constraints, the rights of the Accused are respected and, accordingly, there is no basis to exclude his testimony or refuse a *subpoena* for his appearance.

(ii) Issuance of a Subpoena

4. Government officials enjoy no immunity from the normal legal processes available to compel the testimony of a private individual.[4] It makes no difference whether the official's knowledge was obtained in the course of official duties or not.[5] In a recent case, a Chamber of the International Criminal Tribunal for Yugoslavia dismissed claims of immunity asserted by the serving Prime Minister of the United Kingdom, Tony Blair, and a former Chancellor of the Federal Republic of Germany, Gerhard Schröder.[6] Furthermore, the Chamber held that a *subpoena*, issued to them

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[1] *Requête*, paras. 31-38.
[2] *Bagosora et al*., Decision on Request for Severance of the Three Accused (TC), 27 March 2006, para. 5.
[3] *Id*., para. 7; *Bagosora et al*., Decision on Severance or Exclusion of Evidence Based on Prejudice Arising From Testimony of Jean Kambanda (TC), 11 September 2006, paras. 2-3.
[4] *Krstic*, Decision on Application for Subpoenas (AC), 1 July 2003, para. 27 ("But it is abundantly clear from the passages already quoted from the Blaskic Subpoena Decision, and from paras. 23-24, *supra*, that the statement made in par 38 of that Decision – that "The Appeals Chamber dismisses the possibility of the International Tribunal addressing subpoenas to State officials acting in their official capacity" – can be justified only in relation to the production of documents in their custody in their official capacity. The Appeals Chamber did not say that the functional immunity enjoyed by State officials includes an immunity against being compelled to give evidence of what the official saw or heard in the course of exercising his official functions. Nothing which was said by the Appeals Chamber in the Blaskic Subpoena Decision should be interpreted as giving such an immunity to officials of the nature whose testimony is sought in the present case. No authority for such a proposition has been produced by the prosecution, and none has been found. Such an immunity does not exist. No issue arises for determination in this case as to whether there are different categories of State officials to whom any such immunity may apply, and it is unnecessary to determine such an issue here"). Judge Shahabuddeen issued a dissenting opinion, but only on the issue of whether such a subpoena could be issued for a pre-testimonial interview with the Defence. No such issue arises in the present case.
[5] *Id*.; *Milosevic*, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder (TC), para. 30 ("*Milosevic* Decision").
[6] *Milosevic* Decision, paras. 30, 33.

personally, was the appropriate mechanism for requiring a government official to testify, rather than an order for state cooperation under Article 28 of the Statute.[7]

5. Rule 54 of the Rules of Procedure and Evidence authorizes a Trial Chamber to issue

> "orders, summonses, *subpoenas*, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial".

The applicant for a *subpoena* must show that (i) reasonable attempts have been made to obtain the voluntary cooperation of the witness; (ii) the witness's testimony can materially assist the applicant in respect of clearly identified issues; and (iii) the witness's testimony must be necessary and appropriate for the conduct and fairness of the trial.[8] It has been said that "*subpoenas* should not be issued lightly" and that a Chamber must consider

> "not only the usefulness of the information to the applicant but … its overall necessity in ensuring that the trial is informed and fair".[9]

In discussing the application of these requirements, the Appeals Chamber has stated:

> The applicant seeking a *subpoena* must make a certain evidentiary showing of the need for the *subpoena*. In particular, he must demonstrate a reasonable basis for his belief that the prospective witness is likely to give information that will materially assist the applicant with respect to clearly identified issues in the forthcoming trial. To satisfy this requirements, the applicant may need to present information about such factors as the position held by the prospective witness in relation to the events in question, any relation the witness may have had with the accused which is relevant to the charges, any opportunity the witness may have had to observe or learn about those events, and any statements the witness made to the Prosecution or others in relation to them. The Trial Chamber is vested with discretion in determining whether the applicant succeeded in making the required showing, this discretion being necessary to ensure that the compulsive mechanism of the *subpoena* is not abused. As the Appeals Chamber has emphasized, "*Subpoenas* should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction".[10]

Chambers have considered factors such as the specificity with which the prospective testimony is identified and whether the information can be obtained by other means.[11]

6. The Defence has set out in detail the issues on which General Gatsinzi will be able to testify, and their relevance to specific paragraphs of the Indictment against the Accused. Amongst those issues are: an alleged telegram sent to Rwandan Army units from the *Etat-Major* instructing them to request the assistance of the *Interahamwe* in identifying and eliminating Tutsi civilians; the involvement of the Rwandan Army in massacres in Kigali; the topics of discussion at daily meetings at the *Etat-Major*; and the process by which the Interim Government was installed after the death of President Habyarimana.[12] The Defence submits that General Gatsinzi was in a privileged position to know of these and other events, and that he is one of the few people still alive with such information.

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[7] *Id*. para. 27 ("… where, as here, [the Trial Chamber] is seized of an application for an interview with and testimony from a specific state official--as opposed to an application for information from a state which does not seek to summon a specific official as a witness--the appropriate procedural mechanism for summoning the official to interview and testify is a subpoena addressed to the individual official and not a binding order addressed to the official's state").

[8] *Karemera et al*., Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3 (TC), 12 July 2006, para. 9; *Prosecutor v. Krstic,* Case N°IT-98-33-A, Decision on Application for Subpoenas (AC), 1 July 2003, para. 10; *Prosecutor v. Milosevic*, Case N°IT-02-54-T, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder (TC), 9 December 2005, para. 36.

[9] *Prosecutor v. Halilovic,* Case N°IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 7 ("*Halilovic* Decision").

[10] *Halilovic* Decision, para. 6.

[11] *Id*., *Milosevic* Decision, paras. 30, 33.

[12] *Requête*, paras. 35-37.

7. The Chamber does not lightly issue a *subpoena* to a serving Minister of a State. Nevertheless, the Defence has shown by specific submissions that the testimony of General Gatsinzi is likely to be material to specific matters of importance in the present case. The Defence has also made a sufficient showing that the evidence cannot reasonably be obtained elsewhere, and that it has made reasonable efforts to secure the witness's voluntary cooperation, without success.

8. Accordingly, in the present case, a *subpoena* requiring the personal appearance of the witness is both necessary and appropriate for the conduct of the trial. The Registry shall prepare a *subpoena* addressed to General Marcel Gatsinzi, requiring his appearance before this Chamber in the present trial at a date and time to be agreed upon between the Registry and the witness, in consultation with the parties.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Registrar to prepare a *subpoena* in accordance with this decision, addressed to General Marcel Gatsinzi, requiring his appearance before this Chamber to give testimony in the present case;

DIRECTS the Registry to communicate the *subpoena* to General Gatsinzi through appropriate diplomatic channels, accompanied by a copy of this Decision.

Arusha, 11 September 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Bagosora Motion to Modify its Witness List 11 September 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora – Modification of the Witness List, Removal of witnesses, Addition of witnesses, Interests of justice, Diligent action of Bagosora Defence, Limited number of witnesses involved – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 73 ter (E)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E), 26 June 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Defence Motions to Amend the Defence Witness List, 17 February 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste

Bagosora et al., Decision on Nsengiyumva Motion for Leave to Amend Its Witness List, 6 June 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Requête de la Défense de Bagosora visant la modification de sa liste de témoins", filed on 31 August 2006;

CONSIDERING the Prosecution Response, filed on 1 September 2006;

HEREBY DECIDES the motion.

Introduction

1. The Bagosora Defence requests leave to add two new witnesses to its witness list, and to remove fifteen others. The Defence claims that it learned of the existence of these two witnesses only recently. Their testimony is said to rebut specific Prosecution evidence and the time required for examination of both witnesses is estimated to be only three-and-a-half hours.[1]

2. The Prosecution does not oppose the motion, stating that it "takes no position" on whether the motion should be granted. It does argue, however, that the Defence is not required to request leave to remove witnesses from its witness list and that, indeed, they have already been removed by virtue of a letter from Lead Counsel to the Chamber dated 12 April 2006.

Deliberations

(i) Applicable Standard

3. Rule 73 *ter* (E) of the Rules of Procedure and Evidence provides that:

> After commencement of the Defence case, the Defence, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called.

This standard has previously been addressed in this case:

> In interpreting a similarly worded provision applicable to Prosecution witnesses, this Trial Chamber has held that amendments of a witness list must be supported by "good cause" and be in the "interests of justice". Similar principles have been applied in assessing Defence motions to vary a witness list. The determination of whether to grant a request to vary the witness list requires a close analysis of each witness, including the sufficiency and time of disclosure of the witness' information; the materiality and probative value of the proposed testimony in relation to existing witnesses and allegations in the indictment; the ability of the other party to make an effective cross-examination of the witness; and the justification offered by the party for the addition of the witness.[2]

[1] Motion, paras. 27, 36.
[2] *Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, para. 14 (references omitted).

Whether the addition of witnesses will result in "unfair surprise or prejudice" to the opposing party must be considered in light of the disclosure obligations of the moving party.[3]

(ii) Removal of Witnesses

4. The request to remove witnesses is not opposed by the Prosecution, will economize judicial resources and is obviously consistent with the effective presentation of Defence evidence. The request is, therefore, granted.[4]

(iii)Addition of Witnesses

5. In light of all of the factors enumerated above, the Chamber considers that it is in the interests of justice to allow the Defence to add Witnesses X-06 and X-07 to its witness list. The testimony of these two witnesses appears to be narrowly defined and focused to rebut to specific Prosecution evidence.

6. The present request is only the second filed by the Bagosora Defence, which demonstrates that they have acted diligently to minimize changes to its roster of witnesses and the consequent disruption to trial preparations. The testimony of these witnesses appears to have been discovered only in late July, which suggests that the Defence has brought the present motion as soon as practicable. Furthermore, the limited time required to hear these witnesses suggests that the orderly appearance of witnesses within the time scheduled before the end of the Prosecution case will not be disturbed, particularly in light of the withdrawal of a number of other witnesses. No basis arises from the present motion to alter the present trial schedule, which requires the Bagosora Defence to call all of its factual witnesses by the end of the present session on 13 October 2006.

7. The original disclosure obligation incumbent on the Defence was to file its witness list, along with summaries of the testimony of prospective witnesses by 3 January 2005.[5] In respect of subsequent amendments to Defence witness lists, the Chamber has required disclosure of this information "thirty-five days before the appearance of the witness".[6] Disclosure of the details of these two witnesses was given to the Prosecution on 24 and 28 August 2006. In light of the limited number of witnesses involved, the Chamber considers the latter of the two dates of disclosure to be the effective date of notice for both witnesses. Accordingly, subject to any waiver by the Prosecution, Witnesses X-06 and X-07 may testify no earlier than 2 October 2006.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the request of the Bagosora Defence to add witness X-06 and X-07 to the witness list;

ORDERS, to the extent that it has not yet been provided, that any identifying information and summaries of their testimony be disclosed to the Prosecution;

DECLARES, subject to any waiver by the Prosecution, that the witnesses may not testify before 2 October 2006.

Arusha, 11 September 2006.

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[3] *Bagosora et al*., Decision on Nsengiyumva Motion for Leave to Amend Its Witness List (TC), 6 June 2006, para. 3.
[4] The witnesses removed are: B-04, E-01, F-05, G-09, H-01, H-06, L-01, M-09, N-05, N-08, O-05, Q-01, T-07, X-02 and Z-08.
[5] T. 21 December 2004 p. 27. Rule 73 *ter* (B) (iii) (b) gives the Chamber discretion to "order that the Defence … file … [a] list of witness the Defence intends to call with … [a] summary of the facts on which each witness will testify".
[6] For example *Bagosora et al*., Decision on Defence Motions to Amend the Defence Witness List (TC), 17 February 2006, p. 6.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Severance or Exclusion of Evidence Based on Prejudice Arising from Testimony of Jean Kambanda
11 September 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Jean Kambanda – Exclusion of a testimony, Standard for the evaluation of an evidence, Inadmissibility of testimony broadening the facts imputed to the Accused or the nature of his culpability, Failure of the Prosecution to refer to elements of evidence when pleading its case, Opinion based upon unspecified facts or information of a witness can not be entered as an evidence – Alternative remedies asked by the Defence : severance of the trial [rejected], exclusion of the entirety of Jean Kambanda's testimony [rejected], exclusion of the specifically impugned portions of testimony [granted], Benefits of a joint trial – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rule 85

International and National Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision of 9 May 2003 on the Prosecutor's Application for Rebuttal Witnesses as Corrected According to the Order of 13 May 2003, 13 May 2003 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al, Decision on Request for Severance of Three Accused, 27 March 2006 (ICTR-98-41)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Zejnil Delalić et al., Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, 19 August 1998 (IT-96-21) ; Appeals Chamber, The Prosecutor v. Zejnil Delalić, Judgment, 8 April 2003 (IT-96-21) ; Trial Chamber, The Prosecutor v. Fatmir Limaj et al., Decision on Prosecution's Motion to Admit Rebuttal Statements Via Rule 92 bis, 7 July 2005 (IT-03-66) ; Trial Chamber, The Prosecutor v. Naser Orić, Decision on the Prosecution Motion With Addendum and Urgent Addendum to Present Rebuttal Evidence Pursuant to Rule 86 (A) (iii), 9 February 2006 (IT-03-68)

Australia : High Court of Australia, Shaw v. The Queen, 85 C.L.R. 365, 379 (1952)

Canada : Supreme Court of Canada, R. v. Krause, [1986] 2 S.C.R. 466, 6 November 1986

USA : Supreme Court of Indiana, Griffith v. State, 157 N.E.2d 191 (1959) ; Maryland Court of Appeals, State v. Booze, 334 Md. 64 (1994)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Mose, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion for Severance on the Grounds of Serious Prejudice Caused By the Testimony of Bagosora Witness Jean Kambanda", filed jointly by Kabiligi, Nsengiyumva and Ntabakuze on 14 July 2006;

CONSIDERING the Prosecution Response, filed on 2 August 2006; the joint Reply, filed on 15 August 2006; and the submissions of the Bagosora Defence, filed on 21 August 2006;

HEREBY DECIDES the motion.

Introduction

1. On 11, 12 and 13 July 2006, Jean Kambanda, testified before this Chamber as a witness for Colonel Bagosora. Mr. Kambanda, who was the Prime Minister of Rwanda during the period from April to July 1994, is currently serving a life sentence of this Tribunal, having been convicted of genocide and other crimes[1]. In the course of his cross-examination by the Prosecution, Mr. Kambanda offered testimony to which the Kabiligi, Nsengiyumva and Ntabakuze Defences objected on the ground that it improperly re-opened the Prosecution case and, therefore, went beyond the proper scope of cross-examination as prescribed by the Rules and a previous decision of the Chamber concerning Mr. Kambanda's testimony. After several oral rulings allowing the testimony, the Kabiligi, Nsengiyumva and Ntabakuze Defence teams made an oral motion for severance from the joint trial, arguing that they had been irremediably prejudiced. Exclusion of the testimony was requested as an alternative remedy. After hearing the parties' oral arguments, the Chamber adjourned the remainder of Mr. Kambanda's testimony, and requested further submissions in writing on all of the areas of disputed evidence.

Deliberations

(i) General Principles

2. The parameters of the Prosecution cross-examination of Mr. Kambanda have already been addressed by the Chamber in its decision of 27 March 2006, in response to a previous motion for severance on the basis of his appearance ("the Kambanda Severance Decision"):

> The suggestion that the Prosecution case can be re-opened through cross-examination is unfounded. Rule 90 (G) (i) [of the Rules of Procedure and Evidence ("the Rules)] constrains the scope of cross-examination to three areas: the subject-matter of the examination-in-chief; matters affecting credibility; and, "where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of the case". This last category must [be] read in light of Rule 85 (A) (i), which prescribes that "the trial shall be presented in the following sequence: (i) Evidence of the prosecution; (ii) Evidence for the defence; (iii) Prosecution evidence in rebuttal; (iv) Defence evidence in rejoinder . ..." This sequence implies that ... matters on which no evidence was led during the Prosecution case do not form part of that case. Accordingly, the "case for the cross-examining party" must now be understood as defined and limited by the evidence presented during the Prosecution case. The Prosecution may adduce evidence during its cross-examination which corroborates or reinforces evidence presented during the presentation of its case, but may not, at this stage, venhlre into new areas[2].

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[1] *The Prosecutor v. Kambanda,* Case N°ICTR-97-234, Judgement and Sentence (TC), 4 September 1998. Mr. Kambanda contests the validity of the plea agreement on which the judgement was based; nevertheless, the judgement was confirmed on appeal. *Kambanda v. The Prosecutor,* Case N°ICTR 97-23-A, Judgement (AC), 19 October 2000.
[2] *Bagosora el al.,* Decision on Request for Severance of Three Accused (TC), 27 March 2006, para. 7 (citations omitted).

The parties do not contest this standard, but disagree as to its application in respect of the specific questions asked, or proposed, by the Prosecution. The Defence argues that the questions enter into new areas on which no evidence was led during the Prosecution case; the Prosecution responds that the questions merely corroborate or reinforce evidence heard during the case-in-chief. Furthermore, the Prosecution contends that its questions are proper to test the witness's credibility.

3. In the Chamber's view, no unfairness arises as long as the evidence adduced through Mr. Kambanda has already been substantially presented during the Prosecution's case. Testimony which broadens the facts imputed to the Accused or the nature of his culpability, are inadmissible as they deviate from the order of proof prescribed by Rule 85. Such evidence would require the Defence to engage in additional investigations and the production of additional evidence which, in the context of this very complex and lengthy trial, would not be in the interests of justice. Whether a question broadens the facts imputed to the Accused or the nature of his culpability is, of necessity, a fact-specific inquiry and requires a close comparison of the evidence which was presented during the Prosecution case with the proposed evidence. The party seeking to cross-examine the witness bears the burden of showing by specific references to the case-in-chief that the proposed questions do not broaden the facts imputed to the Accused or the nature of his culpability[3].

(ii) Application

(a) Command of Troops By Kabiligi

4. The Kabiligi Defence objects to a line of questioning which yielded, in its view, three distinct propositions. The transcripts reflect these three elements to be: that the real command of the Army was in the hands of General Kabiligi, rather than another officer, General Bizimungu[4]; that the powers of the office of G3 entailed commanding troops[5]; and that General Kabiligi, in his capacity as the G3,

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[3] The Chamber's view is supported by principles developed by trial chambers in deciding whether to allow the Prosecution to adduce rebuttal evidence under Rule 85 (A) (iii) ofthe Rules. Albeit not an identical situation, the general rule is that the Prosecution must present all of its evidence against the Accused by the close of its case. *Ntagerura et al.,* Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rule 54, 73, and 85 (A) (iii) of the Rules of Procedure and Evidence (TC), 21 May 2003, para. 38 ("To permit the Prosecutor to supplement evidence she should have presented in her case-in-chief would be to violate one of the cardinal precepts preventing the prosecutor from splitting her proofs and condone the practice of presenting cases piecemeal for the Defence to answer. In such circumstances, the Chamber should exercise its discretion to exclude such evidence when offered in rebuttal".); *Nahimana et al.,* Decision of 9 May 2003 on the Prosecutor's Application for Rebuttal Witnesses As Corrected According to the order of 13 may 2003 (TC), para. 50 (referring to the English Court of Appeal holding that if the Prosecution could reasonably have foreseen that a particular piece of evidence was necessary to prove its case it should have put it before the court as part of its case). See also *Delalic et al.,* Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case (TC), 19 August 1998, paras. 18-22; *Delalic et al.,* Judgement (AC), para. 275; *Limaj et al.,* Decision on Prosecution's Motion to Admit Rebuttal Statements Via Rule 92 *bis* (TC), 7 July 2005, para. 6; *Oric,* Decision on the Prosecution Motion With Addendum and Urgent Addendum to Present Rebuttal Evidence Pursuant to Rule 86 (A) (iii) (TC), 9 February 2006. Similar principles follow from the practice of common law jurisdictions. *R. v. Krause,* [1986] 2 S.C.R. 466, para. 15 ("The general rule is that the Crown ... will not be allowed to split its case. The Crown ... must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in ... the indictment and any particulars ... This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence – as much as it deemed necessary at the outset – then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it the full case for the Crown so that it is known from the outset what must be met in response".) *Shaw v. The Queen,* 85 C.L.R. 365, 379 (High Court of Australia, 1952); Archbold, *Criminal Pleading. Evidence and Practice* (London: Sweet and Maxwell, 2002), s. 4-335 (England); *Griffith v. Slate,* 157 N.E.2d 191 (Supreme Court of Indiana, 1959); *State v. Booze,* 334 Md. 64 (Maryland Court of Appeals, 1994).

[4] Motion, p. 10; Reply p. 3; T. 13 July 2006 pp. 10, 15, 16.

[5] Motion, p. 10; Reply p. 3; T. 13 July 2006 pp. 10, 16.

commanded "all troop movements"[6]. The Prosecution argues that the testimony is not new, relying on the testimony of Witness XXJ who testified during the case-in-chief that:

> Yes, the G-3 superiors supervise all military operations on the national territory and, in view of the situation that prevailed, I believe that in his capacity as G-3 he was following even the events that were taking place elsewhere. But he was based in Kigali and he was, more specifically, in charge of the operations that took place in the city of Kigali, but he could also give orders for operations that were taking place elsewhere as he coordinated operations. He coordinated all the operations but, more specifically, he was in charge of operations in the city of Kigali[7].

Reference is also made to the testimony of Witness XAI that

> "there was someone in charge of the chief of operations in the war front, and that person's name was Gratien Kabiligi",

and that "Gratien Kabiligi was in charge of the entire city of Kigali"[8].

5. The Chamber has carefully considered Mr. Kambanda's testimony in comparison with evidence introduced during the Prosecution case and finds that, in most respects, he merely repeats information which has already been substantially introduced during the case-in-chief. In one respect, the testimony does introduce a new element: that General Kabiligi had more power than General Bizimungu. This element of testimony does broaden the facts imputed to the Accused.

(b) General Kabiligi Was Informed That Solders Were Committing Massacres

6. The Defence objects to Kambanda's testimony that Kabiligi "was regularly told that soldiers were taking part in the massacres"[9]. More accurately, the testimony was that Kambanda had, during some meetings with Generals Kabiligi and Bizimungu, informed them that soldiers or deserters were committing massacres. The Prosecution cites no evidence during its case reflecting this testimony. In the Chamber's view, the fact that the Prime Minister at the time informed the Accused of such actions would broaden the facts imputed to the Accused or the nature of his culpability, even if there was evidence during the Prosecution case that others had provided such information.

(c) General Kabiligi Created a Brigade to Control Renegade Soldiers

7. Mr. Kambanda testified that he was informed that

> "in Kigali town a special brigade had been set up specifically to control those so-called uncontrolled elements of the army"

which were committing massacres of civilians[10]. The Prosecution has failed to refer to any such evidence during its case.

(d) General Kabiligi Exercised Command After Fleeing Into Exile

8. Mr. Kambanda testified that after the flight of the interim government into exile, "practically the same command structure was maintained in exile", implying that General Kabiligi continued to

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[6] Motion, p. 10; T. 13 July 2006 p. 16.
[7] Response, para. 16; T. 14 April 2004 p. 45.
[8] Response, para. 15, T. 9 September 2003 pp. 1, 2
[9] Motion, p. 10.
[10] T. 13 July 2006 p. 21.

exercise command over troops[11]. The Prosecution relies on the testimony of Witness ZF, who said that after General Kabiligi fled into exile, he lived in south Goma "where a division he was commanding was. It was the southern Division". The testimony of Mr. Kambanda would, in effect, potentially broaden the command responsibility of the Accused beyond the southern Division, mentioned by Witness ZF, to a larger number of troops. Accordingly, the testimony broadens the facts imputed to the Accused or the nature of his culpability.

(e) The Military Had More Power Than Politicians

9. Mr. Kambanda testified that "in any situation of war, it is the people who bear arms who have the real power, that is true"[12]. The Defence teams object to this testimony as new evidence. In the Chamber's view, this is not a fact which broadens the facts imputed to the Accused or the nature of their culpability. It constitutes no more than an inference or an opinion based upon unspecified facts or information.

(f) Procurement of Arms in Goma for "Into Gisenyi and Into the Rest of Rwanda", and the Transfer of Weapons From Gisenyi Military Camp To Butare Military Camp, June 1994

10. The Prosecution has indicated that it wishes to elicit testimony from the witness concerning

> "the procurement of arms and the movement of arms into Rwanda from – from Goma into Gisensyi and the rest of Rwanda"

by the Accused Nsengiumva[13]. It also did lead evidence that weapons were transferred from Gisenyi Military Camp to the Butare Military Camp in June 1994, for subsequent distribution as part of the civil defence program[14]. The Prosecution argues that evidence was led during its case concerning Nsengiyumva's involvement in the distribution of arms in Gisenyi, and his role in bringing weapons from Goma across the border into Rwanda. The Prosecution has failed, however, to point to any evidence during its case that the Accused was involved in the distribution of weapons to civilians or soldiers throughout Rwanda, or that he obtained weapons in Goma for that purpose. The testimony that he was involved in supplying weapons to civilians in Gisenyi does not justify the introduction of evidence that he was involved in a national scheme to supply a national civil defence program. The testimony introduces new elements which broaden the facts imputed to the Accused and the nature of his culpability.

(g) Paracommando Soldiers Killings Opponents of the MRND Using a List Given by the Accused Ntabakuze

11. The Prosecution relies on evidence that Paracommando soldiers committed massacres of civilians an area adjacent to Camp Kanombe on the night of 6 April 1994 as justification for leading evidence from Mr. Kambanda that Paracommando soldiers killed opponents of the MRND party on the night of 6 April 1994 on the basis of a list of a names given to them by the Accused Ntabakuze[15].

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[11] T. 13 July 2006 p. 22.
[12] T. 13 July 2006 p. 22.
[13] T. 13 July 2006 p. 27.
[14] T. 12 July 2006 pp. 41-50.
[15] Response, para. 30 ("The Prosecution submits that issue of Para Commando soldiers killings opponents of the MRND on the night of 6 to 7 April using a list of names Ntabakuze gave his soldiers is not a "new" area or "new" evidence. Trial Chamber has head evidence of the killings perpetrated by members of the Para Commando Battalion during the night of 6 to 7 April 1994 in the Akajali neighhourhood near the Kanombe Military Camp").

12. As characterized by the Prosecution, the testimony which it seeks to adduce through Mr. Kambanda introduces several new elements: that the Accused personally distributed a list of names of civilian targets to his soldiers; that the targets were specifically identified as opponents of the MRND political party; and that his soldiers committed massacres on the basis of this particular list. The Prosecution has failed to offer specific references from its case showing that this evidence would not broaden the facts imputed to the Accused or the nature of his culpability.

(iii) Remedy

13. The Defence requests three alternative remedies: severance of the trial of the three co-Accused; exclusion of the entirety of Jean Kambanda's testimony from consideration as against the three co-Accused; or exclusion of the specifically impugned portions of testimony as against the three co-Accused[16].

14. The Chamber observes that severance and exclusion do not represent sharply different alternatives in the circumstances of the present case. Even after severance, the three Accused would continue to be tried by the same bench, and on the basis of all of the evidence which has been heard in the joint trial up until the moment of severance. On the other hand, severance now would have the unfortunate and potentially anomalous effect of bifurcating the evidence heard between now and end of the case, including those other than Kambanda.The Chamber has previously discussed the benefits of a joint trial[17]. Where a less drastic remedy is available, it should be chosen. Excluding the improper evidence offers a remedy which is no less effective than the alternatives available in the present case. Accordingly, the Chamber shall declare inadmissible evidence which broadens the facts imputed to the Accused or the nature of his culpability.

(iv) Evidence Introduced for Credibility

15. The Prosecution argues that the matters on which it has asked, or wishes to ask, questions are independently justified by the need to test the witness's credibility, and are "built upon the prior statements" of the witness[18].

16. In order for questions on cross-examination to be permitted on this basis, there must be some basis to believe that the prior statements are, in fact, inconsistent with the witness's testimony. None of the questions can be so justified. As an initial matter, of the testimony which has been elicited so far, only the proposition about the setting up of a special brigade in Kigali is arguably inconsistent with Mr. Kambanda's prior statements[19]. In all other respects, the testimony given by the witness appears to be consistent with his prior statements. As to the areas on which questions have not yet been asked, there is no indication that the witness gave inconsistent testimony in respect of those matters during his examination-in-chief by the Defence, either expressly or implicitly. Indeed, his testimony did not venture close to the matters on which the Prosecution wishes to pose questions to test the witness's credibility. Allowing the Prosecution to venture into any matter discussed by the witness in his voluminous prior statements to the Prosecution would, in effect, lead to an unlimited crossexamination whose effect is to introduce substantive evidence on a wide range of matters. Such an approach would undermine the order of proof prescribed by Rule 85 and, as the questioning on that basis so far indicates, has little value in establishing the witness's credibility. The probative value of

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[16] Motion, p. 8.
[17] Kambanda Severance Decision, para. 3 ("A joint trial relieves the hardship that would otherwise be imposed on witnesses, whose repeated attendance might not he secured; enhances fairness as between the accused by ensuring a uniform presentation of evidence and procedure against all; and minimizes the possibility of inconsistencies in treatment of evidence, sentencing, or other matters, that could arise from separate trials").
[18] Response, para. 33.
[19] T. 13 July 2006p.21

questions which are unrelated the examination-in-chief, or for which there is no indication of a potential inconsistency, are outweighed by their prejudicial effect.

FOR THE ABOVE REASONS, THE CHAMBER

EXCLUDES the evidcnce of Mr. Kambanda that: (i) General Kabiligi had more power than General Bizimungu as a commander in the Rwandan Army during the period at issue in this trial; (ii) Kabiligi and General Bizimungu were informed by Kambanda that active or deserting soldiers were committing massacres; (iii) Kabiligi set up a special brigade to discipline uncontrolled elements of the Rwandan Army which were committing massacres; (iv) Kabiligi was in charge of all troops of the Rwandan Army after the flight of those forces from Rwanda; (v) Nsengiyumva procured weapons in Goma for national distribution throughout Rwanda; (vi) Paracommando soldiers killed opponents of the MRND party on the night of 6 April 1994 on the basis of a list of a names given to them by the Accused Ntabakuze.

Arusha, 11 September 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Ntabakuze Motion under Article 28 and for Videoconference Testimony Under Rule 54 of Colonel de St. Quentin 11 September 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Aloys Ntabakuze – Videoconference testimony, Deposition granted "at the request of either party" under Rule 71, Power of the Chamber to order the hearing of testimony by video-conference under Rule 54, Interest of justice – Cooperation of the States, France, Legitimate concerns of a state, Short notice for testimony risks to disturb the proper functioning of the military unit of the witness – Motion granted

International Instruments cited :

Rules of Procedure and Evidence, rules 54, 71, 71 (A) and 71 (D) ; Statute, art. 28

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 October 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Testimony by Video-Conference, 20 December 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request to the Kingdom of The Netherlands for Cooperation and Assistance, 7 February 2005 (ICTR-98-41)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Duško Tadić, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, 25 June 1996 (IT-94-1)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Ntabakuze "Motion for Request of Cooperation from the Government of France Pursuant to Article 28 of the Statute", and the *Addendum* and Amendment thereto, filed on 8 March and 28 August 2006, respectively;

HEREBY DECIDES the motion.

Introduction

1. On 8 March 2006, the Ntabakuze Defence filed a motion asking the Chamber to issue a request for cooperation to the Government of France, in particular, to

> "facilitate a meeting and an interview with Colonel Grkgoire de St. Quentin with a view to calling him as a witness"[1].

The Defence and the Registry subsequently advised the Chamber that progress was being made towards arranging an interview. On 5 May and 27 June 2006, a representative of the Ntabakuze Defence interviewed Colonel de St. Quentin in accordance with procedures required by the Government of France. The Addendum and Amendment to the motion now requests an

> "order to the Government of France to provide all necessary cooperation and assistance to facilitate the immediate attendance ... of Colonel Gregoire de St. Quentin, to appear as a witness before this Trial Chamber"[2].

2. Article 28 of the Statute imposes an obligation on States to

> "cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law".

A request to a Chamber to make an order under Article 28 must set forth the nature of the information sought; its relevance to the trial; and the efforts that have been made to obtain it. The type of assistance sought should also be defined with particularity[3].

3. The Government of France has indicated its willingness to make Colonel de St. Quentin available for a deposition by video-conference pursuant to Rule 71 (D) of the Rules of Procedure and Evidence rather than allowing him to travel to Arusha to testify *viva voce* as is requested by the Defence[4]. France indicates that it is difficult to make Colonel de St. Quentin available on short notice, as he is the commander of a military unit on active duty[5]. The Defence acknowledges the French position, but does not support the request for a deposition, arguing that Rule 71 (A) requires that there be "exceptional circumstances". As the Defence knows of no such circumstances, it does not believe

[1] Motion, p. 5.
[2] Addendum, p. 4.
[3] *Bagosora et al*., Decision on Request to Kingdom of The Netherlands for Cooperation and Assistance (TC), 7 February 2005, para. 5 ; *Bagosora et al*., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4.
[4] Addendum, Annex 2 (Note verbale from the Ambassador of France in Tanzania to the ICTR Registrar, 7 August 2006).
[5] Addendum, Annex 1 (Note verbale from the Ambassador of France in Tanzania to the lCTR Registrar, 7 July 2006).

that such an application would succeed. Furthermore, Rule 71 (A) states that a deposition may be granted "at the request of either party"; the Defence argues that in the absence of such a request, no deposition may be ordered[6].

Deliberations

4. Where possible, a Trial Chamber should take the legitimate concerns of a state into account in fashioning requests pursuant to Article 28. The Government of France submits that Colonel de St. Quentin remains on active duty as the head of a military unit and that his absence would be disruptive of its proper functioning. On the other hand, the trial calendar prescribes that the presentation of the Ntabakuze case be completed by 13 October 2006.

5. The Defence correctly observes that a deposition under Rule 71 may only be granted "at the request of either party". As no party has made such a request, the Chamber may not make such an order.

6. The Chamber does, however, have the power under Rule 54 to order the hearing of testimony by video-conference where it is "in the interests of justice". This power, and the "interests of justice" standard, was first recognized before the ICTY in the Tadić case, a precedent which this Tribunal has followed[7]. The criteria for determining whether videoconference testimony is in the "interests of justice" include: the importance of the testimony; the inability or unwillingness of the witness to attend; and that a good reason has been adduced for that inability or unwillingness[8]. Rule 54 specifically provides that an order thereunder may be made by the Chamber proprio motu[9].

7. The submissions of the Government of France indicate that Colonel de St. Quentin's appearance in Arusha on short notice would interfere with the functioning of the military unit which he commands. This concern constitutes a good reason for Colonel de St. Quentin's inability to appear. Under these circumstances, and in light of the Defence's insistence on the importance of the testimony, it is in the interests of justice that the testimony be heard by video-conference. Although the Defence has made no such request, the Chamber considers this to be an appropriate mechanism for respecting the legitimate concerns of the Government of France, while ensuring that the testimony is heard in accordance with the trial schedule. Accordingly, the order shall be made *proprio motu*.

FOR THE ABOVE REASONS, THE CHAMBER

RESPECTFULLY REQUESTS the Government of France to make Colonel de St. Quentin available to provide testimony in the present case by way of video-conference;

DIRECTS the Registry to transmit this decision to the relevant authorities of the Government of France and, in consultation with the parties and the Government of France, to arrange for the taking of a deposition by video-conference in accordance with this decision.

Arusha, 11 September 2006.

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[6] Addendum, para. 7.
[7] *Tadić*, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence By Video-Link (TC), 25 June 1996, para. 19 ; *Bagosora et al*., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004 ; *Bagosora et al*., Decision on Testimony By Video-Conference (TC), 20 December 2004, para. 4.
[8] *Bagosora et al*., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004, para. 6.
[9] Rule 54 reads: "At the request of either party or proprio motu, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial".

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Kabiligi Motion for Exclusion of Testimony of Witness XAI 14 September 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Gratien Kabiligi – Exclusion of testimony, Request for reconsideration of one specific element of a former decision of the Chamber, Duty of the Trial Chamber to examine communications other than the Indictment in determining whether adequate notice of a material fact – Motion denied

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Sylvestre Gacumbitsi, Judgement, 7 July 2006 (ICTR-2001-64)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Mladen Naletilić and Vinko Martinović, Judgement, 3 May 2006 (IT-98-34)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Kabiligi Defence "Motion to Exclude the Testimony of Witness XAI Relating to an Alleged Order to Kill Prisoners at Nyakenke", filed on 15 May 2006;

CONSIDERING the Prosecution Response, filed on 16 May 2006; and the Kabiligi Reply, filed on 29 May 2006;

HEREBY DECIDES the motion.

1. The present motion is, in effect, a request for reconsideration of one specific element of the Chamber's "Decision on Exclusion of Testimony Outside the Scope of the Indictment" of 27 September 2005. In that decision, the Chamber excluded testimony that three RPF infiltrators were arrested and killed on the implicit orders of the Accused, but declined to exclude testimony that he

> "gave a speech to soldiers under his command in which he warned of RPF infiltrators dressed as civilians and encouraged the soldiers to be 'vigilant so that the infiltrators can be captured'".[1]

2. The Defence argues that the Chamber should reconsider its decision primarily on the basis that it erred by taking into account communications other than the Indictment in deciding whether sufficiently detailed notice had been given of the evidence.[2] In the alternative, the Defence argues that

[1] Kabiligi Exclusion Decision, para. 9.

[2] Motion para. 9 ("the Trial Chamber took the position that vagueness in an Indictment can somehow by 'cured' during the trial by subsequent disclosure"); para. 11 ("The Prosecution cannot be allowed to amend its case against the Accused through

even if such communications may be considered by the Chamber, no submissions were made indicating the paragraph of the Indictment to which the material fact would be relevant.[3]

3. The Defence has not raised any convincing basis for reconsideration. As to the applicable legal principles, the Appeals Chamber has recently re-affirmed that a Trial Chamber has not only a discretion, but a duty, to examine communications other than the Indictment in determining whether adequate notice of a material fact was provided:

> In reaching its judgement, a Trial Chamber can only convict the accused of crimes which are charged in the indictment. If the indictment is found to be defective because it fails to plead material facts or does not plead them with sufficient specificity, the Trial Chamber must consider whether the accused was nevertheless accorded a fair trial. In some instances, where the accused has received timely, clear and consistent information from the Prosecution detailing the factual basis underpinning the charges against him or her, the defective indictment may be deemed cured and a conviction may be entered.[4]

This in no way detracts from the importance of an indictment as the sole accusatory instrument. It does recognize, however, that in large, complex cases, not every detail of every element of evidence which will be adduced throughout a lengthy trial need be mentioned in an indictment. On the other hand, lack of specificity in an indictment may only be cured through timely, clear and consistent notice of the details of material facts which are alleged against the Accused.

4. The Trial Chamber properly directed itself to the criteria for assessing whether adequate notice was given to the Defence for this evidence to be admitted, based upon the applicable jurisprudence of both the Appeals Chamber and this Trial Chamber.[5] Contrary to the Defence submission, the Pre-Trial Brief Revision did indicate that this witness's testimony, as summarized in the Pre-Trial Brief, related to paragraphs 5.1 and 6.46 of the Indictment. Although those paragraphs are vague in relation to the evidence, the summary provided additional detail which cured the deficiency.

5. No basis has been raised to suggest that the Chamber erred in law, or misapplied that law to the facts of the case, or that the facts of the situation have changed so as to justify reconsideration.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 14 September 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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the filing of a Pre-Trial Brief, and in doing so cause extreme prejudice to an Accused who is necessarily restricted in the preparation of the defence of these new allegation, and defeat the purpose of the procedural mechanisms which exist for confirmation of the indictment, and amendment of an indictment against an accused").

[3] Motion, para. 13.

[4] *Naletilić and Martinović*, Judgement (AC), 3 May 2006, para. 26; *Ntagerura et al*., Judgement (AC), 7 July 2006, para. 65 (holding that the Trial Chamber had committed an error of law in failing to consider whether defects in the Indictment had been cured).

[5] Judgements of the Appeals Chamber subsequent to the Chamber's decision have confirmed, for example, that a Pre-Trial Brief is an appropriate means by which details of material facts may be communicated, so as to clarify an otherwise vague indictment: *Naletilić and Martinović*, Judgement (AC), 3 May 2006, para. 27.

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Decision on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment
15 September 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Anatole Nsengiyumva – Exclusion of Evidence Outside the Scope of the Indictment, Specific Exclusion Requests Based on Lack of Notice, Obligation of the Trial Chamber to consider whether a vague provision in an indictment has been cured by timely, clear and consistent communications, Distinction between the forms for giving material notice of the Pre-Trial Brief and opening statement and of the "mere service of witness statements", Failure to voice a contemporaneous objection does not waive the Accused's rights but results in a shifting of the burden of proof, No lack of notice when a witness is recalled for further questioning later – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rule 73 bis (E)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E), 26 June 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Defence Objection to Elements of Testimony of Witness XBH, 3 July 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Sylvestre Gacumbitsi, Judgement, 17 June 2004 (ICTR-2001-64) ; Appeals Chamber, The Prosecutor v. Eliezer Niyitegeka, Judgement, 9 July 2004 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and ICTR-96-17) ; Trial Chamber, The Prosecutor v. Protais Zigiranyirazo, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief, 30 September 2005 (ICTR-2001-73) ; Appeals Chamber, The Prosecutor v. André Ntagerura et al., Judgement, 8 February 2006 (ICTR-96-10A) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Ndindiliyimana's Extremely Urgent Motion to Prohibit the Prosecution From Leading Evidence on Important Material Facts Not Pleaded in the Indictment Through Witness ANF, 15 June 2006 (ICTR-99-50) ; Appeals Chamber, The Prosecutor v. Sylvestre Gacumbitsi, Judgement, 7 July 2006 (ICTR-2001-64) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Certification of Decision on Exclusion of Evidence, 14 July 2006 (ICTR-98-41)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Zoran Kupreškić, Judgement, 23 October 2001 (IT-95-16) ; Appeals Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Judgement, 17 December 2004 (IT-95-14/2) ; Appeals Chamber, The Prosecutor v. Mladen Naletilić and Vinko Martinović, Judgement, 3 May 2006 (IT-98-34)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Nsengiyumva Defence "Motion for the Exclusion of Evidence of Allegations Falling Outside the Indictment Pursuant to Articles 17 and 18 of the Statute of the

International Tribunal and Rules 47, 50, 53 *bis* and 62 of the Rules of Procedure and Evidence", filed on 9 May 2006; and the "Corrigendum", filed on 16 May 2006;

CONSIDERING the Prosecution Response, filed on 19 May 2006; and the Nsengiyumva Reply, filed on 7 June 2006;

HEREBY DECIDES the motion.

Introduction

1. The Nsengiyumva Defence requests that the Chamber exclude from its consideration twenty categories of Prosecution evidence on the basis that they fall outside the scope of the Indictment.[1] The Defence argues that these matters are not mentioned in the Indictment with sufficient specificity to be admissible against the Accused. The Defence accepts that vagueness in an indictment may be cured through subsequent communications from the Prosecution, but asserts that such occasions are exceptional and did not take place here.[2]

2. The Prosecution submits that the evidence in question is relevant to the Indictment. To the extent that paragraphs in the Indictment are vague in relation to the evidence, the Prosecution relies on other communications such as the Particulars of the Indictment, the Supporting Materials, and the Pre-Trial Brief to show that any such defects were cured. Additional details were provided through disclosure of witness statements and at least one motion for leave to vary the Prosecution witness list. Furthermore, the Defence should not now be able to request exclusion of evidence where it failed to register a contemporaneous objection. The Prosecution also argues that the Defence has suffered no prejudice from the alleged vagueness of the Indictment, having made submissions and presented evidence which responds directly and precisely to the Prosecution evidence which it now seeks to exclude.[3]

DELIBERATIONS

(I) Applicable Principles

3. The legal framework for determining whether evidence is inadmissible based on alleged lack of notice of a material fact has been discussed on four previous occasions by the Chamber in response to Defence motions similar to that now under consideration.[4] The first of these decisions laid the foundation for analyzing such a motion:

> Rule 89 (C) provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value". To be admissible, the "evidence must be in some way relevant to an element of a crime with which the Accused is charged." The present motion complains that the evidence has no relevance to anything in the Indictment, or that some paragraphs of the Indictment to which it might be relevant are too vague to be taken into account. Some recent Appeals Chamber judgements thoroughly discuss the specificity with which an indictment must be pleaded, and the significance of other forms of Prosecution disclosure of its case. Although the question addressed in those cases was whether a conviction should be quashed because of insufficient notice of a charge in the indictment, the analysis is equally relevant to the present

[1] Motion, para. 49.
[2] Reply, paras. 3-15.
[3] Prosecution Response, paras. 16-20.
[4] *Bagosora et al.*, Decision on Exclusion of Testimony Outside the Scope of the Indictment (TC), 27 September 2005 ("Kabiligi Exclusion Decision I"); *Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006 ("Ntabakuze Exclusion Decision"); *Bagosora et al.*, Decision on Kabiligi Motion for Exclusion of Evidence (TC), 4 September 2006 ("Kabiligi Exclusion Decision II"); *Bagosora et al.*, Decision on Kabiligi Motion for Exclusion of Testimony of Witness XAI (TC), 14 September 2006.

question, namely, whether evidence is sufficiently related to some charge in the Indictment to be admissible.

The rights of the Accused enshrined in Article 20 of the Statute impose, according to the Appeals Chamber in *Kupreškić*, "an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven". Material facts may also be communicated to the Accused other than through the indictment:

If an indictment is insufficiently specific, *Kupreškić* stated that such a defect 'may, in certain circumstances cause the Appeals Chamber to reverse a conviction.' However, *Kupreškić* left open the possibility that a defective indictment could be cured 'if the Prosecution provides the Accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.' The question whether the Prosecution has cured a defect in the indictment is equivalent to the question whether the defect has caused any prejudice to the Defence or, as the *Kupreškić* Appeals Judgement put it, whether the trial was rendered unfair by the defect. *Kupreškić* considered whether notice of the material facts that were omitted from the indictment was sufficiently communicated to the Defence in the Prosecution's Pre-Trial Brief, during disclosure of evidence, or through proceedings at trial. In this connection, the timing of such communications, the importance of the information to the ability of the Accused to prepare its defence, and the impact of the newly-disclosed material facts on the Prosecution case are relevant. As has been previously noted, 'mere service of witness statements by the [P]rosecution pursuant to the disclosure requirements' of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial.

Whether vagueness in the indictment has been cured by subsequent disclosure involves consideration of the following factors: the consistency, clarity and specificity with which the material fact is communicated to the Accused; the novelty and incriminating nature of the new material fact; and the period of notice given to the Accused. Mention of a material fact in a witness statement does not necessarily constitute adequate notice: the Prosecution must convey that the material allegation is part of the case against the Accused. This rule recognizes that, in light of the volume of disclosure by the Prosecution in certain cases, a witness statement will not, without some other indication, adequately signal to the Accused that the allegation is part of the Prosecution case. The essential question is whether the Defence has had reasonable notice of, and a reasonable opportunity to investigate and confront, the Prosecution case.[5]

As described above, "curing" is the process by which vague or general allegations in an indictment are given specificity and clarity through communications other than the indictment itself. Only material facts which can be reasonably related to existing charges may be communicated in such a manner.[6]

4. A trial chamber not only has the power, but an obligation, to consider whether a vague provision in an indictment has been cured by timely, clear and consistent communications.[7] As stated by the Appeals Chamber in *Naletilić*:

In reaching its judgement, a Trial Chamber can only convict the accused of crimes which are charged in the indictment. If the indictment is found to be defective because it fails to plead material facts or does not plead them with sufficient specificity, the Trial Chamber must

[5] Kabiligi Exclusion Decision I, paras. 2-3.

[6] *Naletilić*, Judgement (AC), para. 26 ("a Trial Chamber can only convict the accused of crimes which are charged in the indictment"); Kabiligi Exclusion Decision II, para. 3; *Zigiranyirazo*, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief (TC), 30 September 2005, para. 13 ("the process of curing an Indictment does take place only when the material fact was already in the Indictment in a certain manner, not when it was not included at all"); Kabiligi Exclusion Decision II, para. 3.

[7] *Ntagerura et al.*, Judgement (AC), para. 65 (holding that the Trial Chamber had committed an error of law in failing to consider whether defects in the Indictment had been cured); Kabiligi Exclusion Decision, para. 5.

consider whether the accused was nevertheless accorded a fair trial. In some instances, where the accused has received timely, clear and consistent information from the Prosecution detailing the factual basis underpinning the charges against him or her, the defective indictment may be deemed cured and a conviction may be entered.[8]

In appropriate circumstances, Trial Chambers have exercised their discretion in favour of curing.[9] Decisions to do so have been expressly upheld by the Appeals Chamber.[10]

5. Failure to plead the physical perpetration of a criminal act by an accused under a count of the Indictment constitutes a defect.[11] On the other hand, "less detail may be acceptable if the 'sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes'".[12] Many acts attributed to an accused fall on the spectrum between these two extremes. Individual actions of an accused which contribute to crimes will require more specific notice than proof of the crimes themselves, where they are physically committed by others. The specificity of the notice required is proportional to the extent of the Accused's direct involvement.[13]

6. Whether a defective indictment has been cured depends on "whether the accused was in a reasonable position to understand the charges against him or her".[14] The presence of a material fact somewhere in the Prosecution disclosure does not suffice to give reasonable notice; what is required is notice that the material fact will be relied upon as part of the Prosecution case, and how.[15] In *Naletilić*, the Appeals Chamber distinguished between those sources of disclosure which are adequate, and those which are not:

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[8] *Naletilić*, Judgement (AC), para. 26; Kabiligi Exclusion Decision II, para. 4.
[9] *Kajelijeli*, Judgement (TC), para. 408 (Trial Chamber II); *Gacumbitsi*, Judgement (TC), para. 191 (Trial Chamber III); *Kamuhanda*, Judgement (TC), paras. 59-60 (Trial Chamber II); *Bizimungu et al*., Decision on Ndindiliyimana's Extremely Urgent Motion to Prohibit the Prosecution From Leading Evidence on Important Material Facts Not Pleaded in the Indictment Through Witness ANF (TC), 15 June 2006, para. 32 (Trial Chamber II).
[10] *Ntakirutimana*, Judgement (AC), paras. 94 ("In light of the principles discussed above, the Trial Chamber's conclusion was correct. Although the allegation of an attack at Gitwe Hill could and should have been specifically pleaded in the Indictment, the Defence was subsequently informed in a clear, consistent, and timely manner that it had to defend against this allegation"), 101 ("The Trial Chamber concluded that sufficient information was given regarding this allegation to the summary of Witness SS's testimony in Annex B to the Pre-Trial Brief and one of SS's prior witness statements, which was disclosed on 7 February 2001. In the view of the Appeals Chamber, this conclusion was correct"), 108 ("The details in Annex B and the statement of Witness CC notified the Defence that the Prosecution would allege that Elizaphan Ntakirutimana transported attackers and pointed out Tutsi refugees near the Gishyita-Gisovu road. The Trial Chamber therefore committed no error in concluding that the Bisesero Indictment's failure to allege these facts was cured"), 119 ("The Appeals Chamber therefore finds that the failure in the Bisesero Indictment to allege with specificity that Elizaphan Ntakirutimana was in a convoy which included attackers was cured by subsequent information communicated to the Defence); *Niyitegeka*, Judgement (AC), paras. 225 ("it was clear from the Prosecution's Pre-Trial Brief that the Prosecution intended to charge the Appellant with participation in an attack on that date and at that location, and that testimony would be adduced stating that the Appellant was armed and shot at Tutsi refugees … Accordingly, the Prosecution gave the Appellant clear, consistent and timely information"), 228 ("Accordingly, the Appeals Chamber finds that the Trial Chamber did not err in finding that the Appellant had sufficient notice of the material facts"), 237 ("the failure [to plead the material fact in the Indictment] was cured by information in the Pre-Trial Brief. The Trial Chamber therefore committed no error in relying on this evidence and, consequently, this ground of appeal is dismissed"); Kabiligi Exclusion Decision II, para. 5.
[11] *Ntakirutimana*, Judgement (AC), para. 32; *Kupreskic*, Judgement (AC), para. 89.
[12] *Naletilić*, Judgement (AC), para. 24; *Kupreskic*, Judgement (AC), para. 89.
[13] *Gacumbitsi*, Judgement (AC), para. 49 ("The Appeals Chamber has held that 'criminal acts that were physically committed by the accused personally must be set forth in the indictment specifically, including where feasible "the identity of the victim, the time and place of the events and the means by which the acts were committed"'. An indictment lacking this precision may, however, be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charge"); Kabiligi Exclusion Decision II, para. 3.
[14] *Naletilić*, Judgement (AC), para. 27 (with references).
[15] *Muvunyi*, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005 (TC), para. 22 ("It is to be assumed that an Accused will prepare his defence on the basis of material facts contained in the indictment, not on the basis of all the material disclosed to him that may support any number of additional charges, or expand the scope of existing charges").

> In assessing whether a defective indictment was cured, the issue to be determined is whether the accused was in a reasonable position to understand the charges against him or her. In making this determination, the Appeals Chamber has in some cases looked at information provided through the Prosecutor's Pre-Trial Brief or its opening statement. The Appeals Chamber considers that the list of witnesses the Prosecution intends to call at trial, containing a summary of the facts and the charges in the indictment as to which each witness will testify and including specific references to counts and relevant paragraphs in the indictment, may in some cases serve to put the accused on notice. However, the mere service of witness statements or of potential exhibits by the Prosecution pursuant to disclosure requirements does not suffice to inform an accused of material facts that the Prosecution intends to prove at trial. Finally, an accused's submissions at trial, for example, the motion for judgement of acquittal, final trial brief or closing arguments, may in some instances assist in assessing to what extent the accused was put on notice of the Prosecution's case and was able to respond to the Prosecution's allegations.[16]

The Appeals Chamber has, in effect, established a distinction between the Pre-Trial Brief and opening statement, on the one hand, which are permissible ways of giving notice of material facts; and the "mere service of witness statements", which are not.[17]

7. The Appeals Chamber has also recognized that

> "defects in an indictment … may arise at a later stage of the proceedings because the evidence turns out differently than expected".

Where this is the case, the Chamber must

> "consider whether a fair trial required an amendment of the indictment, an adjournment, or the exclusion of the evidence outside the scope of the indictment".[18]

In accordance with this reasoning, the Chamber will also entertain the possibility that the filing of a motion for the addition of a witness provides adequate notice, provided that the motion is granted and there was a sufficient delay between the filing of the motion and the appearance of the witness.[19]

8. Objections play an important role in ensuring that the trial is conducted on the basis of evidence which is relevant to the charges against the accused. The failure to voice a contemporaneous objection does not waive the Accused's rights, but results in a shifting of the burden of proof:

> In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also file a timely motion to strike the evidence or to seek an adjournment to conduct further investigations in order to respond to the unpleaded allegation.
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> …
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> [A]n accused person who fails to object at trial has the burden of proving on appeal that his ability to prepare his case was materially impaired. Where, however, the accused person objected at trial, the burden is on the Prosecution to prove on appeal that the accused's ability to prepare his defence was not materially impaired.[20]

Accordingly, to the extent that the Defence has pointed to no specific objection concerning the evidence in question, the presumption shall be that the burden rests on the Defence to show that the

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[16] *Naletilić*, Judgement (AC), para. 27 (citations omitted); as for the significance of submissions at trial showing that the Accused's ability to prepare was not materially impaired, see *Kvocka*, Judgement (AC), paras. 52-54; *Kordic and Cerkez*, Judgement (AC), para. 148; *Niyitegeka*, Judgement (AC), para. 198; *Kupreskic*, Judgement (AC), para. 122.
[17] Kabiligi Exclusion Decision II, para. 7.
[18] *Naletilić*, Judgement (AC), para. 25.
[19] Ntabakuze Exclusion Decision, paras. 10, 44; Kabiligi Exclusion Decision II, para. 8.
[20] *Niyitegeka*, Judgement (AC), 9 July 2004, paras. 199-200; Kabiligi Exclusion Decision II, para. 9.

lack of notice has been prejudicial to its ability to understand and respond to the evidence in question.[21]

9. The Chamber's approach in the sections which follow may be summarized as follows. Where a material fact cannot be reasonably related to the Indictment, then it shall be excluded. Where the material fact is relevant only to a vague or general allegation in the Indictment, then the Chamber will consider whether notice of the material fact was given in the Pre-Trial Brief or the opening statement, so as to cure the vagueness of the Indictment. Notice of a material fact anywhere in the Pre-Trial Brief would inform the Defence of the need to address and investigate the allegation, regardless of the specific witness who is said to be the source of the information.[22] The Pre-Trial Brief is a means of giving additional particulars concerning the Prosecution case, not only the content of individual witness's testimony. Material facts which concern the actions of the Accused personally are scrutinized more closely than general allegations of criminal conduct. Other forms of disclosure, such as witness statements or potential exhibits, are generally insufficient to put the Defence on reasonable notice. The Chamber recognizes two exceptions to this principle: first, where the Prosecution filed a motion for the addition of a witness, which was subsequently granted by the Chamber, and which stated or drew attention to the material facts on which the witness would testify; second, where a lengthy adjournment was ordered by the Chamber for the express purpose of allowing the Defence to meet newly discovered material facts.[23]

(II) APPLICATION: SPECIFIC EXCLUSION REQUESTS BASED ON LACK OF NOTICE

(a) The Butare, Rubavu and Mudende Incidents (Witnesses XBH, XBG and XBM)

10. The Defence objects to testimony from Witness XBH that: (i) the Accused attended a meeting in Butare with Colonel Bagosora and Captain Nizeyimana where they drew up a list of people to be killed; (ii) Tutsis on that list were targeted on a priority basis during killings in the commune of Nyamyumba, Butare *préfecture*; and (iii) the Accused handed over Tutsis to *Interahamwe* in Rubavu commune in or near Gisenyi Town who led them away to be killed.[24]

11. Witness XBH was the object of three written motions before and after his testimony: a Prosecution motion requesting leave to add his name to the witness list under Rule 73 *bis* (E); a Defence motion requesting that his proposed testimony concerning the drawing up of lists be excluded in advance; and finally, a Defence motion requesting that Witness XBH be recalled for further cross-examination on the basis of a statement given by the witness after his testimony, upon which the Defence wished to question the witness.[25] The combined effect of the Chamber's decisions on the first two motions was to allow the Prosecution to call Witness XBH, and to authorize questions, in particular, concerning the drawing up of lists in Butare. The Chamber found that no prejudice would arise from such questioning in light of the period of notice of the witness's testimony, and that the

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[21] Ntabakuze Exclusion Decision, paras. 7, 9.
[22] Although the Pre-Trial Brief is 168 pages long, it does not constitute the type of disclosure which could lead to material facts being buried amongst a great mass of detail.
[23] Paras. 8 and 9 of the present decision substantially correspond to paras. 7 and 10 of the *Bagosora et al*., Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006. An interlocutory appeal on these points is now pending before the Appeals Chamber. *Bagosora et al*., Decision on Request for Certification of Decision on Exclusion of Evidence (TC), 14 July 2006. The Chamber has considered the parties' submissions concerning the Prosecution's alleged non-compliance with a previous decision in this trial requiring the Prosecution to provide further particulars to the Indictment. Motion, paras. 11-20; Response, paras. 6-8; Reply, paras. 16-21. The Chamber does not consider it necessary to resolve this issue; the requests for exclusion will be examined in light of the principles enunciated in this section.
[24] Motion, paras. 50-53.
[25] Confidential Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) of the Rules of Procedure and Evidence, filed on 13 June 2003; Defence Notice of Intended Objection to Elements of Testimony of Witness XBH, filed on 30 June 2003; Nsengiyumva's Extremely Urgent Motion to Recall Prosecution Witness XBH for Further Cross-Examination, etc., filed on 6 April 2005.

addition of the witness was in the interests of justice under Rule 73 *bis* (E). Furthermore, the Chamber specifically held that the testimony concerning the drawing up of lists was relevant to paragraphs 5.1, 5.25 and 5.29 of the Indictment.[26] The Chamber is of the view that disclosure of a witness statement in conjunction with a motion for leave to allow that witness to appear before the Chamber, places the Defence on notice that the matters mentioned in the statement may be elicited during the witness's testimony.[27] Disclosure of a witness statement under these circumstances is entirely different from a massive disclosure of witness statements without any guidance as to the relevance of those statements to the trial.

12. The Chamber considers that notice of all three material facts objected to by the Defence was sufficient. Even if notice was for some reason inadequate at the time of the witness's first appearance, the witness was recalled for further questioning more than two years later.[28] If the Defence believed that it had suffered any prejudice due to lack of notice at the time of his first appearance, the occasion of his recall offered an opportunity to cross-examine the witness in light of subsequent investigations on these matters. Indeed, an adjournment is precisely one of the remedies foreseen by the Appeals Chamber to ensure that

> "the Defence has had reasonable notice of, and a reasonable opportunity to investigate and confront, the Prosecution case".[29]

The Defence having had an ample opportunity to investigate and confront the material facts offered by Witness XBH, the evidence is admissible.

13. The Defence also objects to the testimony of Witnesses XBG and XBM concerning the Accused's involvement in massacres at Mudende University.[30] Witness XBG testified that Nsengiyumva sent soldiers and *gendarmes* to the University to encourage the killing of Tutsis.[31] Witness XBM stated that Nsengiyumva arrived at the University in a military jeep, gave orders for Hutus to clear the campus and left before the subsequent massacre of Tutsi students.[32]

14. The Prosecution motion for leave to add Witnesses XBG and XBM to the witness list makes specific reference to their expected testimony concerning the Accused's role in massacres at Mudende University. This provided clear and unequivocal notice that the Prosecution intended to rely on these material facts as proof of the allegations in paragraphs 6.11 and 6.22 of the Indictment concerning the Accused's involvement in killing civilian Tutsis, and that he gave orders to militias to carry out such killings. On this basis, the Chamber finds this evidence to be admissible.

(b) Busasamana Killings

15. The Defence objects to testimony of Witness XBG that the Accused was personally involved in a massacre at Busasamana Parish which allegedly took place shortly after the massacre at Mudende University in May 1994.[33] The witness testified that the Accused arrived at Busasamana, addressed a

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[26] *Bagosora et al*., Decision on Defence Objection to Elements of Testimony of Witness XBH (TC), 3 July 2003, paras. 6-11; *Bagosora et al*., Decision on Prosecution Motion for Addition of Witness Pursuant to Rule 73 *bis* (E).
[27] Ntabakuze Exclusion Decision, paras. 10, 44.
[28] T. 18 May 2005 p. 7 (oral ruling authorizing recall of Witness XBH). The witness testified on 3, 4 and 7 July 2003 and on 20, 21 and 22 July 2005.
[29] Kabiligi Exclusion Decision, para. 2; *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 26 ("such situations may call for measures such as an amendment of the indictment, an adjournment, or the exclusion of evidence outside the scope of the indictment").
[30] Motion, paras. 54-55.
[31] T. 8 July 2003 p. 37.
[32] T. 14 July 2003 pp. 43-47.
[33] Motion, paras. 56-57.

group of approximately 2,000 *Interahamwe* and then stayed on the scene giving orders as the *Interahamwe* attacked the chapel.[34]

16. The Prosecution's opening statement substantially conveys the content of this testimony:

> In Gisenyi, you will hear evidence of an efficiently executed scorched earth programme of killing Tutsis, personally supervised by Lieutenant-Colonel Nsengiyumva … You will hear evidence of killings done at the Catholic diocesan parish of Nyundo … You will hear similar stories of killings done by *Interahamwe* and soldiers in the parish of Busasamana.[35]

The statement of Witness XBG, which was communicated to the Defence in conjunction with the Prosecution motion discussed above for amendment of its witness list, placed the Defence on notice of more precise details as to the nature of this material fact. These communications gave the Defence sufficiently specific notice of the material facts which are relevant to the general allegations in paragraphs 6.11 and 6.22 of the Indictment concerning the Accused's involvement in killing civilian Tutsis, and his orders to militias to engage in such killings. On this basis, the evidence is admissible.

(c) Bisesero Killings

17. The Defence seeks to exclude the testimony of Witnesses Omar Serushago and ABQ concerning allegations that the Accused sent *Interahamwe* to Bisesero Hills in Kibuye to attack Tutsi refugees.[36]

18. Paragraph 6.27 of the Indictment alleges that Nsengiyumva was ordered by Edouard Karemera to send troops to the Bisesero area in Kibuye. The Indictment was accompanied by a document entitled "Supporting Material", which consists of specific and focused excerpts from statements of prospective witnesses in relation to each paragraph of the Indictment. This document provided the Defence with a clear indication of the material facts which the Prosecution would present at trial. It reproduces the letter from Karemera in its entirety as well as a summary of anticipated testimony for Witness FF, which describes the killing of Tutsi civilians in Bisesero Hills.[37] In addition, Omar Serushago's summary of anticipated testimony in the Pre-Trial Brief indicates that he would testify to Nsengiyumva's involvement in a meeting to discuss an intervention in Kibuye.[38]

19. The Defence argues that paragraph 6.27 of the Indictment and the proposed testimony of Omar Serushago refer to "troops", not *Interahamwe*.[39] However, paragraph 4.5 of the Indictment does allege generally that the Accused had "authority over the MRND militia, the *Interahamwe*, and the CDR militia, the *Impuzamugambi*" by virtue of his rank, previous positions, and personal relations. The Chamber does not accept, in light of the totality of the Indictment, that the Defence would have been prejudiced in its investigations or that it would have misapprehended the nature of the material facts alleged against the Accused. The Supporting Material and Pre-Trial Brief provide additional detail on the involvement of *Interahamwe* in these events. On this basis, the evidence is admissible.

(d) Killings at Roadblocks in Kiyovu

20. The Defence objects to testimony by Witness DAS that Nsengiyumva appeared at roadblocks in the Kiyovu neighbourhood of Kigali while killings were being carried out by soldiers and *Interahamwe*.[40] The testimony contains no allegation that Nsengiyumva actually participated in the

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[34] T. 8 July 2003 pp. 70-80.
[35] T. 2 April 2002 pp. 188-89.
[36] Motion, paras. 58-60.
[37] Supporting Material to Nsengiyumva Indictment (hereinafter "Supporting Material"), filed on 3 August 1998, p. 112.
[38] Pre-Trial Brief, filed on 21 January 2002, Appendix A, p. 157.
[39] Reply, para. 53.
[40] Motion, para. 61.

killings or gave orders to kill, but Witness DAS gave no indication that the Accused took exception to the behaviour he was witnessing.[41]

21. The Chamber rejects the Prosecution assertion that a reading of the Indictment as a whole provided notice to the Accused of these allegations. The amended version of paragraph 6.22 of the Indictment alleges that the Accused

> "ordered militiamen, in a continuous and ongoing fashion, to eliminate Tutsis at roadblocks and to track them down and exterminate them".[42]

The Pre-Trial Brief furnished further detail, stating that Witness DAS would testify to killings at roadblocks in Kiyovu and his observations of the Accused during these killings. The Chamber finds that the Indictment is sufficiently specific in respect of these allegations; even if this were not the case, the Pre-Trial Brief would have cured any vagueness in the Indictment.[43] Accordingly, the evidence is admissible.

(e) Meetings to Plan and Preparation of Lists

22. The Defence seeks to exclude the testimony of Witnesses XBH, ABQ, DO, XXQ and HV regarding the production and use of lists of people to be killed.[44] Witness XBH testified that the Accused had actual involvement in the creation of such lists and that he distributed copies of the lists to several named individuals.[45] Witness ABQ recounted a meeting at which Nsengiyumva read Tutsi names from a list and ordered that these individuals be killed.[46] Witness DO gave testimony about individuals who were killed pursuant to a list given by the Accused.[47] Witness XXQ talked about the Accused's involvement in a group known as AMASASU and a list drafted by the group defining the enemy.[48] Finally, Witness HV described masked soldiers reading names from a list and asking those persons named to come forward.[49]

23. Paragraph 5.1 of the Indictment alleges that, between 1990 and 1994, the Accused conspired with Bagosora and others to plan the extermination of Tutsis, a plan which included "the preparation of lists of people to be eliminated". Nsengiyumva is alleged under paragraph 5.26 to have had responsibility for supervising the establishment of these lists and for updating them. Paragraph 5.29 alleges that military and *Interahamwe* carried out massacres of Tutsis and moderate Hutus on the basis of these pre-established lists.

24. Further precision in respect of the direct involvement of the Accused was provided by subsequent communications to the Defence. For the reasons discussed in section (a) above, the Chamber finds that the Accused had sufficient notice of Witness XBH's allegations, not only concerning the drawing up of a list, but also its use in the killing of Tutsis in Gisenyi.[50] It would have been evident from this information and references in the Pre-Trial Brief that the Accused was involved in the distribution of these lists, not only their preparation. Witness DO's testimony is also admissible

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[41] T. 5 November 2003 pp. 19-20.
[42] As amended by Particulars, filed 25 May 2000.
[43] Pre-Trial Brief, Appendix A, p. 37 ("The witness was guard at Terre Des Hommes in Kiyovu, the center of Kigali. He observed significant evidence of killings by PG and Interahamwe, particularly around roadblocks. Observed BAGOSORA and NSENGIYUMVA in area. At a major roadblock, witness hears Bagosora giving orders and heard him say not to spare any Tutsi").
[44] Motion, paras. 62-67.
[45] T. 3 July 2003 pp. 16-18; 25-26.
[46] T. 6 September 2004 pp. 6-7.
[47] T. 30 June 2003 p. 42.
[48] T. 11 October 2004 pp. 28-32, 38-39, 46-49.
[49] T. 23 September 2004 pp. 29-32.
[50] See also Decision on Defence Objection to Elements of Testimony of Witness XBH (TC), 3 July 2003, para. 11.

on that basis.[51] The testimony of Witness ABQ is also admissible. Indeed, the Prosecution submits that the meeting described by Witness ABQ is alleged at paragraph 6.16 of the Indictment.[52] The Supporting Material provided additional details, through a statement attributed to Witness OQ:

> The next day, April 7, 1994 I saw Colonel Anatole Nsengiyumva come to the house of one man who was our neighbour called Barnabe Samvura … Colonel Anatole Nsengiyumva had a list of names of people who had to be killed immediately in Gisenyi. I saw him hold the list and he read and distributed the list to some of the CDR Party leaders. I heard Colonel Nsengiyumva instruct CDR people to start killing people. He said "start the work" [*sic*] Colonel Anatole Nsengiyumva parked his military car in front of Barnabe's home near my family house. I heard him say "start the work here." That "here" was … house. I saw him pointing at … house. Colonel Nsengiyumva gave orders for the killings to start … house. After Colonel Anatole Nsengiyumva gave the orders, CDR members and some other Interahamwe who joined the meeting later, started blowing whistles. As the crowd got bigger, I managed to escape. That day, CDR members killed … Together, six ... were killed in the presence of Colonel Anatole Nsengiyumva. I was hiding in a house near by and saw him standing there near our house.[53]

The specificity provided in both the Indictment and Supporting Material was further reinforced in the Prosecutor's motion to add Witness ABQ to its witness list.[54] On this basis, the Chamber finds that sufficient notice was given of the material facts concerning the involvement of the Accused in the preparation and distribution of lists, as described by these witnesses. The evidence is admissible.

25. In respect of evidence specifically concerning AMASASU, although the Indictment does not mention the group by name, paragraphs 1.13 to 1.16 refer to "prominent civilian and military figures", sharing an "extremist Hutu ideology", working together from as early as 1990 to pursue a "strategy of ethnic division and incitement to violence". According to paragraph 1.15, their strategy included "the preparation of lists of people to be eliminated" and "the assassination of certain political opponents". In addition, the Supporting Material quotes an expert witness as saying that

> "one notes in particular [within the armed forces] the creation of the AMASASU in January 1993 which demanded the establishment of a cleansed army and the elimination of all RPF allies".[55]

Consequently, and given the rather general character of Witness XXQ's evidence, the Chamber finds the testimony to be admissible.

(f) Masaka Killings

26. The Defence seeks to exclude the testimony of Witness DBN, who stated that the Accused travelled to Camp Kanombe, obtained soldiers from Ntabakuze and then oversaw killings at Masaka.[56]

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[51] To the extent that notice of "distribution" as distinct from the creation of such lists would have been helpful to the Defence, this element was communicated, for example, through the Pre-Trial Brief, Summary of Witness OQ: "Witness saw a list of names of people who had to be killed being distributed by Colonel Nsengiyumva to members of the CDR political party and the *Interahamwe*."

[52] Prosecutor's Response, para. 159.

[53] Supporting Material, pp. 98-99.

[54] Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E),filed on 24 March 2004, para. 17 (stating that Witness ABQ would testify that he "saw a list in NSENGIYUMVA'S hand and heard him read out more than 10 names of Tutsi to be killed" and that he had "first-hand information about the attacks that were subsequently carried out pursuant to NSENGIYUMVA'S order"). The Chamber granted the Prosecutor's request to add Witness ABQ, finding it to be in the "interests of justice". Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) (TC), 21 May 2004, para. 19.

[55] Supporting Material, pp. 13-14 (excerpt from report of André Guichaoua).

[56] Motion, para. 68.

27. Paragraphs 6.33 and 6.36 of the Indictment plead that the Accused, by virtue of his position, exercised authority over members of the *Forces Armées Rwandaises* (FAR), their officers and militiamen, and that these subordinates committed massacres with Nsengiyumva's knowledge. The Pre-Trial Brief provides more detail through a summary of Witness DBN's anticipated testimony:

> Saw Nsengiyumva at the camp. He came to ask Ntabakuze for some soldiers to eliminate some people suspected of being *Inkontanyi* in Masaka forest. Few minutes later soldiers went to Masaka forest. On their return soldiers said they had found Tutsi in the banana plantation and that they were killed by soldiers.[57]

28. The Indictment and the Pre-Trial Brief, taken together, reasonably informed the Defence of this allegation, and the evidence is admissible.

(g) Killings of Tutsi Women at Gisenyi Roadblock

29. The Defence states in its motion that "the allegations by Witness DCH concerning the alleged killings of Tutsi women at a roadblock in Gisenyi are not pleaded in the Indictment."[58]

30. The Defence pleading is deficient. The testimony in question – at least at the reference provided by the Defence – makes no allegation that the Accused was personally involved in the event described.[59] Under these circumstances, the Chamber considers that paragraph 6.21 of the Indictment provides adequate notice of this material fact. Even if the evidence were to more directly implicate the Accused, the Chamber notes that the Indictment alleges in paragraphs 6.21 and 6.22 that roadblocks were set up in Gisenyi *préfecture* between April and July 1994 and that killings took place there under the supervision of the Accused. Particulars in support of paragraph 6.22 further allege that the Accused "ordered militiamen, in a continuous and ongoing fashion, to eliminate Tutsis at roadblocks…"

(h) Documents Linked to Planning

31. The Nsengiyumva Defence objects to the testimony of Prosecution expert Alison Des Forges concerning to sets of documents referred to as the "MELVERN Documents" and the "FARZZZ Documents". The Defence argues that "her particulars are not mentioned in the indictment or in the expert report" and that her testimony was "outside her field of expertise and in respect of which she lacks first-hand knowledge".[60]

32. The Chamber considers that the arguments raised in the motion concern the probative value of the expert's testimony, rather than exclusion. No proper basis for exclusion having been articulated, the request is rejected.

(i) Death Squads and Networks

33. The Defence seeks the exclusion of the testimony of Witnesses Filip Reyntjens, ZF, XXQ and XBM concerning the Accused's alleged involvement in death squads and networks such as the AMASASU.[61]

34. Although the Indictment makes no reference to death squads and networks by name, paragraphs 1.13 to 1.16 do mention "prominent civilian and military figures", who shared an "extremist Hutu ideology" and who worked together from as early as 1990 to pursue a "strategy of

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[57] Pre-Trial Brief, Appendix A, p. 45.
[58] Motion, para. 69.
[59] The transcript reference provided by the Defence is T. 24 June 2004, p. 70.
[60] Motion, paras. 70-72. The parties mistakenly reference "Melvlin Documents" instead of "Melvern".
[61] Motion, paras. 73-77; Reply, para. 71.

ethnic division and incitement to violence", which included the use of lists to target and kill political opponents. Further detail was provided in the Supporting Material: one expert witness discussed the group *AMASASU*, of which the Accused is alleged to have been a member,[62] and Witness OA claimed that "[e]veryone knows that Anatole Nsengiyumva was one of the leaders of the death squad …"[63] On the basis of the Indictment and the Supporting Material, the Chamber finds that the Accused was reasonably informed that these general allegations were part of the case against him and admits the testimony of Witnesses Reyntjens, ZF, XXQ and XBM in this regard.

(j) Sending Interahamwe to Kigali by Bus

35. The Defence objects to the testimony of Witness DCH, who saw Nsengiyumva at a stadium in Gisenyi as *Interahamwe* were loaded onto buses bound for Kigali.[64]

36. The Indictment pleads generally that Nsengiyumva was involved in the training and supervision of militia groups in Gisenyi, including the *Interahamwe*.[65] In support of paragraph 5.16 of the Indictment, the Supporting Material discloses the following information, based on a statement of Witness ON:

> Anatole Nsengiyumva was also the co-ordinator of the *Interahamwe* in the *préfecture*. He allegedly supervised the distribution of weapons to administrative authorities and civilians well before the genocide. Moreover, his work as co-ordinator also consisted of recruiting militiamen. At a certain point, the young recruits whom everyone knew, went to receive paramilitary training in weapon handling. They were taken to the Gishwati forest and to Mutura *commune*. My Hutu colleague were among those who received the training … On several occasions, I saw Anatole Nsengiyumva accompany bus convoys of *Interahamwe* going to their training grounds.[66]

37. The Pre-Trial Brief contains numerous references to the Accused's involvement in the training and deployment of *Interahamwe*.[67] Taken together, the Indictment, Supporting Material and Pre-Trial Brief provided the Accused with adequate notice that such allegations would form part of the case against him and need not be pleaded with greater specificity. Moreover, the presence of the Accused at the stadium is not, in itself, highly incriminating. Consequently, the evidence is admissible.

(k) Meetings to Plan the Killings of Tutsis and Meeting of Survivors

38. The Defence requests exclusion of three categories of evidence related to this general topic: (i) Witness ABQ's testimony concerning a meeting at Samvura's house, chaired by the Accused, on 7 April at which the participants received orders to attack Tutsis which led immediately thereafter to an attack on the home of a certain Mbungo; (ii) testimony of Witness XBG, OAF and OAB concerning the role of the Accused at meetings in Gisenyi where people were encourage to kill Tutsis; and (iii) testimony of Witness ABQ concerning a meeting of Tutsi survivors at Umuganda Stadium in Gisenyi, attended by Nsengiyumva, whose purpose was to expose the survivors to further attacks.[68]

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[62] Supporting Material, pp. 13-14 (excerpt from report of André Guichaoua).
[63] Supporting Material, p. 101.
[64] Motion, paras. 78-80.
[65] Indictment paras. 5.15, 5.16, 5.21 and 6.36. For paragraph 5.16 of the Indictment, additional information was provided by means of particulars to the effect that the Accused's involvement in the training consisted of "providing military instructors" and that trainings took place between 1 June 1993 and 31 July 1994 at Gishwati, Bigogwe, in Mutara *Commune* and at the Umuganda Stadium. Particulars, para. 5.16.
[66] Supporting Material, p. 59.
[67] Pre-Trial Brief, Appendix A, pp. 34, 153-60 (summaries of anticipated testimony for Witnesses DAJ and ZD).
[68] Motion, paras. 81-87 ; T. 6 September 2004 pp. 8-9, 14-19.

39. The Indictment alleges at paragraphs 5.1 that the Accused and Samvura conspired to exterminate Tutsis and "organized, ordered and participated in the massacres". Paragraph 6.16, which the Prosecution asserts is the same meeting discussed by Witness ABQ, further pleads:

> At one of those meetings, Anatole Nsengiyumva gave the order to start the massacres, designating a specific location where a Tutsi family had sought refuge. In the minutes that followed that order, the militiamen executed the members of the family in Anatole Nsengiyumva's presence.

The excerpts in the Supporting Material in relation to paragraph 6.16 state that the meeting was held on 7 April at Samvura's house, and that the Accused instructed "CDR people to start killing people".[69] Furthermore, the motion to add Witness ABQ to the Prosecution witness list, which was subsequently granted by the Chamber, offered a detailed account of the witness's expected testimony concerning the conduct of the Accused at a meeting at Samvura's house on 7 April, including his role in the subsequent attack.[70] The Indictment itself provided sufficiently specific notice of this allegation. To the extent that there is any lack of specificity, the additional materials provided clear, consistent and timely notice of the testimony, and its relevance to the Indictment.

40. Paragraph 6.16 states that the Accused "chaired meetings at which he ordered the militiamen to kill the Tutsi." Paragraph 6.22 states that "[b]etween 8 April and mid-July 1994, Anatole Nsengiyumva ordered militiamen and soldiers to exterminate the civilian Tutsi population and its 'accomplices'". Paragraph 6.14 makes specific reference to the distribution of weapons. The Supporting Material offers further details concerning specific meetings at which the Accused is alleged to have been present and his conduct. The summaries of testimony of Witnesses OAB and XAS in the Pre-Trial Brief give more details about specific meetings. The motion for the addition of Witness ABQ offers a detailed summary of the testimony expected from the witness, and the charges in the Indictment to which it is relevant.[71] That motion, which was subsequently granted by the Chamber, indicates that Witness ABQ would be called to give testimony about a meeting at Samvura's house on the morning of 7 April, at which the Accused is alleged to have exhorted the participants to kill Tutsis more quickly. The motion for the addition of Witness XBG indicates that the witness's expected testimony concerns "distribution of weapons to the militia, the *Interahamwe* and *Impuzamugambi*".[72] The Indictment itself provided sufficiently specific notice of this allegation. To the extent that there is any lack of specificity, the additional materials provided clear, consistent and timely notice of the testimony, and its relevance to the Indictment.

41. The same cannot be said, however, concerning Witness ABQ's evidence concerning a meeting at Umuganda Stadium in May 1994 to which Tutsi civilians were lured with promises of security. According to Witness ABQ, Nsengiyumva spoke to the refugees. Shortly after his departure, a group of Interahamwe arrived and took the Tutsis away to their deaths.[73] A specific contemporaneous objection was raised by the Defence, and was noted by the Chamber.[74]

42. The Chamber is of the view that this evidence is inadmissible. Although the Indictment does make general allegations about the Accused's role in killings of civilians, there is no allegation resembling this meeting or this particular type of conduct. Furthermore, the Prosecution failed to point to any timely, clear and consistent communications which would cure the vagueness of the Indictment in relation to this evidence. The Prosecution's reference to evidence of Defence witnesses does not, in

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[69] Supporting Material, pp. 98-99.
[70] Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) of the rules of Procedure and Evidence, filed on 24 March 2004, para. 17.
[71] Prosecutor's Motion For Leave to Vary the Witness List, etc., filed on 24 March 2004, para. 7.
[72] Motion for Leave to Vary the Witness List, etc., filed on 13 June 2003, para. 7.
[73] T. 6 September 2004 pp. 13-16.
[74] Id. pp. 14-15.

the circumstances, provide an adequate indication that the Defence had sufficient notice of this material fact.[75] This evidence is excluded.

(l) Meetings at Gisenyi Scouts Camp and Butotori Site

43. The Defence objects to testimony of Witness DCH that the Accused participated in three meetings in Gisenyi: two meetings in 1992 or 1993 involving the Accused and other high-ranking army officers and politicians at Butotori and then, the next day, at the Hotel Meridien; and a meeting in June 1994 at the Gisenyi Scouts Camp during which Minister Rafiki Hyacinthe issued orders to kill Tutsis.[76] Aside from alleging Nsengiyumva's presence at these meetings, Witness DCH did not attribute any orders or behaviour to him. On the other hand, the presence of the Accused at these meetings might imply agreement with some of the views expressed during those meetings.

44. The paragraphs of the Indictment cited by the Prosecution are only vaguely relevant to the evidence in question. Further, the Prosecution has been unable to point to any reference in the Supporting Material to the Indictment, the Pre-Trial Brief, or the opening statement which gives notice of these events with any greater specificity. The Prosecution relies on references to this evidence in a statement of Witness DCH and a statement of Witness ZF, both of which appear to have been routinely disclosed by the Prosecution in accordance with their obligations under the Rules. The only connection between these statements and the Pre-Trial Brief is that the "Pre-Trial Brief Revision" indicates that Witness DCH and other witnesses will testify concerning paragraph 6.33 of the Indictment, which refers to a conspiracy amongst political and military authorities to exterminate the Tutsi population. The summary of Witness DCH's testimony, annexed to the Pre-Trial Brief, contains no reference to these meetings.

45. The Chamber concludes that the vagueness of the Indictment in relation to these meetings has not been cured by timely, clear and consistent notice of the material fact to which Witness DCH testified.

(m) Killings at Mutura Commune

46. The Defence seeks to exclude the testimony of Witnesses XBM and XBG concerning killings that occurred across Mutura Commune.[77]

47. For the reasons expressed in section (a) above, this request is denied.

(n) Killing of Bagogwe Tutsis

48. The Defence objects to the testimony of Witnesses DCH and HV about killings of Bagogwe Tutsis.[78] Witness DCH asserted that the Accused was present when bodies of Bagogwe Tutsis were displayed in a vehicle outside the Gisenyi *préfecture* office.[79] This incident took place sometime between 1992 and 1993.[80] Witness HV testified that, on 8 April 1994, a crowd of people descended onto the campus of Mudende University with machetes, sharpened bamboo and clubs and killed the Bagogwe Tutsis who had taken refuge there.[81]

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[75] Response, para. 179.
[76] Motion, paras. 88-89, T. 22 June 2004 pp. 59-63.
[77] Motion, paras. 90-93.
[78] Motion, paras. 94-95.
[79] T. 23 June 2004 pp. 41-43. According to the witness, the bodies were displayed to "serve as a lesson" to Hutus of the value of Tutsi lives.
[80] T. 23 June 2004 pp. 38, 43.
[81] T. 23 September 2004 pp. 25-26.

49. Though the Indictment mentions the Bagogwe Tutsis as a group targeted by civilian and military authorities, it makes no specific reference to the particular incident described by Witness DCH.[82] The Pre-Trial Brief, however, provides additional details in the form of the summaries of the testimony of Witness OAB and OD, both of which mention the killings of Bigogwe Tutsi prior to 1994 as part of the Prosecution case.[83] Specifically, the summary of Witness OAB states that the witness "saw bodies of Tutsi massacred in Bigogwe and transported in a pickup escorted by Bizimana's soldiers".[84] Consequently, the Chamber finds that the Accused had notice of this allegation and admits the evidence. As previously discussed, the fact that the summary of Witness DCH does not also contain this allegation does not diminish the notice given by virtue of the Pre-Trial Brief. Such notice of a material fact anywhere in the Pre-Trial Brief would inform the Defence of the need to address and investigate the allegation, regardless of the specific witness from whom the Prosecution elicits the evidence in support thereof.

50. The testimony of Witness HV is also admissible.[85] Although no mention of massacres at Mudende University can be found in the Indictment, the summary for Witness HV contained in the Pre-Trial Brief provided the following information:

> Witness will state that following the announcement of the President's death, smoke engulfed the entire campus and the witness saw villagers running to take refugee [*sic*] at campus. On 8th April 1994 the witness saw soldiers armed with guns and wearing red caps and multicoloured but predominantly green clothes together with villagers armed with machetes, sticks, clubs and sharp bamboo, storm into classes where Tutsi had taken refuge and massacred all of them.[86]

To the extent that allegations in the Indictment concerning the Accused's alleged role in the killing of Tutsi civilians are vague, the Pre-Trial Brief provided timely, clear and consistent information that the Prosecution intended to rely on this material fact.

(o) Installation of the Radio RTLM Antenna and Incitement Messages

51. The Defence seeks to exclude the testimony of Witnesses XBM and DBN concerning the installation of an RTLM antenna and its subsequent broadcasts.[87] Witness XBM testified that the Accused urged people "to separate the wheat from the chaff" at the inauguration of the new RTLM antenna.[88] Witness DBN then described messages broadcast on RTLM, which were aimed at inciting the population to violence against the Tutsi population.[89]

52. The Indictment alleges that incitement of the population to hatred of the Tutsi was a fundamental part of the plan of genocide.[90] As part of the plan, prominent figures from the President's circle set up RTLM to ensure widespread dissemination of calls to violence.[91] The Prosecution further elaborated upon this allegation in its opening statement:

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[82] Indictment, para. 5.30. The killing of Bagogwe Tutsis referred to in the Indictment is alleged to have occurred in 1991 as a precursor to the events of 1994.
[83] Pre-Trial Brief, Appendix A, pp. 105, 109.
[84] Pre-Trial Brief, Appendix A, p. 105.
[85] The Chamber notes that this allegation is distinct from the one previously discussed (see section (a) above) concerning massacres at Mudende University in May 1994, as described by Witnesses XBG and XBM.
[86] Pre-Trial Brief, Appendix A, p. 87.
[87] Motion, paras. 96-97.
[88] T. 14 July 2003 pp. 31-32 (responding to what those words meant, the witness stated "I do not quite know what he meant, but I think that the Hutus had to hunt down or chase the Tutsis").
[89] T. 1 April 2004 pp. 60-61.
[90] Indictment, paras. 5.4, 5.5, 5.8.
[91] Indictment, para. 1.16.

> Your honours, they gave support and assistance to the hate radio, RTLM, in its propaganda of fear and hatred of Tutsis and Hutus opposed to the MRND party. They also gave support and assistance to the hate radio RTLM in its incitement of attacks against these civilian targets.[92]

53. The Pre-Trial Brief further suggested that RTLM would be an important issue in the case. It alleged that Nsengiyumva was a shareholder in RTLM and that RTLM was a "central instrument in the genocide as it happened and before".[93] Summaries of anticipated testimony of Witnesses DBN and Kambanda in the Pre-Trial Brief as well as potential exhibits all make reference to RTLM.[94] Furthermore, the Prosecution motion for the addition of Witness XBM to the witness list indicates that he would testimony concerning anti-Tutsi statements by the Accused "during public meetings and rallies held in Gisenyi".[95] Although there is no explicit reference to the inauguration of the RTLM antenna, the Defence would at least have been placed on notice that it should look closely at the statement of the proposed statement to understand the material facts to which the proposed witness would testify. Page 5 of Witness Statement XBM-1 provides a detailed description of the Accused's conduction on that occasion, and there can be no doubt that, in responding to the Prosecution motion and its subsequent preparations, that the Defence would have understood that this evidence was part of the Prosecution case, and its relevance to the Indictment.

54. In the Chamber's view, the Indictment is itself sufficiently specific concerning the significance of RTLM broadcasts for the evidence to be admissible on that basis alone. To the extent that there may any vagueness concerning the Accused's speech at the inauguration of the RTLM antenna, adequate notice was provided by other communications as to justify its admission.

(p) Orders to Kill Former Director of School Printing House

55. The Defence challenges the testimony of Witness OAB that the Accused issued orders in June 1994 to have the former director of the school printing house executed.[96]

56. The Indictment makes general allegations that the Accused issued orders to militiamen and soldiers to exterminate Tutsis in paragraphs 6.16, 6.22, and 6.23.[97] Paragraph 6.28 alleges that in June 1994, Nsengiyumva participated in a meeting in Gisenyi at which "Joseph Nzirorera and Juvénal Uwilingiyimana took note of the names of the Tutsi and moderate Hutu who had come from other prefectures. They drew up a list of people to eliminate, which they handed over to the *Interahamwe*." Amongst the Supporting Material underlying this paragraph is a statement from Omar Serushago, which states in particular that during the meeting "we were given a list of people to be killed including Stanis Simbizi, the manager of the school print shop in Kigali". The Chamber does not consider the Indictment to be defective in relation to the evidence and, even if it were, the notice provided by the Supporting Materials would have provided timely, clear and consistent notice of the material fact so as to cure any deficiency.

(q) Training of Militia

57. The Defence seeks to exclude the testimony of Witnesses XBM and ABQ concerning the Accused's personal involvement in the training of militia.[98] Witness XBM stated that the Accused

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[92] T. 2 April 2002 p. 154.
[93] Pre-Trial Brief, pp. 3-4. It further alleged that RTLM was part of a conspiracy by ringleaders of the genocide.
[94] See, e.g., Pre-Trial Brief, Appendix A, p. 45, Appendix A1, Registry no. 6480, Appendix B, Registry no. 6459.
[95] Motion for Leave to Vary the Witness List, etc., filed on 13 June 2003, para. 9.
[96] Motion, para. 98.
[97] The Prosecution provided particulars in support of paragraph 6.22 of the Indictment, but the additional information does not reference this specific allegation. Particulars, para. 6.22.
[98] Motion, paras. 99-101.

provided the programme for trainings and spoke as part of these trainings.[99] Witness ABQ also heard the Accused speak as part of a training program.[100]

58. Paragraphs 5.14 to 5.16 of the Indictment describe Nsengiyumva's close involvement in and supervision of the training of militia groups.[101] The Supporting Material provided further detail regarding Nsengiyumva's training activities in Gisenyi:

> Anatole Nsengiyumva was also the co-ordinator of the *Interahamwe* in the *préfecture*. He allegedly supervised the distribution of weapons to administrative authorities and civilians well before the genocide. Moreover, his work as co-ordinator also consisted of recruiting militiamen. At a certain point, the young recruits whom everyone knew, went to receive paramilitary training in weapon handling. ... On several occasions, I saw Anatole Nsengiyumva accompany bus convoys of *Interahamwe* going to their training grounds. Most of the militiamen were dressed in civilian clothes and wore hats with CDR insignia.[102]

59. The Indictment and Supporting Material gave the Accused sufficient notice that his direct involvement in the training of militia groups would form part of the case against him. Consequently, the evidence is admissible.

(r) Distribution of Weapons

60. The Defence asks the Chamber to exclude the testimony of five witnesses relating to Nsengiyumva's alleged involvement in the distribution of weapons at various times and locations.[103] Witness XBM testified that Nsengiyumva, along with Jean-Bosco Barayagwiza, took firearms from his vehicle and distributed them to approximately 50 people.[104] Witness Omar Serushago testified that the Accused was in command of a camp in Gisenyi where he handed out weapons to *Interahamwe*.[105] Witness XXQ indicated that the *AMASASU* group, of which the Accused was allegedly a member, was involved in the distribution of weapons as part of the planning for the genocide.[106] Witness ZF described weapons brought from the Seychelles and distributed to militia at Gisenyi stadium.[107] Witness OAF testified that Nsengiyumva was present while boxes of grenades were unloaded and distributed by civilians and soldiers.[108]

61. The Indictment refers repeatedly to the Accused's direct participation in the distribution of weapons, including several specific occasions when he allegedly gave weapons to *Interahamwe* and militiamen.[109] The Supporting Material provided additional detail on these allegations, as based on statements given by Witnesses ON, EB, DO, OX, OY and ZF.[110] Numerous witness summaries in the Pre-Trial Brief also mentioned the Accused's alleged involvement in the distribution of weapons,

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[99] T. 14 July 2003 pp. 36-37.
[100] T. 6 September 2004 pp. 29-31.
[101] Indictment, para. 5.16 ("In Gisenyi *préfecture*, between June 1993 and July 1994, Anatole Nsengiyumva supervised the training of the MRND militia, the *Interahamwe*, and that of the CDR militia, the *Impuzamugambi*"). As discussed previously, additional information for paragraph 5.16 of the Indictment was provided by means of particulars. Particulars, para. 5.16.
[102] Supporting Material, p. 59 (summary of anticipated testimony of Witness ON).
[103] Motion, paras. 102-107.
[104] T. 14 July 2003 pp. 32-33.
[105] T. 18 June 2003 pp. 25, 44.
[106] T. 11 October 2004 p. 31.
[107] T. 28 November 2002 p. 62.
[108] T. 23 June 2003 pp. 10-11.
[109] Indictment, paras. 5.14, 5.19-5.24, 6.14, 6.16, and 6.21. Further detail was provided by the Prosecution in the form of particulars, which allege that the Accused distributed weapons on a continuous basis between certain dates at certain specific locations. Particulars, para. 5.23.
[110] Supporting Material, pp. 59, 62-63, 97, 99, and 104. Witness ON would purportedly say that the Accused "supervised the distribution of weapons" before the events of 1994. Witnesses EB, DO, OX, and OY described events where the Accused allegedly unloaded weapons for later distribution, gave orders for distribution of weapons, and distributed weapons himself.

including many eyewitness observations of the Accused.[111] These allegations are sufficiently detailed to give notice to the Accused of the testimony of Witnesses Serushago, XXQ and ZF.

62. Sufficient notice of the testimony of Witness OAF, where distribution of weapons is alleged in the presence of Nsengiyumva, was provided by the Supporting Material to paragraph 6.16 of the Indictment:

> [O]n the same April 7, 1994, Colonel Anatole Nsengiyumva called a meeting at the taxi park in Gisenyi … There were so many *Interahamwe* at this meeting. There were boxes and [*sic*] boxes of grenades and guns at this meeting place. I saw them. Later, I saw Captain Bizimuremyi open boxes of guns and grenades with Colonel Nsengiyumva, Bernard Munyagishari, Omari and the rest of the people present. I saw Bernard Munyagishari, Omari Thomas, Colonel Nsengiyumva etc hand over so many guns and grenades to the *Interahamwe* at this meeting. Captain Bizimuyemyi and Colonel Nsengiyumva supervised the distribution of these arms in general may be because they were military officers and knew all about arms. After thes[e] arms and grenades were distributed, the *Interahamwe* went out and started killing Tutsis and moderate Hutus.[112]

63. Notice was also provided for the testimony of Witness XBM through the Prosecution's motion to add the witness, which stated that the witness had first-hand information about Bagosora and Nsengiyumva distributing weapons to the militia.[113] All of the evidence in this category is admissible as relevant to the Indictment.

(s) Rape Allegations

64. The Defence objects to the testimony of Witness ZF that several members of the *Interahamwe*, including Omar Serushago, had a house where they brought young Tutsi girls to rape and then kill.[114]

65. The Indictment makes allegations of sexual assaults and other crimes in several places.[115] Specifically, paragraph 6.24 states:

> Between April and July 1994, Bernard Munyagishari, his group of militiamen and Omar Serushago's group of militiamen abducted, confined, raped, sexually assaulted and committed other crimes of sexual nature against Tutsi woman [*sic*] and girls.

66. The Supporting Material elaborated on this paragraph with the anticipated testimony of Witness ZF:

> As regards sex crimes, I can tell you that it was common knowledge that several militiamen would rape Tutsi girls and then kill them … I also remember that Damas, one of the militiamen I mentioned earlier, has [*sic*] a house in Gisenyi where he took and kept girls for a while before executing them… He said … that the house was used by himself, Omar and Thomas … for keeping people, some of them young, and rape them before executing them …[116]

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[111] Pre-Trial Brief, Appendix A, pp. 105-106, 108, 110-111, 114-115, 117-118, 124, 144, 146, 150, 154-155. The summaries of witnesses OAB, OAE, OB, OF, PA, XXA, XXF and Serushago describe the distribution of weapons, while those of Witnesses OJ, OO, OQ, OY, PC, PW, XAS and Ruggiu describe personal observations of the Accused engaged in the distribution of weapons.
[112] Supporting Material, p. 99.
[113] Confidential Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) of the Rules of Procedure and Evidence, filed on 13 June 2003, para. 9.
[114] Motion, para. 108.
[115] Indictment, paras. 5.32, 6.24 and 6.34.
[116] Supporting Material, p. 107. Testimony was expected for two other witnesses concerning the alleged rapes. Supporting Material, pp. 107-09 (summary of anticipated testimony by Witnesses ZD and EB).

67. Additional detail was also provided in the Pre-Trial Brief through the anticipated testimony of Witnesses EB, OAM, OAO, and Omar Serushago.[117] Through the Indictment, Supporting Material and Pre-Trial Brief, the Accused had sufficient notice that this allegation would form part of the case against him, and the evidence is admissible.

(t) Killings of Other Persons

68. The Defence requests the exclusion of testimony by Witnesses OAB, OAF, and ZF, each of whom gave testimony that the Accused gave orders on a specific occasion for precisely identified individuals to be killed.[118] The three individuals concerned are Saad; Thomas, and Tegeli.

69. Where the Accused is alleged to have given precise orders for the killing of specific individuals, the obligation to provide precisions as to the circumstances thereof is at its highest. The Prosecution has failed to provide any references to sufficiently detailed paragraphs of the Indictment, or to communications outside of the Indictment, which would have given the Defence notice of the specific occasions in question. Accordingly, the Chamber excludes the evidence.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part.

DECLARES the following evidence pieces of evidence inadmissible:

1. Witness ABQ's testimony that the Accused participated in a meeting of survivors at Umuganda Stadium in May 1994 and that the survivors were later killed by *Interahamwe*;
2. Witness DCH's testimony about two meetings in Gisenyi in 1992 or 1993 of top political and military leaders, the first held at Butotori and the second held at the Hotel Meridien;
3. Witness DCH's testimony concerning a meeting in June 1994 at the Gisenyi Scouts Camp during which Minister Rafiki Hyacinthe issued orders to kill Tutsis;
4. Witness XBM's testimony about meetings in Gisenyi *préfecture*, with the exception of a meeting at Méridien Hotel in May 1994 which is admissible; and
5. The testimonies of Witnesses OAB, OAF, and ZF that the Accused issued orders for the killing of Saad, Thomas, and Tegeli, respectively.

Arusha, 15 September 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[117] Pre-Trial Brief, Appendix A, pp. 68, 107-08, 157.
[118] Motion, paras. 109-111. The Defence withdrew its request for exclusion of portions of Witness XBH's testimony: Corrigendum, para. 3.

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Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence 18 September 2006 (ICTR-98-41-AR73)

(Original: English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Liu Daqun ; Theodor Meron

Aloys Ntabakuze – Exclusion of evidence, Principles of admissibility of evidence, Principles of sufficiency of the indictment, Case in which a defect of the Indictment may be cured, Curing of the defect only by the provision of timely, clear and consistent information to the accused, Risk of prejudice to the accused could be cured by post-indictment submissions, Degree of specificity required in the indictment with respect to the modes of liability and the locations where the crimes were committed, Distinction between counts or charges, Omission of a count or charge from the indictment cannot be "cured" by the provision of timely, clear, consistent information, Addition of a charge must necessarily be done through an amendment to the indictment, Obligation of the Chamber to consider the risk of expansion of charges by addition of new material facts, Material facts concerning the personal actions of the accused have to be clearly and specifically pleaded in the indictment, No obligation to amend the Indictment to cure it regarding the material facts underpinning the charges, Possibility to cure a defect in the indictment by addition of a witness, Power of the Trial Chamber to determine the measures to takes in case of discovery of new material facts at Trial – Timeliness of objections to evidence for lack of notice, Distinction between late objections at stage of Trial and Appeal, Objections based on lack of notice should be specific and timely, Objection raised at trial does not automatically lead to a shift in the burden of proof – Interlocutory appeal partially granted

International Instrument cited :

Rules of Procedure and Evidence, rules 50 and 98 bis

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Clément Kayishema and Obed Ruzindana, Judgement (Reasons), 1 June 2001 (ICTR-95-1) ; Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Decision on the Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003 (ICTR-98-44) ; Appeals Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible', 2 July 2004 (ICTR-97-21) ; Appeals Chamber, The Prosecutor v. Eliezer Niyitegeka, Judgement, 9 July 2004 (ICTR-96-14) ; Trial Chamber, The Prosecutor v. Emmanuel Ndindabahizi, Judgement, 15 July 2004 (ICTR-2001-71) ; Appeals Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004 (ICTR-98-42) ; Appeals Chamber, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and ICTR-96-17) ; Appeals Chamber, The Prosecutor v. André Ntagerura et al., Judgement, 8 February 2006 (ICTR-96-10A) ; Appeals Chamber, The Prosecutor v. Sylvestre Gacumbitsi, Judgement, 7 July 2006 (ICTR-2001-64)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Anto Furundžija, Judgement, 21 July 2000 (IT-95-17/1) ; Appeals Chamber, The Prosecutor v. Zoran Kupreškić, Judgement, 23 October 2001 (IT-95-16) ; *Appeals Chamber,* The Prosecutor v. Milorad Krnojelac, Judgment, 17 September 2003 (IT-97-

25) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Judgement, 29 July 2004 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Miroslav Kvočka, Judgement, 28 February 2005 (IT-98-30/1) ; Appeals Chamber, The Prosecutor v. Slobodan Milošević, Decision on Interlocutory Appeal on Kosta Bulatović's Contempt Proceedings, 29 August 2005 (IT-02-54) ; Appeals Chamber, The Prosecutor v. Mladen Naletilić and Vinko Martinović, Judgement, 3 May 2006 (IT-98-34)

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), is seized of the "Ntabakuze Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I 'Decision on Ntabakuze Motion for Exclusion of Evidence'", filed by Aloys Ntabakuze on 20 July 2006 ("Interlocutory Appeal" and "Appellant", respectively).

I. Procedural History

2. On 28 March 2006, the Appellant filed a "Motion for the Exclusion of Evidence of Allegations falling outside the Scope of the Indictment" ("Motion"),[1] requesting that Trial Chamber I exclude from its consideration seventeen categories of evidence as irrelevant to the Indictment. On 29 June 2006, the Trial Chamber granted the Motion in part, partially excluding three of the challenged categories of evidence, but denying the request for exclusion in respect of the remaining fourteen categories.[2]

3. On 6 July 2006, the Appellant requested leave to file an interlocutory appeal from the Impugned Decision.[3] On 14 July 2006, the Trial Chamber granted in part the Motion for Certification.[4]

4. The Appellant filed his Interlocutory Appeal on 20 July 2006. The Prosecution responded on 31 July 2006,[5] and the Appellant replied on 4 August 2006.[6]

II. Scope of The Appeal

5. The Interlocutory Appeal is limited by the Certification Decision to questions relating to "the propositions of law articulated in paragraphs 7 and 10" of the Impugned Decision.[7] These paragraphs read as follows:

> 7. Objections play an important role in ensuring that the trial is conducted on the basis of evidence which is relevant to the charges against the accused. The failure to voice a contemporaneous objection does not waive the Accused's rights, but results in a shifting of the burden of proof:

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[1] An addendum to the Motion was filed on 7 April 2006.
[2] "Decision on Ntabakuze Motion for Exclusion of Evidence", 29 June 2006 ("Impugned Decision"), Disposition. The Trial Chamber also observed that the Prosecution conceded the partial exclusion of a fourth category. *Id*., para. 25.
[3] "Ntabakuze Motion for Certification of the 'Decision on Ntabakuze Motion for Exclusion of Evidence' of 29 June 2006, pursuant to Rule 73 (B)", 6 July 2006 ("Motion for Certification").
[4] "Decision on Request for Certification of Decision on Exclusion of Evidence", 14 July 2006 ("Certification Decision"), p. 5.
[5] Prosecutor's Response to "Ntabakuze Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I 'Decision on Ntabakuze Motion for Exclusion of Evidence'", 31 July 2006 ("Response").
[6] Ntabakuze Reply to "Prosecutor's Response to 'Ntabakuze Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I 'Decision on Ntabakuze Motion for Exclusion of Evidence'", 7 August 2006 ("Reply"). The Reply was received by the Tribunal in time on 4 August 2006 but due to a fire in the Tribunal premises, the Reply could not be filed before 7 August 2006. In the circumstances, the Appeals Chamber will consider the Reply as validly filed.
[7] Certification Decision, p. 5.

> In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also file a timely motion to strike the evidence or to seek an adjournment to conduct further investigations in order to respond to the unpleaded allegation.
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> …
>
> [A]n accused person who fails to object at trial has the burden of proving on appeal that his appeal [sic] that his ability to prepare his case was materially impaired. Where, however, the accused person objected at trial, the burden is on the Prosecution to prove on appeal that the accused's ability to prepare his defence was not materially impaired.
>
> This standard applies whenever the objection is not raised contemporaneously with the introduction of the evidence.[8]
>
> 10. The Chamber's approach in the sections which follow may be summarized as follows. Where a material fact cannot be reasonably related to the Indictment, then it shall be excluded. Where the material fact is relevant only to a vague or general allegation in the Indictment, then the Chamber will consider whether notice of the material fact was given in the Pre-Trial Brief or the opening statement, so as to cure the vagueness of the Indictment. Material facts which concern the actions of the Accused personally are scrutinized more closely than general allegations of criminal conduct. Other forms of disclosure, such as witness statements or potential exhibits, are generally insufficient to put the Defence on reasonable notice. The Chamber recognizes two exceptions to this principle: first, where the Prosecution filed a motion for the addition of a witness, which was subsequently granted by the Chamber, and which stated the material facts on which the witness would testify (Witness AAA); second, where a lengthy adjournment was ordered by the Chamber for the express purpose of allowing the Defence to meet newly discovered material facts (Witness DBQ).[9]

6. In his Interlocutory Appeal, the Appellant submits that the Trial Chamber erred in its enunciation of the legal principles in both paragraphs. The Appeals Chamber will consider first the principles outlined in paragraph 10 of the Impugned Decision.

III. Curing defects in the indictment (paragraph 10 of the Impugned Decision)

A. Submissions of the Parties

7. The Appellant submits that the Trial Chamber erred in eight respects in paragraph 10 of the Impugned Decision in its description of the standards to apply in determining whether or not to exclude evidence on the basis of lack of notice of the material facts to which the evidence relates:[10]

- First, the Trial Chamber failed to take into account the exceptional nature of "curing" the indictment, essentially transforming the exception into the rule;[11]
- Second, the Trial Chamber failed to consider that the admission of large amounts of evidence outside the indictment could render the trial unfair since this has the effect of replacing the case in the original indictment with a completely different one, and since the accused never knows precisely the case he has to meet;[12]

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[8] Impugned Decision, para. 7, citing *Eliézer Niyitegeka v. The Prosecutor*, Case N°ICTR-96-14-A, Judgement of 9 July 2004 ("*Niyitegeka* Appeal Judgement"), paras 199-200, and referring to *The Prosecutor v. Emmanuel Ndindabahizi*, Case N°ICTR-2001-71-T, Judgement and Sentence of 15 July 2004 ("*Ndindabahizi* Trial Judgement"), para. 29.

[9] References omitted. In footnote 22 of the Impugned Decision, the Trial Chamber adds that, in one case, it will also rely on the material supporting the Indictment itself to determine whether notice of the material fact was given so as to cure the vagueness in the Indictment.

[10] Interlocutory Appeal, para. 18 (1st para. 18, at p. 7).

[11] Interlocutory Appeal, paras 18 (2nd para. 18, at p. 8) and 19.

[12] Interlocutory Appeal, paras 20-22. See also Reply, paras 7-8, 14.

- Third, the Trial Chamber failed to define the degree of specificity required in the indictment, in particular with respect to the mode of liability and the locations where the crimes were committed;[13]
- Fourth, the Trial Chamber failed to recognize that evidence of a material fact should be excluded if the latter is not mentioned in the indictment in any form; contrary to what the Trial Chamber found, it is not sufficient that the material fact be "reasonably related to the indictment";[14]
- Fifth, the Trial Chamber "understat[ed] th[e] imperative" that material facts which concern the personal actions of the accused be specifically and clearly pleaded in the indictment;[15]
- Sixth, the Trial Chamber erroneously considered that the Prosecution could include new material facts in the charges against the accused through the filing of a motion for the addition of a witness rather than by seeking to amend the indictment;[16]
- Seventh, the Trial Chamber erred in finding that a lengthy adjournment could be sufficient to allow the Defence to meet newly discovered material facts because, although the adjournment may permit the Defence to better prepare for cross-examination of the witness, "it does not permit the Defence to know whether the Prosecution also intends to add new charges to the indictments [sic]; the Defence is still left in the dark as to the potential use of the newly discovered evidence";[17]
- Eighth, while the Trial Chamber correctly stated that vagueness in the indictment may be cured when additional information is provided in the pre-trial Brief or the opening statement and that other forms of disclosure such as witness statements and potential exhibits are generally insufficient to put the Defence on reasonable notice, it erred in its application of these principles in the case at hand.[18]

8. The Prosecution responds that most of the arguments made by the Appellant fall outside the scope of the issues for which certification was granted.[19] The Prosecution also contends that the Trial Chamber has discretion in determining which evidence to admit and in deciding on the general conduct of the proceedings, but that the Appellant has not identified any discernable error or abuse in the Trial Chamber's exercise of its discretion.[20] The Prosecution submits that the guiding principles identified by the Trial Chamber at paragraph 10 of the Impugned Decision are consistent with the jurisprudence of the Appeals Chamber and were properly applied.[21]

9. In the Prosecution's view, "[t]he Appellant's erroneous arguments appear to stem from the fact that he equates or mischaracterizes material facts with new charges, claiming that they are allegations outside the scope of the indictment and necessarily cause him material prejudice."[22] The Prosecution recalls that the count or charge is the alleged legal prohibition infringed whereas the materials facts are the acts and omissions of the accused that give rise to that allegation of infringement of a legal prohibition.[23] The Prosecution argues that while communication of timely information cannot cure the omission of a charge in an indictment, it is settled law that it can cure vagueness or imprecision

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[13] Interlocutory Appeal, paras 23-24.
[14] Interlocutory Appeal, paras 25-26.
[15] Interlocutory Appeal, paras 27-28.
[16] Interlocutory Appeal, para. 29.
[17] Interlocutory Appeal, para. 30.
[18] Interlocutory Appeal, para. 31.
[19] Response, para. 2.
[20] Response, paras 8-9.
[21] Response, para. 11.
[22] Response, para. 12.
[23] Response, para. 12, quoting *The Prosecution v. Tharcisse Muvunyi*, Case N°ICTR-00-55A-AR73, "Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005", 12 May 2005 ("*Muvunyi* Decision"), para. 19.

respecting a charge that appears in the indictment.[24] Thus, the failure to plead a material fact in the indictment does not necessarily mean that the Prosecution must seek an amendment to the indictment; the omission of material facts from the indictment can be cured by the provision of timely, clear and consistent information to the Defence.[25] The Prosecution maintains that the Trial Chamber's framework in paragraph 10 of the Impugned Decision follows these principles: when the Trial Chamber required that the material facts be reasonably related to the indictment, it simply required that the material fact be related to a charge in the indictment, as opposed to a charge omitted from it.[26]

10. The Prosecution also submits that the Appellant's argument regarding the "exceptional nature of curing" is unconvincing because, even in cases where some of the material facts at issue were known at the time the indictment was filed (and in the present case, this has not been demonstrated), vagueness in the indictment can still be cured by subsequent communications to the Defence.[27] In response to the Appellant's argument that the defects in this case were too numerous to be cured, the Prosecution responds that the essential question is not the number of alleged defects that have been cured, but whether the Defence had clear and unambiguous notice that the material facts would be relied upon as part of the Prosecution's case, and had sufficient opportunity to respond to the charge, so that the fairness of the trial is preserved.[28] Finally, to the Appellant's contention that the Trial Chamber ignored the requirement that material facts which concern the personal actions of the accused be specifically and clearly pleaded in the indictment, the Prosecution responds that the Impugned Decision leaves no doubt that physical perpetration of a criminal act by an accused must be pleaded in the indictment, and that when it was not, the Trial Chamber ruled the evidence inadmissible.[29]

11. The Appellant replies that the question before the Appeals Chamber is not whether the Trial Chamber properly exercised its discretion in admitting or excluding evidence, but rather whether the Trial Chamber correctly formulated the standards to apply in the exercise of that discretion.[30] He adds that if the Appeals Chamber were to find that the Trial Chamber erred in its articulation of these standards, then the Trial Chamber would have to reconsider its previous decision.[31]

12. The Appellant notes the admission of the Prosecution that the Indictment in this case lacked specificity, and submits that in light of this admission, the Prosecution "had an absolute obligation to rectify the lack of 'specificity' regarding the Accused Ntabakuze before the Defence was put to its case," something which it failed to do.[32]

13. The Appellant denies having confused material facts with new charges,[33] and submits that "many of the new *specific events* that emerged in the evidence, which were *never mentioned* in any form in the Indictment, do, indeed, constitute new 'charges', and are not merely 'material facts' underpinning broad generalities already in the Indictment."[34]

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[24] Response, para. 13, referring to *The Prosecutor v. André Ntagerura et al.*, Case N°ICTR-99-46-A, Judgement of 7 July 2006 ("*Cyangugu* Appeal Judgement"), para. 32.
[25] Response, para. 13, referring to *Prosecutor v. Zoran Kupreškić et al.*, Case N°IT-95-16-A, Judgement of 23 October 2001 ("*Kupreškić et al.* Appeal Judgement"), paras 117-121, and *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases N°ICTR-96-10-A and ICTR-96-17-A, Judgement of 13 December 2004 ("*Ntakirutimana* Appeal Judgement"), para. 27.
[26] Response, para. 13. At paragraph 12 of the Response, the Prosecution also argues that, in the case at hand, the Trial Chamber did not consider that the new material facts (*i.e.*, those not mentioned in the Indictment but found to have been sufficiently disclosed to the Defence) added new charges or changed the nature of the existing charges; rather, the new material facts were reasonably related to existing charges, were relevant, and evidence thereon was admissible.
[27] Response, paras 14-15.
[28] Response, para. 15.
[29] Response, para. 16.
[30] Reply, paras 1-3, 5-6, 9, 15.
[31] Reply, para. 6.
[32] Reply, para. 7.
[33] Reply, paras 10-11.
[34] Reply, para. 12 (emphasis in original).

B. ANALYSIS

14. The Appeals Chamber will briefly recall the general principles of admissibility of evidence and sufficiency of the indictment. It will then consider each of the errors alleged to have been committed by the Trial Chamber except the eighth error alleged by the Appellant – that although the Trial Chamber correctly outlined certain relevant principles, it erred in its application of them – as this clearly goes beyond the scope of the certification.

1. Preliminary Question: Standard of Review

15. The Prosecution submits that

> "[t]he reconsideration envisaged in the Interlocutory Appeal is unwarranted and amounts to an impermissible attempt to overcome the Trial Chamber's discretionary power to admit evidence, during the course of the trial."[35]

16. The Appeals Chamber disagrees. The present appeal does not concern the Trial Chamber's exercise of its discretion in admitting particular categories of evidence, but rather the correctness of the legal principles which it identified as applicable to the exercise of its discretion to admit the disputed evidence. As the final arbiter of the law, the Appeals Chamber will overturn a Trial Chamber's decision if it is established that the Trial Chamber committed an error of law.[36]

2. Admissibility of Evidence of Material Facts Insufficiently Pleaded in the Indictment

17. It is well established that an accused has a right to be informed in detail of the charges against him or her, and that as a corollary the Prosecution is obliged "to state the material facts underpinning the charges in the indictment, but not the evidence by which material facts are to be proven."[37] No conviction against the accused can be entered on the basis of material facts omitted from the indictment or pleaded with insufficient specificity, unless the Prosecution has cured the defect in the indictment by provision to the accused of "timely, clear and consistent information detailing the factual basis underpinning the charges against him or her."[38]

18. When the Defence is of the view that the Prosecution introduces evidence of material facts of which it had no notice, it can make an objection to the admission of such evidence for lack of notice.[39] If the Trial Chamber agrees with the Defence that insufficient notice has been given, it should exclude the challenged evidence in relation to the unpleaded material facts,[40] require the Prosecution to amend

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[35] Response, para. 9 (references omitted).

[36] *Prosecutor v. Tihomir Blaškić*, Case N°IT-95-14-A, Judgement of 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 15; *Prosecutor v. Miroslav Kvočka et al.*, Case N°IT-98-30/1-A, Judgement of 28 February 2005 ("*Kvočka et al.* Appeal Judgement"), para. 17; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela"*, Case N°IT-98-34-A, Judgement of 3 May 2006 ("*Naletilić and Martinović* Appeal Judgement"), para. 10. See also *Prosecutor v. Milošević*, Case N°IT-02-54-A-R77.4, Decision on Interlocutory Appeal on Kosta Bulatović's Contempt Proceedings, 29 August 2005, para. 40 and fn. 43.

[37] *Kupreškić et al.* Appeal Judgement, para. 88. See also *Niyitegeka* Appeal Judgement, para. 193; *Blaškić* Appeal Judgement, paras 208-209; *Ntakirutimana* Appeal Judgement, para. 25; *Kvočka et al.* Appeal Judgement, para. 27; *Naletilić and Martinović* Appeal Judgement, para. 23; *Cyangugu* Appeal Judgement, para. 21.

[38] *Kupreškić et al.* Appeal Judgement, para. 114; *Kvočka et al.* Appeal Judgement, para. 33; *Naletilić and Martinović* Appeal Judgement, para. 26; *Cyangugu* Appeal Judgement, paras 28 and 30.

[39] *Prosecutor v. Anto Furundzija*, Case N°IT-95-17/1-A, Judgement of 21 July 2000 ("*Furundžija* Appeal Judgement"), para. 61.

[40] In this connection, the Appeals Chamber recalls that a Chamber can find the particular evidence inadmissible to prove a material fact of which the accused was not on notice, but admissible with respect to other allegations sufficiently pleaded: *Arsène Shalom Ntahobali* and *Pauline Nyiramasuhuko v. The Prosecutor*, Case N°ICTR-97-21-AR73, "Decision of 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'", 2 July 2004, para. 15; *Pauline Nyiramasuhuko v. The*

the indictment, grant an adjournment to allow the Defence adequate time to respond to the additional allegations,[41] or take other measures to preserve the rights of the accused to a fair trial.[42]

3. Alleged Failure to Recognize Relevant Principles

19. The Appellant alleges that the Trial Chamber erred in its articulation of the applicable legal standard at paragraph 10 of the Impugned Decision because it failed to recognize certain relevant principles (first, second and third errors alleged). However, the mere fact that the Trial Chamber did not expressly mention all the applicable principles in paragraph 10 of the Impugned Decision does not necessarily mean that it ignored them. As the first sentence of paragraph 10 explains, the paragraph is merely a summary of the approach the Trial Chamber will take in the rest of its decision. The Trial Chamber was under no obligation to repeat word for word all the statements made by the Appeals Chamber on the subjects of the specificity required in an indictment and the circumstances in which a defective indictment will be deemed cured. Further, the fact that the Trial Chamber was clearly aware of the extent of the jurisprudence established by the Appeals Chamber is demonstrated by its numerous references to the relevant case law in the paragraphs prior to paragraph 10 in the Impugned Decision.[43] Accordingly, the Appeals Chamber is not persuaded that the Appellant has shown that the Trial Chamber erred simply by failing to comprehensively mention all of the relevant jurisprudence of the Appeals Chamber at paragraph 10 of the Impugned Decision. With this in mind, the Appeals Chamber now considers the specific arguments raised by the Appellant.

(a) First Error Alleged

20. The Appellant submits that the Trial Chamber failed to take into account the exceptional nature of "curing" the indictment, essentially transforming the exception into the rule.

21. The ICTY Appeals Chamber has explained that

> in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category.[44]

Thus, "curing" is likely to occur only in a limited number of cases. In this connection, the Appeals Chamber is not convinced by the Trial Chamber's suggestion, at paragraph 4 of the Impugned Decision, that a distinction should be made between cases "where the Prosecution knows of material facts at the time the indictment is filed, but fails to plead them" (in which cases curing would be exceptional) and cases where the material facts "are subsequently discovered" (in which cases curing would not be characterized as exceptional). Indeed, the risk of prejudice to the accused is the same in

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Prosecutor, Case N°ICTR-98-42-AR73, "Decision on Pauline Nyiramasuhuko's Request for Reconsideration", 27 September 2004, para. 12; *Muvunyi* Decision, para. 55 ("If evidence is relevant to a charge in the current indictment and is probative of that charge, then subject to any other ground for exclusion that may be advanced by the Defence, that evidence should be admissible.").

[41] *Kupreškić et al*. Appeal Judgement, para. 92; *Kvočka et al*. Appeal Judgement, para. 31; *Naletilić and Martinović* Appeal Judgement, para. 25.

[42] For instance, in certain circumstances, the Trial Chamber could allow the Defence to recall witnesses for cross-examination after the Defence has completed further investigations: see *The Prosecutor v. Édouard Karemera et al*., Case N°ICTR-98-44-AR73, "Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment", 19 December 2003 ("*Karemera* Decision"), para. 28.

[43] See Impugned Decision, paras 2-7 and corresponding footnotes.

[44] *Kupreškić et al*. Appeal Judgement, para. 114. See also *Cyangugu* Appeal Judgement, para. 114.

both types of cases.[45] In both types of cases, the defect in the indictment may be deemed cured only by the provision of timely, clear and consistent information to the accused.

22. This being said, the Appeals Chamber notes that, at paragraphs 2, 3 and 6 of the Impugned Decision, the Trial Chamber referred at length to the jurisprudence of the Appeals Chamber and correctly identified the relevant legal principles in determining whether the defects in the indictment have been cured: the Trial Chamber properly stated that a defect in the indictment can only be deemed cured if the Prosecution has provided timely, clear and consistent information to the accused, which puts him or her in a reasonable position to understand the charges against him or her. Thus, the Appeals Chamber is not persuaded that the error made by the Trial Chamber in paragraph 4 of the Impugned Decision led it to "transform the exception into the rule" or to misapply the relevant legal principles.

23. The Appeals Chamber also emphasizes that,

> "if the indictment is found to be defective because it fails to plead material facts or does not plead them with sufficient specificity, the Trial Chamber *must* consider whether the accused was nevertheless accorded a fair trial."[46]

Thus, the mere fact that a Trial Chamber considers in a number of instances, as the Trial Chamber did here, whether defects in the indictment have been cured, is not contrary to the principle that there are a limited number of cases wherein a defective indictment will actually be considered to have been cured.

(b) Second Error Alleged

24. The Appellant also contends that the Trial Chamber failed to consider that the admission of large amounts of evidence outside the indictment could render the trial unfair. In the words of the Appellant:

> even if individual defects in the indictment might be said to be "cured" by disclosure, a vast number of such instances in a single trial would render such a "cure" meaningless, because the sheer volume of evidence outside the indictment, which has the effect of replacing one Prosecution case with a completely different case than that set out in the indictment, makes the trial inherently unfair.
>
> […] the Trial Chamber thus erred [in] applying a standard which permits the Prosecution to argue a completely different case than that in the indictment, inasmuch as the allegations falling outside the scope of the indictment significantly outnumber those that are actually mentioned therein. To permit those allegations to stand, without formal amendment of the indictment, by only engaging in an incident by incident analysis without taking into account the totality of new evidence, is to allow the Prosecution to utterly transform the indictment by stealth and stages through the trial, so that the Accused can never really know with any assurance exactly what case he has to meet.[47]

25. In support of this argument, the Appellant refers to paragraph 114 of the *Cyangugu* Appeal Judgement. There, the Appeals Chamber expressed its concern as to the extent of the defects in the indictment that the Prosecution argued had been cured by post-indictment submissions. The Appeals Chamber explained that, even if all defects in the indictment had been deemed cured, it would have

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[45] The only difference concerns the "level of blame" on the Prosecution: As stated in the *Ntakirutimana* Appeal Judgement (para. 125), "the practice of failing to allege known material facts in an indictment is unacceptable."
[46] *Naletilić and Martinović* Appeal Judgement, para. 26 (emphasis added). See also *Kvočka et al.* Appeal Judgement, para. 33, and *Cyangugu* Appeal Judgement, para. 28.
[47] Interlocutory Appeal, paras 21-22.

had to consider whether the extent of the defects in the indictment, in itself, did not lead to an unfair trial.[48]

26. The Appeals Chamber agrees that when the indictment suffers from numerous defects, there may still be a risk of prejudice to the accused even if the defects are found to be cured by post-indictment submissions. In particular, the accumulation of a large number of material facts not pled in the indictment reduces the clarity and relevancy of that indictment, which may have an impact on the ability of the accused to know the case he or she has to meet for purposes of preparing an adequate defence. Further, while the addition of a few material facts may not prejudice the Defence in the preparation of its case, the addition of numerous material facts increases the risk of prejudice as the Defence may not have sufficient time and resources to investigate properly all the new material facts. Thus, where a Trial Chamber considers that a defective indictment has been subsequently cured by the Prosecution, it should further consider whether the extent of the defects in the indictment materially prejudice an accused's right to a fair trial by hindering the preparation of a proper defence. The Appeals Chamber finds that the Trial Chamber failed to do so in the Impugned Decision and therefore, instructs the Trial Chamber to reconsider the Impugned Decision on this basis.

(c) Third Error Alleged

27. The Appellant submits that the Trial Chamber erred in failing to define the degree of specificity required in the indictment, in particular with respect to the modes of liability and the locations where the crimes were committed. As explained above, the Appeals Chamber is not convinced that the Appellant has shown that the Trial Chamber erred by failing to define at paragraph 10 of the Impugned Decision the requisite degree of specificity required in the indictment.[49] The Trial Chamber was aware of the jurisprudence of the Appeals Chamber on this question. The Appeals Chamber does not consider that it is necessary here to repeat at length this jurisprudence.[50] Nevertheless, to address some of the specific arguments of the Appellant on this point, the Appeals Chamber would like to emphasize the following:

> 1-An indictment that fails to "indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged" may be ambiguous and could be found defective.[51] In particular, it is essential that the indictment specifies on what legal basis of the Statute an individual is being charged (Article 6 (1) and/or 6 (3));[52]
>
> 2-The location of the crimes alleged to have been committed should be specified in the indictment. However, the degree of specificity required will depend on the nature of the Prosecution's case.[53] As stated in the *Ntakirutimana* Appeal Judgement, "[t]here may well be

[48] *Cyangugu* Appeal Judgement, para. 114:
La Chambre d'appel doit se montrer préoccupée par la démarche du Procureur dans la présente affaire. Elle ne saurait trop rappeler que l'acte d'accusation, seul instrument de mise en accusation, doit exposer la thèse du Procureur de manière circonstanciée. Si, dans certains cas, un acte d'accusation vicié peut être réputé « purgé », la Chambre d'appel réitère qu'il ne peut exister qu'un nombre limité d'affaires qui entrent dans cette catégorie. Dans le cas d'espèce, la Chambre d'appel est troublée par l'ampleur avec laquelle le Procureur cherche à recourir à cette exception. Même si les arguments du Procureur selon lesquels les Actes d'accusation avaient été purgés de leurs vices s'étaient révélés prospères dans chacun des cas, il aurait malgré tout été du devoir de la Chambre d'appel de considérer si l'ampleur des vices identifiés n'aurait pas rendu le procès inéquitable en soi (no official translation available yet, footnote omitted).
[49] See *supra* para. 19.
[50] For more on the specificity required in an indictment, see *Kupreškić et al*. Appeal Judgement, paras 89-90; *Prosecutor v. Krnojelac*, Case N°IT-97-25-A, Judgement of 17 September 2003 ("*Krnojelac* Appeal Judgement"), paras 132, 138; *Blaškić* Appeal Judgement, paras 210-219; *Kvočka et al*. Appeal Judgement, paras 28-30, 41-42; *Naletilić and Martinović* Appeal Judgement, para. 24; *Cyangugu* Appeal Judgement, paras 23-26.
[51] *Krnojelac* Appeal Judgement, para. 138; *Blaškić* Appeal Judgement, para. 212; *Kvočka et al*. Appeal Judgement, para. 29.
[52] *Krnojelac* Appeal Judgement, para. 138.
[53] See *Kupreškić et al*. Appeal Judgement, para. 89; *Krnojelac* Appeal Judgement, para. 132; *Blaškić* Appeal Judgement, paras. 210, 212-213, 216-218; *Kvočka et al*. Appeal Judgement, para. 28; *Naletilić and Martinović* Appeal Judgement, para. 24; *Cyangugu* Appeal Judgement, paras 23-26.

situations in which the specific location of criminal activities cannot be listed, such as where the accused is charged as having effective control over several armed groups that committed crimes in numerous locations. In cases concerning physical acts of violence perpetrated by the accused personally, however, location can be very important."[54]

3-Any vagueness or ambiguity in the above respects may be cured in certain cases by the provision of timely, clear and consistent information to the Defence.[55]

4. Alleged Errors in the Statements made in Paragraph 10 of the Impugned Decision

(a) Fourth Error Alleged

28. The Trial Chamber stated that "[w]here a material fact cannot be reasonably related to the Indictment, then it shall be excluded."[56] The Appellant submits that this is an incorrect standard. The Appellant argues that "[a] material fact should be excluded if it is not mentioned in the indictment at all in any concrete form", and that "the failure to mention an accusation *in the indictment* is a defect that can not be remedied."[57]

29. The Appeals Chamber is not convinced by the arguments of the Appellant on this point. The Appeals Chamber first recalls the distinction between counts or charges ("*accusations*" in French) and "material facts":

> The count or charge is the legal characterisation of the material facts which support that count or charge. In pleading an indictment, the Prosecution is required to specify the alleged legal prohibition infringed (the count or charge) and the acts or omissions of the Accused that give rise to that allegation of infringement of a legal prohibition (material facts).[58]

It is clear that the omission of a count or charge from the indictment cannot be "cured" by the provision of timely, clear, consistent information.[59] Indeed, since the indictment is the only charging instrument,[60] the addition of counts or charges is possible only through amendment, as set out in Rule 50 of the Rules. However, it is also clear that the omission of a material fact underpinning a charge in the indictment can, in certain cases, be cured by the provision of timely, clear and consistent information.[61]

30. In this connection, the Appeals Chamber stresses that the possibility of curing the omission of material facts from the indictment is not unlimited. Indeed, the "new material facts" should not lead to a "radical transformation" of the Prosecution's case against the accused.[62] The Trial Chamber should always take into account the risk that the expansion of charges by the addition of new material facts may lead to unfairness and prejudice to the accused. Further, if the new material facts are such that they could, on their own, support separate charges,[63] the Prosecution should seek leave from the Trial Chamber to amend the indictment and the Trial Chamber should only grant leave if it is satisfied that it would not lead to unfairness or prejudice to the Defence.[64]

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[54] *Ntakirutimana* Appeal Judgement, para. 75.
[55] See *supra* footnote 38.
[56] Impugned Decision, para. 10.
[57] Interlocutory Appeal, para. 25 (emphasis in original), referring to *Cyangugu* Appeal Judgement, para. 32.
[58] *Muvunyi* Decision, para. 19.
[59] *Cyangugu* Appeal Judgement, para. 32.
[60] *Cyangugu* Appeal Judgement, para. 114.
[61] *Kupreškić et al*. Appeal Judgement, para. 88; *Kvočka et al*. Appeal Judgement, para. 28; *Naletilić and Martinović* Appeal Judgement, para. 23; *Cyangugu* Appeal Judgement, para. 22.
[62] See *Kupreškić et al*. Appeal Judgement, para. 121; *Ntakirutimana* Appeal Judgement, para. 28.
[63] For examples of new material facts which could support separate charges against an accused, see *Muvunyi* Decision, paras 33 and 35.
[64] *Karemera* Decision, para. 28; *Muvunyi* Decision, para. 22. See also *Kvočka et al*. Appeal Judgement, para. 32.

31. The Trial Chamber statements in paragraph 10 of the Impugned Decision are in conformity with the principles outlined above. Accordingly, the Appeals Chamber finds that the Appellant has not shown an error on the part of the Trial Chamber.

(b) Fifth Error Alleged

32. The Appellant submits that, by stating that

> "[m]aterial facts which concern the actions of the Accused personally are scrutinized more closely than general allegations of criminal conduct,"[65]

the Trial Chamber "understated the imperative" that material facts which concern the personal actions of the accused must be specifically and clearly pleaded in the indictment.[66]

33. The Appeals Chamber agrees with the Appellant that material facts which concern the personal actions of the accused have to be clearly and specifically pleaded in the indictment.[67] However, the Appeals Chamber does not consider that the Trial Chamber suggested otherwise at paragraph 10 of the Impugned Decision. In addition, the statement at paragraph 10 must be read together with paragraph 5 of the Impugned Decision, where the Trial Chamber stated:

> Allegations of physical perpetration of a criminal act by an accused must appear in an indictment. On the other hand, "less detail may be acceptable if the 'sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes'". Many acts attributed to an accused fall on the spectrum between these two extremes. Individual actions of an accused which contribute to crimes will require more specific notice than proof of the crimes themselves, where they are physically committed by others. The specificity of the notice required is proportional to the extent of the Accused's direct involvement.[68]

Accordingly, the Appeals Chamber is not satisfied that the Trial Chamber understated the requirement that personal actions of the accused be clearly and specifically pleaded in the indictment. The above passage from the Impugned Decision clearly shows that the Trial Chamber was aware of the applicable legal principles.

(c) Sixth Error Alleged

34. The Trial Chamber found that notice of a material fact not included in the indictment could be given through a Prosecution motion for the addition of a witness

> "which was subsequently granted by the Chamber, and which stated the material facts on which the witness would testify."[69]

The Appellant contends that this is an error because the addition of a witness cannot "*alter the charges* against the Accused *as already judicially ratified* by the reviewing Judge";[70] if the Prosecution wishes to add new material facts in the charges, it must seek to amend the indictment.[71]

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[65] Impugned Decision, para. 10.
[66] Interlocutory Appeal, paras 27-28.
[67] See *Kupreškić et al*. Appeal Judgement, para. 89; *Krnojelac* Appeal Judgement, para. 132; *Niyitegeka* Appeal Judgement, para. 193; *Ntakirutimana* Appeal Judgement, para. 32; *Kvočka et al*. Appeal Judgement, para. 28; *Naletilić and Martinović* Appeal Judgement, para. 24; *Cyangugu* Appeal Judgement, para. 23; *Sylvestre Gacumbitsi v. The Prosecutor*, Case N°ICTR-2001-64-A, Judgement of 7 July 2006 ("*Gacumbitsi* Appeal Judgement"), para. 49.
[68] References omitted.
[69] Impugned Decision, para. 10.
[70] Interlocutory Appeal, para. 29.
[71] Interlocutory Appeal, para. 29.

35. The Appeals Chamber reiterates that, while the addition of a charge must necessarily be done through an amendment to the indictment, the omission of material facts from the indictment can in certain circumstances be cured without having to amend the indictment.[72] As to whether notice of a new material fact could be conveyed through a Prosecution motion to add a witness, the Appeals Chamber recalls that, as a general rule:

> Whether the Prosecution cured a defect in the indictment depends, of course, on the nature of the information that the Prosecution provides to the Defence and on whether the information compensates for the indictment's failure to give notice of the charges asserted against the accused. *Kupreškić* considered that adequate notice of material facts might be communicated to the Defence in the Prosecution's pre-trial brief, during disclosure of evidence, or through proceedings at trial. The timing of such communications, the importance of the information to the ability of the accused to prepare his defence, and the impact of the newly-disclosed material facts on the Prosecution's case are relevant in determining whether subsequent communications make up for the defect in the indictment. As has been previously noted, "mere service of witness statements by the [P]rosecution pursuant to the disclosure requirements" of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial.[73]

In determining whether a defective indictment was cured by timely, clear and consistent information, the Appeals Chamber has looked to the Prosecution pre-trial brief (together with its annexes and chart of witnesses)[74] or the Prosecution's opening statement.[75] However, the Appeals Chamber never suggested that defects in the indictment could only be cured through the Prosecution pre-trial brief or its opening statement. The Appeals Chamber cannot exclude the possibility that a defect in the indictment could be cured through a Prosecution motion for addition of a witness, provided any possible prejudice to the Defence was alleviated by, for example, an adjournment to allow the Defence time to prepare for cross-examination of the witness. Accordingly, the Appeals Chamber is not convinced that the Trial Chamber erred in stating that although disclosure of witness statements or potential exhibits are generally insufficient to put an accused on reasonable notice, a defect in the indictment could be cured by the information conveyed in a Prosecution motion to add a witness, which clearly states the material facts on which the witness would testify.

(d) Seventh Error Alleged

36. The Trial Chamber found that when a new material fact is discovered at trial, the fairness of the proceedings against the accused may be preserved by granting a lengthy adjournment for the express purpose of allowing the Defence to meet the newly discovered material fact.[76] The Appellant submits that this is in error because simply granting an adjournment does not permit the Defence to know what use will be made of the newly discovered evidence; it is only once the Prosecution seeks an amendment of the indictment that the Defence will have the opportunity to respond and argue the issue.[77]

37. In *Kupreškić*, the Appeals Chamber emphasized that

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[72] See *supra* paras 29-30.
[73] *Niyitegeka* Appeal Judgement, para. 197 (references omitted).
[74] *Kupreškić et al*. Appeal Judgement, para. 117; *Ntakirutimana* Appeal Judgement, paras 46-48; *Kvočka et al*. Appeal Judgement, paras 43-45 ; *Naletilić and Martinović* Appeal Judgement, paras 27, 45; *Gacumbitsi* Appeal Judgement, paras 57-58.
[75] *Kupreškić et al*. Appeal Judgement, para. 118; *Kordić and Čerkez* Appeal Judgement, para. 169; *Kvočka et al*. Appeal Judgement, paras 46-47.
[76] Impugned Decision, para. 10.
[77] Interlocutory Appeal, para. 30.

> the Prosecution is expected to know its case before it goes to trial. It is not acceptable for the Prosecution to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds. There are, of course, instances in criminal trials where the evidence turns out differently than expected. Such a situation may require the indictment to be amended, an adjournment to be granted, or certain evidence to be excluded as not being within the scope of the indictment.[78]

Thus, when a new material fact is discovered at trial, the Trial Chamber should determine which measure(s) are required in the circumstances of the case to preserve the fairness of the proceedings. If the Trial Chamber decides that an adjournment is warranted, it could also order the Prosecution to amend the indictment for greater clarity, but this might not be required in every case. Accordingly, the Appeals Chamber does not find that the Trial Chamber erred in stating at paragraph 10 of the Impugned Decision that the accused was put on reasonable notice of material facts omitted from the indictment where

> "a lengthy adjournment was ordered by the Chamber for the express purpose of allowing the Defence to meet newly discovered material facts."

IV. Timeliness of objections to evidence for lack of notice (Paragraph 7 of the Impugned decision)

38. In paragraph 7 of the Impugned Decision, the Trial Chamber held that, when evidence is adduced that purportedly goes beyond the allegations in the indictment, the Defence must raise an objection "contemporaneously with the introduction of the evidence"; if the Defence raises its objection later during trial, it bears the burden of proving that its ability to prepare its case was materially impaired.[79] The Appellant submits that this is erroneous.

39. At the outset, the Appeals Chamber notes that the Parties made several arguments relating not to the statements made in paragraph 7 of the Impugned Decision but rather to their concrete application.[80] This goes beyond the scope of the certification, and these arguments will not be considered.

A. Submissions of the Parties

40. In the Appellant's view, the Trial Chamber considered, erroneously, that

> "nothing less than a contemporaneous objection, at or very near the time the impugned evidence is offered is a sufficiently timely form of objection."[81]

The Appellant submits that the recent jurisprudence of the Appeals Chamber shows that pre-trial objections, objections in Rule 98 *bis* proceedings, and even objections in closing arguments, when taken together, are sufficient to maintain the burden of proof on the Prosecutor to show lack of prejudice to the Defence.[82] In fact, argues the Appellant, it may not always be possible to object to the evidence at the time it is adduced since the purpose in adducing the evidence may become clear only later (for instance, through a motion to amend the indictment or in the Prosecution's closing brief).[83]

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[78] *Kupreškić et al*. Appeal Judgement, para. 92. See also *Niyitegeka* Appeal Judgement, para. 194; *Blaškić* Appeal Judgement, para. 220; *Ntakirutimana* Appeal Judgement, para. 26; *Kvočka et al*. Appeal Judgement, paras 30-31; *Naletilić and Martinović* Appeal Judgement, para. 25; *Cyangugu* Appeal Judgement, para. 27.
[79] Impugned Decision, para. 7.
[80] See, e.g., Interlocutory Appeal, para. 35; Response, paras 20-21; Reply, para. 16.
[81] Interlocutory Appeal, para. 32.
[82] Interlocutory Appeal, paras 33 (1st para. 33 at p. 12), 33 (3rd para. 33 at p. 13), 34, referring to *Naletilić and Martinović* Appeal Judgement, para. 22 and *Gacumbitsi* Appeal Judgement, paras 52-54.
[83] Interlocutory Appeal, para. 33 (2nd para. 33 at p. 13).

41. The Prosecution responds that the statements made in paragraph 7 of the Impugned Decision are consistent with the principles set out in the *Niyitegeka* Appeal Judgement, according to which the Defence must interpose a specific objection at the time the evidence is introduced.[84] The Prosecution submits that blanket objections or generalized claims of lack of notice and prejudice cannot be considered as sufficient and specific.[85] The Prosecution also contends that the determination of whether a timely and appropriate objection has been made is a case-specific exercise, and that the Appellant's reliance on the Appeals Chamber's pronouncements in other cases is thus unhelpful.[86]

B. ANALYSIS

42. In support of its findings at paragraph 7 of the Impugned Decision, the Trial Chamber cited parts of paragraphs 199 and 200 of the *Niyitegeka* Appeal Judgement. It is useful to reproduce the entire discussion in *Niyitegeka* :

> In considering whether a defect in the indictment has been cured by subsequent disclosure, the question arises as to which party has the burden of proof on the matter. Although the Judgement in *Kupreškić* did not address this issue expressly, the Appeals Chamber's discussion indicates that the burden in that case rested with the Prosecution. *Kupreškić* stated that, in the circumstances of that case, a breach of "the substantial safeguards that an indictment is intended to furnish to the accused" raised the presumption "that such a fundamental defect in the … Indictment did indeed cause injustice." The defect could only have been deemed harmless through a demonstration "that [the Accused's] ability to prepare their defence was not materially impaired." *Kupreškić* clearly imposed the duty to make that showing on the Prosecution, since the absence of such a showing led the Appeals Chamber to "uph[o]ld the objections" of the accused.
>
> It is noteworthy, however, that *Kupreškić* specifically mentioned the fact that the accused in that case had made a timely objection before the Trial Chamber to the admission of evidence of the material fact in question. In general, "a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial, and to raise it only in the event of an adverse finding against that party." Failure to object in the Trial Chamber will usually result in the Appeals Chamber disregarding the argument on grounds of waiver. In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also choose to file a timely motion to strike the evidence or to seek an adjournment to conduct further investigations in order to respond to the unpleaded allegation.
>
> The importance of the accused's right to be informed of the charges against him under Article 20 (4) (a) of the Statute and the possibility of serious prejudice to the accused if material facts crucial to the Prosecution are communicated for the first time at trial suggest that the waiver doctrine should not entirely foreclose an accused from raising an indictment defect for the first time on appeal. Where, in such circumstances, there is a resulting defect in the indictment, an accused person who fails to object at trial has the burden of proving on appeal that his ability to prepare his case was materially impaired. Where, however, the accused person objected at trial, the burden is on the Prosecution to prove on appeal that the accused's ability to prepare his defence was not materially impaired. All of this is of course subject to the inherent jurisdiction of the Appeals Chamber to do justice in the case.[87]

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[84] Response, para. 18.
[85] Response, para. 19.
[86] Response, paras 19-20.
[87] *Niyitegeka* Appeal Judgement, paras 198-200 (footnotes omitted).

43. As the above illustrates, the *Niyitegeka* Appeal Judgement outlined a carefully balanced approach taking into account, on the one hand, the principle that

> "a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of trial, and to raise it only in the event of an adverse finding against that party"[88]

and, on the other hand,

> "the importance of the accused's right to be informed of the charges against him under Article 20 (4) (a) of the Statute and the possibility of serious prejudice to the accused if material facts crucial to the Prosecution are communicated for the first time at trial."[89]

44. In *Niyitegeka*, the Appeals Chamber was concerned with the situation of an appellant who had failed to object to the lack of notice at trial, and had raised the issue for the first time on appeal.[90] The present appeal contemplates a different situation: the objection is not raised at the time the evidence is presented, but it is nonetheless raised at the trial stage. This is a crucial difference: the objection is not as late as if it had been raised only on appeal, and there might be more elements militating against a conclusion that the objection was not timely raised. For instance, the objection might not have been raised at the time the evidence was adduced because the purpose for adducing the evidence might have become clear only later.

45. Accordingly, when an objection based on lack of notice is raised at trial (albeit later than at the time the evidence was adduced), the Trial Chamber should determine whether the objection was so untimely as to consider that the burden of proof has shifted from the Prosecution to the Defence in demonstrating whether the accused's ability to defend himself has been materially impaired. In doing so, the Trial Chamber should take into account factors such as whether the Defence has provided a reasonable explanation for its failure to raise its objection at the time the evidence was introduced and whether the Defence has shown that the objection was raised as soon as possible thereafter.

46. In summary, objections based on lack of notice should be specific and timely. The Appeals Chamber agrees with the Prosecution that blanket objections that "the entire indictment is defective" are insufficiently specific.[91] As to timeliness, the objection should be raised at the pre-trial stage (for instance in a motion challenging the indictment) or at the time the evidence of a new material fact is introduced. However, an objection raised later at trial will not automatically lead to a shift in the burden of proof: the Trial Chamber must consider relevant factors, such as whether the Defence provided a reasonable explanation for its failure to raise the objection earlier in the trial.

47. The Appeals Chamber finds that the statements made by the Trial Chamber at paragraph 7 of the Impugned Decision must be corrected to the extent explained above. As a consequence, the Trial Chamber should reconsider the Impugned Decision on this basis. This reconsideration will be limited to the instances where the Trial Chamber found that the objection had not been raised at the time the evidence was introduced and therefore concluded that the burden of proof had shifted to the Defence.

V. Conclusion

48. The Appeals Chamber finds that even if a Trial Chamber finds that the defects in the indictment have been cured by post-indictment submissions, it should consider whether the extent of the defects in the indictment materially prejudices the accused's right to a fair trial by hindering the

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[88] *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case N°ICTR-95-1-A, Reasons for Judgement of 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement"), para. 91.
[89] *Niyitegeka* Appeal Judgement, para. 200.
[90] See *Niyitegeka* Appeal Judgement, paras 199-200, 205-206, 210, 237.
[91] As this falls outside the scope of the appeal, the Appeals Chamber expresses no opinion on the question whether the two motions filed in May and August 2002 by the Ntabakuze Defence constitute sufficiently specific objections.

preparation of a proper defence. The Appeals Chamber instructs the Trial Chamber to reconsider the Impugned Decision on this basis. In all other respects, the Appeals Chamber is of the view that the Trial Chamber did not err in its articulation of the principles at paragraph 10 of the Impugned Decision. As to paragraph 7 of the Impugned Decision, the Appeals Chamber has outlined the approach that should be taken in deciding whether an objection for lack of notice has been timely raised, and, consequently, who bears the burden of proof on this question. The Appeals Chamber instructs the Trial Chamber to reconsider the Impugned Decision to the extent described above.

VI. Disposition

49. For the foregoing reasons, the Interlocutory Appeal is allowed in part.

Done in English and French, the English text being authoritative.

Done this 18th day of September 2006, At The Hague, The Netherlands.

[Signed]: Fausto Pocar

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Order for Transfer of Defence Witness Jean Kambanda 19 September 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Jean Kambanda – Transfer of detained witness, Mali – Transfer ordered

International Instrument cited :

Rules of Procedure and Evidence, rule 90 bis (B)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Jean Kambanda, Judgement and Sentence, 4 September 1998 (ICTR-97-23) ; Appeals Chamber, The Prosecutor v. Jean Kambanda, Judgement, 19 October 2000 (ICTR-97-23) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Severance or Exclusion of Evidence Based on Prejudice Arising From Testimony of Jean Kambanda, 11 September 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED of the "*Requête … sollicitant une ordonnance de transfert*", etc., filed by the Bagosora Defence on 14 September 2006;

CONSIDERING the Prosecution Response, filed on 15 September 2006;

HEREBY DECIDES the motion.

1. The Bagosora Defence requests an order for the temporary transfer of one of its witnesses, Jean Kambanda, to the Detention Unit of the Tribunal in Arusha for the purpose of testifying before the Chamber. Mr. Kambanda is serving a life sentence of this Tribunal in the Republic of Mali.[1] He testified before the Chamber on 11, 12 and 13 July 2006, before the balance of his testimony was postponed pending resolution of a motion for the exclusion of parts of his testimony or for severance.[2] The Bagosora Defence requests that he be available in Arusha for the continuation of his testimony as of 2 October 2006, to be completed before the end of the present trial session on 13 October 2006. The Prosecution does not oppose the request, but asks that the testimony be heard as soon as practicable and that the order should continue in effect until the completion of the witness's testimony, whenever that may be.

2. Rule 90 *bis* (B) of the Rules of Procedure and Evidence sets two conditions for such an order: first, that

> "the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal";

and second, that the "[t]ransfer … does not extend the period of his detention as foreseen by the requested State". Furthermore, Article 4 of the agreement between the United Nations and the Republic of Mali specifically provides for the temporary transfer of a detained person for the purpose of giving testimony, provided that the detainee is not required for criminal proceedings in Mali.[3]

3. The Chamber has been advised by the Registry that Mr. Kambanda is not required for criminal proceedings in Mali during the proposed period of transfer. The first condition, therefore, is satisfied. As Mr. Kambanda is serving a life sentence, there is no scope for the application of the second condition. The precise timing of the witness's testimony is a different matter. The Chamber will, however, take into account the view of the Bagosora Defence that the witness should not continue his testimony until the return of Lead Counsel to Arusha, on or about 2 October 2006.

FOR THE ABOVE REASONS, THE CHAMBER

ORDERS, conditional upon the agreement of the Government of Mali, that Jean Kambanda shall be temporarily transferred to the Detention Unit as soon as possible and returned no later than 30 October 2006, pursuant to Rule 90 *bis* of the Rules;

REQUESTS the Government of Mali to facilitate the transfer in cooperation with the Registrar and the Government of Tanzania;

INSTRUCTS the Registrar to:

(A) transmit this decision to the Governments of Mali and Tanzania;

(B) ensure the proper conduct of the transfer, including the supervision of the witnesses in the Tribunal's detention facilities;

(C) remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the timing of the

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[1] *Kambanda*, Judgement (TC), 4 September 1998, p. 28; *Kambanda*, Judgement (AC), 19 October 2000, p. 39.

[2] *Bagosora et al*., Decision on Severance or Exclusion of Evidence Based on Prejudice Arising From Testimony of Jean Kambanda (TC), 11 September 2006.

[3] Agreement Between the Government of the Republic of Mali and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda, 12 February 1999, registered 4 October 2000 (Reg. No. 36963), <http://www.ictr.org/ENGLISH/agreements/mali.pdf>.

temporary detention, and as soon as possible, inform the Trial Chamber of any such change.

Arusha, 19 September 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Modalities for Presentation of a Witness 20 September 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Issuance of a subpoena to a serving colonel in the French military, France, Requests of the French Government to ensure national security, Limitations proposed do not impair the rights of the Accused – Subpoena rejected in light of the willingness of the Government of France to make the witness available to testify

International Instrument cited :

Rules of Procedure and Evidence, rules 53, 54, 75 and 79

International Case cited :

I.C.T.Y. : Trial Chamber, The Prosecutor v. Tihomir Blaškić, Decision of Trial Chamber I on Protective Measures for General Philippe Morillon, Witness of the Trial Chamber, 12 May 1999 (IT-95-14)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Ntabakuze Motion Requesting an Order for a *Subpoena*", filed on 14 September 2006;

CONSIDERING the Prosecution Response and the Defence "Submissions", both filed on 18 September 2006;

HEREBY DECIDES the motion.

Introduction

1. The Ntabakuze Defence requests a *subpoena* for the appearance of a serving colonel in the French military to give testimony before this Chamber. This request follows the receipt of a letter from the Government of France indicating that the colonel is available to testify, but only under certain conditions. After being advised that the procedure proposed by the French Government had been

substantially followed during the testimony of a French officer before the International Criminal Tribunal for Yugoslavia, the Defence declared that it was

> "prepared to accept any measures that the Chamber may deem in its discretion, to be reasonable and warranted, under the circumstances".[1]

2. Aside from insisting that the witness's appearance cannot be used to postpone the deadline for the end of the Defence case, the Prosecution took "no other position on the merits of the Motion".[2]

Deliberations

3. The French Government proposes five conditions for the appearance of the colonel: (i) that the testimony be heard in closed session; (ii) non-disclosure of the witness's identity; (iii) limiting the scope of examination to matters already covered during a previous interview of the witness, and the same limitation on cross-examination; (iv) the presence of a representative of the Government of France in the proceedings who is authorized to assert a national security privilege; and (v) non-disclosure of the witness's testimony to any party to another proceeding.[3] The letter from the Government of France invokes national security as the basis for these requests.

4. No party to these proceedings has opposed the requests. The Defence has pointed out certain factual differences between the present case and the precedent before the ICTY, but accepts that the general statements of law are applicable to the present case. It has also emphasized that any limitation on cross-examination should not adversely affect the Chamber's ability to assess the witness's credibility. Ultimately, however, the Defence:

> wishes to emphasize that it is prepared to accept any measures that the Chamber may deem, in its discretion, to be reasonable and warranted, under the circumstances. Our main concern is to have the witness testify in a timely manner to the contents of the questionnaire which he has already answered in the presence of the French authorities, in accordance with the usual French procedure, with which the Ntabakuze Defence has scrupulously complied.[4]

5. In the absence of any objection, the Chamber considers the proposed requests to be acceptable in the circumstances, and finds them permissible under the Rules of Procedure and Evidence. Both parties have, in effect, declared that they have no objection to the limitations on the scope of the examination and cross-examination proposed by the French Government. Furthermore, as this is a Defence witness, such limitations do not impair the rights of the Accused. On the contrary, strict insistence on the usual procedures for disclosure and the scope of cross-examination could lead to the testimony not being heard by the close of the Defence case, which would serve the interests of neither the Accused, nor justice. The Chamber has the power to order non-disclosure of the witness's testimony under Rules 53, 54, 75 and 79. Indeed, the very conditions proposed here were previously accepted by a Trial Chamber of the ICTY in *Blaskić*.[5] This Chamber has itself previously permitted the presence of representatives from a national government to assist a witness under similar circumstances.[6] However, as in the *Blaskić* case, it must be the Chamber which resolves any disputes as to the proper scope of questioning which may arise during the testimony.

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[1] Submissions, para. 5.
[2] Response, para. 5.
[3] Motion, Annex 1.
[4] Submissions, para. 5.
[5] *The Prosecutor v. Blaskić*, Decision of Trial Chamber I on Protective Measures for General Philippe Morillon, Witness of the Trial Chamber (TC), 12 May 1999.
[6] T. 19 January 2004 p. 2 (representative of Government of Canada permitted to be present to assist with the testimony of General Romeo Dallaire).

6. The measures granted in the present instance must be understood as exceptional. The Government of France has invoked national security and appears to have a credible basis for making that claim.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the request for *subpoena*, in light of the willingness of the Government of France to make the witness available to testify;

DECLARES that (i) the testimony be heard in closed session; (ii) the witness's identity will not be disclosed; (iii) examination and cross-examination shall be limited to matters already covered during previous interviews of the witness; (iv) a representative of the Government of France may be present during proceedings and may request that the witness be relieved from answering questions on the grounds of national security; and (v) the witness's testimony shall not be subject to disclosure to any party in another proceeding.

Arusha, 20 September 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Request to the Kingdom of Belgium for Assistance Pursuant to Article 28 of the Statute 21 September 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Cooperation of the States, Belgium, Interview of a person in detention in Belgium – Motion granted

International Instruments cited :

Rules of Procedure and Evidence, rule 54 ; Statute, art. 28

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request to the Kingdom of The Netherlands for Cooperation and Assistance, 7 February 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request to the Kingdom of Belgium for Assistance Pursuant to Article 28 of the Statute, 21 April 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Nsengiyumva Motion for Witness Higaniro to Testify by Video-Conference, 29 August 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "*Requête … visant la coopération du Royaume de Belgique*", filed by the Bagosora Defence on 20 September 2006;

HEREBY DECIDES the request.

1. The Bagosora Defence asks the Chamber to issue a request to the Government of Belgium to permit an interview with Alphonse Higaniro, a person now in detention in Belgium, who is scheduled to testify on behalf of the Nsengiyumva Defence in early October. The Defence indicates that such a meeting is for the purpose of determining whether it wishes to cross-examine the witness.

2. Article 28 of the Statute imposes an obligation on States to

> "cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law".

A request to a Chamber to make an order under Article 28 must set forth the nature of the information sought; its relevance to the trial; and the efforts that have been made to obtain it. The type of assistance sought should also be defined with particularity.[1]

3. This Chamber has previously found that Mr. Higaniro may have information relevant to this trial.[2] Colonel Bagosora is said to have been present on one of the occasions on which Mr. Higaniro may be able to give testimony.[3] The correspondence appended to the motion shows that the Defence has tried to arrange the interview without recourse to the Chamber, but that Belgian law requires an order under Article 28 for such an interview to be permitted. Accordingly, the Chamber finds that the conditions for the issuance of a request under Article 28 are satisfied.

FOR THE ABOVE REASONS, THE CHAMBER

RESPECTFULLY REQUESTS the Kingdom of Belgium to provide any relevant assistance in facilitating a meeting between the Bagosora Defence and Mr. Alphonse Higaniro;

DIRECTS the Registry to transmit this decision to the relevant authorities of the Kingdom of Belgium.

Arusha, 21 September 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[1] *Bagosora et al*., Decision on Request to the Kingdom of The Netherlands for Cooperation and Assistance (TC), 7 February 2005, para. 5; *Bagosora et al*., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4.

[2] *Bagosora et al*., Decision on Request to the Kingdom of Belgium for Assistance Pursuant to Article 28 of the Statute (TC), 21 April 2006, para. 3; *Bagosora et al*., Decision on Nsengiyumva Motion for Witness Higaniro to Testify by Video-Conference (TC), 29 August 2006.

[3] *Bagosora et al*., Decision on Nsengiyumva Motion for Witness Higaniro to Testify by Video-Conference (TC), 29 August 2006, para. 3.

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Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence 25 September 2006 (ICTR-98-41-AR73)

(Original: English)

Appeals Chamber

Judges: Fausto Pocar, Presiding Judge ; Mehmet Güney ; Liu Daqun ; Theodor Meron ; Wolfgang Schomburg

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Disclosure of documents, Immigration documents, General conduct of trial proceedings within the discretion of the Trial Chamber, Reversing of the Trial Chamber's Decision only in case of incorrect interpretation of governing law, Unduly restrictive interpretation of Rule 66 (B) of the Rules contrary to its plain meaning, Right of the Accused to inspect the documents of the Prosecutor, Test for materiality of the document, Large interpretation of the concept of Preparation of the case, No affirmative obligation on the Prosecution to disclose any and all documents which may be relevant to its cross-examination, Trial Chamber best placed to determine the modalities for disclosure and the time required for an accused to prepare his defence – Decision reversed

International and National Instruments cited :

Rules of Procedure and Evidence, rules 66 (B) and 67 (C)

United States Federal Rule of Criminal Procedure 16 (a) (1) (E)

International and National Cases cited :

I.C.T.R. : Appeals Chamber, Georges Rutaganda v. The Prosecutor, Decision on the Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66 (B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions, 28 June 2002 (ICTR 96-3) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006 (ICTR-98-44) ; Appeals Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on Interlocutory Appeal, 29 May 2006(ICTR-2000-55A) ; Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006 (ICTR-98-44)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Radislav Krstić, Judgement, 19 April 2004 (IT-98-33) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Judgement, 29 July 2004 (IT-95-14)

United States of America : Supreme Court of The United States, United States v. Armstrong, 13 May 1996, 517 U.S. 456, 462 (1996) ; District of Columbia Circuit, United States v. Marshall, 14 December 1998, 132 F.3d 63, 68 (D.C. Cir. 1998)

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other

Serious Violations Committed in the Territory of Neighboring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of an interlocutory appeal[1] filed jointly by Anatole Nsengiyumva and Gratien Kabiligi ("Appellants") against a decision of Trial Chamber I,[2] ("Impugned Decision") dismissing Mr. Nsengiyumva's request for the disclosure of documents pursuant to Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence ("Rules").

Background

2. In April 2005, soon after the defence cases in this case commenced, the Prosecution disclosed that it had documents related to the immigration, refugee, and asylum status of certain defence witnesses that it intended to use during cross-examination for impeachment purposes.[3] On 16 May 2005, one of the Appellants, Mr. Nsengiyumva, requested the disclosure of this material,[4] in part, based on Rule 66 (B) of the Rules.[5] On 27 September 2005, the Trial Chamber denied this request and held that the Prosecution would make such documents available at the time of cross-examination in conformity with the normal practice in the case.[6]

3. The Appellants sought certification to appeal the Impugned Decision, which the Trial Chamber granted on 22 May 2006.[7] The Appellants filed their joint appeal brief on 29 May 2006. The Prosecution responded on 8 June 2006,[8] and the Appellants replied on 12 June 2006.[9]

4. The Appellants argue that in reaching the Impugned Decision the Trial Chamber erred in its interpretation of Rule 66 (B) and took account of extraneous considerations, such as the ability of the Appellants to obtain the documents themselves.[10] They submit that the immigration documents are essential in assisting them to assess the potential credibility of their case.[11] Consequently, the Appellants contend that they are being denied the right to make a full answer and defence to the

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[1] Kabiligi and Nsengiyumva Joint Appeal under Rule 73 (B) of Trial Chamber I's "Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses", 29 May 2006 ("Appeal").
[2] *The Prosecutor v. Théoneste Bagosora et al.*, Case N°ICTR-98-41-T, Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses, 27 September 2005 ("Impugned Decision").
[3] Impugned Decision, para. 1; Appeal, paras. 4, 5.
[4] Based on Nsengiyumva's request, the Trial Chamber described this material as follows: "The Defence motion describes the requested materials as materials, documents, correspondence and any papers in [the Prosecution's] possession, control and/or custody that relate to immigration status and/or records of (i) Witness LIG-2; (ii) Defence Witness LT-1; (iii) any other Defence witnesses on the Nsengiyumva defence list in respect of whom inquiries into immigration, asylum and or refugee status may have been made; and (iv) any potential defence witnesses. According to the motion, such materials include, but are not limited to, any enquiry or correspondence from the Prosecution to any host country; any response from a host country thereto; documents forwarded in such correspondence; and documents relating to immigration, refugee status or record of proceedings relating thereto as disclosed by the host country, UNHCR or any other organization." See Impugned Decision, para. 3, footnote 4.
[5] Impugned Decision, para. 2. In addition, Mr. Nsengiyumva requested disclosure on the basis of Rule 68, which the Chamber denied. *Id.,* paras. 2, 9, 10. See also Appeal, para. 6.
[6] Impugned Decision, para. 12.
[7] *The Prosecutor v. Théoneste Bagosora et al.*, Case N°ICTR-98-41-T, Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements, 22 May 2006 ("Certification Decision"). The Trial Chamber did not certify the Appellants' appeal on the basis of Rule 68. *Id.,* para. 7.
[8] Prosecutor's Response to "Kabiligi and Nsengiyumva Joint Appeal under Rule 73 (B) of Trial Chamber I's 'Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses'", 8 June 2006 ("Prosecution Response").
[9] Joint Kabiligi and Nsengiyumva Reply to "Prosecutor's Response to Kabiligi and Nsengiyumva Joint Appeal under Rule 73 (B) of Trial Chamber I's 'Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses'", 12 June 2006 ("Appellants Reply").
[10] Appeal, paras. 14-41.
[11] Appeal, paras. 15, 16.

charges against them without the requested disclosure.[12] The Appellants seek an order compelling the Prosecution to disclose the documents in question.[13]

5. The Prosecution responds that the Appellants cite no legal authority in support of their reading of Rule 66 (B).[14] The Prosecution further refers to domestic legal provisions and national case law in support of the Trial Chamber's approach.[15] The Prosecution disputes that the Trial Chamber relied on any extraneous considerations in interpreting Rule 66 (B), such as the ability of the defence to obtain the documents, and notes that this observation referred simply to the lack of prejudice in the present case.[16] In their Reply, the Appellants primarily attempt to distinguish the national case law referred to by the Prosecution.[17]

Discussion

6. In this decision, the Appeals Chamber considers whether the Trial Chamber erred in denying the request for disclosure under Rule 66 (B) of the Rules.[18] As the Impugned Decision relates to the general conduct of trial proceedings, this is a matter that falls within the discretion of the Trial Chamber.[19] A Trial Chamber's exercise of discretion will be reversed only if the challenged decision was based on an incorrect interpretation of governing law, was based on a patently incorrect conclusion of fact, or was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[20]

7. Rule 66 (B) of the Rules provides for the inspection of certain items which are: (1) "material to the preparation of the defence case", or (2) "intended for use by the Prosecution as evidence at trial".[21] The Trial Chamber ruled that the immigration documents did not fall into either of these categories.[22] It reasoned that the immigration documents were not "material to the preparation of the defence case" because they did not counter the Prosecution's evidence presented during its case-in-chief, but rather concerned the credibility of defence evidence.[23] In addition, for the Trial Chamber, the immigration documents did not constitute material intended for use by the Prosecution at trial because, in its view, this category refers only to evidence for use during the Prosecution's case-in-chief, which is closed.[24]

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[12] Appeal, paras. 34-41. At trial, Mr. Nsengiyumva's fair trial claims also included allegations related to witness intimidation and endangerment. Appeal, para. 6. The Appellants do not address these arguments on appeal and instead focus on their ability to assess the potential credibility of their case.
[13] Appeal, para. 42.
[14] Prosecution Response, para. 6.
[15] Prosecution Response, paras. 10-15.
[16] Prosecution Response, paras. 22, 23.
[17] Appellants Reply, paras. 5-24.
[18] Rule 66 (B) refers to permitting "inspection". Nonetheless, the provision imposes a disclosure obligation on the Prosecution in the sense of making information available to the Defence. That it is a disclosure obligation in this general sense is reflected in the title of Rule 66, "Disclosure of Materials by the Prosecutor" as well as the language of Rule 66 (C) which refers to Prosecution ability to apply to a Trial Chamber in certain circumstances to be relieved from the obligation "to disclose pursuant to Sub-Rules (A) and (B)". The use of the term "inspection" in Sub-Rule (B) simply relieves the Prosecution from providing copies of requested items to the Defence, though a Trial Chamber may nonetheless issue an order this end.
[19] *Tharcisse Muvunyi v. The Prosecutor*, Case N°ICTR-00-55A-AR73(C), Decision on Interlocutory Appeal, 29 May 2006, para. 5 ("*Muvunyi* Appeal Decision").
[20] *Muvunyi* Appeal Decision, para. 5. See also *The Prosecutor v. Théoneste Bagosora et al.*, Case N°ICTR-98-41-AR73, ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decisions on Witness Protection Orders, 6 October 2005, para. 3 ("*Bagosora* Appeal Decision").
[21] Rule 66 (B) states in full: "At the request of the Defence, the Prosecutor shall, subject to Sub-Rule (C), permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused."
[22] Impugned Decision, para. 6.
[23] Impugned Decision, paras. 5, 6.
[24] Impugned Decision, paras. 5, 6.

8. The Appellants contend that, in reaching this conclusion, the Trial Chamber adopted an unduly restrictive interpretation of Rule 66 (B) of the Rules contrary to its plain meaning.[25] The Appeals Chamber agrees. The language of Rule 66 (B) does not support the Trial Chamber's restrictive approach. The Prosecution refers extensively to domestic legal provisions, in particular United States Federal Rule of Criminal Procedure 16 (a) (1) (E),[26] in support of the Trial Chamber's approach.[27] However, the Appeals Chamber considers the meaning of Rule 66 (B) to be sufficiently clear so as not to require resort to domestic legal provisions in determining its scope.[28] The Appeals Chamber routinely construes the Prosecution's disclosure obligations under the Rules broadly in accord with their plain meaning.[29] Nothing in Rule 66 (B) limits an accused's right to inspection only of material related to the Prosecution's case-in-chief.[30] Rather, this Rule uses much broader language: "material to the preparation of the defence case" and "intended for use … at trial".

9. The Appellants seek material potentially falling under both categories.[31] In accord with the plain meaning of Rule 66 (B) of the Rules, the test for materiality under the first category is the relevance of the documents to the preparation of the defence case. Preparation is a broad concept and does not necessarily require that the material itself counter the Prosecution evidence.[32] Indeed, for the Appellants, the immigration documents are material to the preparation of their defence because these documents may improve their assessment of the potential credibility of their witnesses before making a final selection of whom to call in their defence.[33] The Appeals Chamber cannot exclude that this is an appropriate basis for authorizing the inspection of documents if the requisite showing is made by the defence. There are few tasks more relevant to the preparation of the defence case than selecting witnesses.[34] The Trial Chamber is the appropriate authority to make this case-specific assessment in the first instance under the appropriate standard. Moreover, the use of the phrase "at trial" in the

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[25] Appeal, paras. 14-25.

[26] This provision reads: "Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant." This rule was amended in 2002, and what was previously sub-part (C) – which is the reference cited by the Prosecution and the Trial Chamber (Impugned Decision paras. 6, 7; Prosecution Response, para. 12) – was moved with minor amendments to sub-part (E).

[27] Prosecution Response, paras. 10-16.

[28] This was the same approach taken by the ICTY Appeals Chamber in interpreting the scope of Rule 68. See *The Prosecutor v. Radislav Krstić* Case N°IT-98-33-A, Judgement, 19 April 2004, para. 179 ("*Krstić* Appeal Judgement").

[29] *The Prosecutor v. Edouard Karemera et al*., Case N°ICTR, 98-44-A73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, paras. 9-13 ("*Karemera* Appeal Decision"). See also *Krstić* Appeal Judgement, para. 180; *The Prosecutor v. Tihomir Blaškić,* Case N°IT-95-14-A, Judgement, 20 July 2004, paras. 265, 266 ("*Blaškić* Appeal Judgement").

[30] In contrast, United States Federal Rule of Criminal Procedure 16 (a) (1) (E) expressly states that the government's disclosure obligation is limited to items to be used in its "case-in-chief". The United States Supreme Court in turn seized on this language to similarly restrict the category "material to preparing the defense" as well to preparations to counter the government's case-in-chief. See *United States v. Armstrong*, 517 U.S. 456, 462 (1996). It is significant that the Tribunal's Rules omit this reference in favour of a more broad formulation.

[31] In addition to prior statements, which could be used for impeachment purposes and possibly tendered as exhibits, the Appellants seek disclosure of a broader category of material, extending to correspondence between the Prosecution and state authorities. See Impugned Decision, para. 3, footnote 4 (quoted *supra*).

[32] Indeed, even under United States Federal Rule of Criminal Procedure 16, which is limited to disclosure on matters material to the preparation of the defence against the prosecutor's case-in-chief, evidence is material "as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." See *United States v. Marshall*, 132 F.3d 63, 68 (D.C. Cir. 1998) (emphasis added). Further, it also extends to some extent to information which might dissuade a defendant from pursuing an unmeritorious defence. *Id*.

[33] Appeal, para.16.

[34] The Prosecution counters that providing possible impeachment material to the defence obviates the purpose of cross-examination and will only result in contrived and perjured testimony. Prosecution Response, para. 9. The Appeals Chamber disagrees. In the present case, the Appellants appear to be seeking disclosure precisely to avoid putting questionable witnesses on the stand. Moreover, the Prosecution still retains the ability to raise questions during cross-examination concerning the witness's preparation in light of the disclosure and make relevant arguments in its final submissions.

second category of Rule 66 (B) signals its applicability throughout the proceedings.[35] As such, at least some of the immigration documents sought are equally subject to inspection to the extent that they are intended as exhibits at trial.

10. The Appeals Chamber observes that this plain reading of Rule 66 (B) of the Rules does not create a broad affirmative obligation on the Prosecution to disclose any and all documents which may be relevant to its cross-examination, as suggested by the Trial Chamber.[36] Rule 66 (B) is only triggered by a sufficiently specific request by the defence,[37] which in turn engages reciprocal disclosure obligations on the defence's part under Rule 67 (C). In this case, as the Trial Chamber recognized, the defence sought a precise category of documents, namely immigration-related material, admittedly in the possession of the Prosecution.[38]

11. In addition, the Trial Chamber observed in the Impugned Decision that the defence was aware of the identity and residence of its witnesses and thus was capable of undertaking its own investigations for the material.[39] The Appellants contend that this is an irrelevant consideration and an error of law.[40] The Prosecution responds that the decision was not based on this observation.[41] The Appeals Chamber, for its part, cannot discern whether the Trial Chamber's observation was a basis for denying the motion. Nonetheless, in the Appeals Chamber's view, there is no requirement for the defence to make independent efforts to obtain material prior to receiving requested disclosure under the Rules. A request under Rule 66 (B) is one of the methods available to the defence for carrying out investigations.

12. Finally, the Appeals Chamber notes that the Impugned Decision in fact provided for the disclosure of at least some of the requested material, the documents intended as exhibits, at the time of cross-examination.[42] This framework may be appropriate in some circumstances for certain material. The Appeals Chamber affirms that the Trial Chamber is best placed to determine both the modalities for disclosure and also what time is sufficient for an accused to prepare his defence based on the timing of such disclosure.[43] It is evident, however, that disclosure at the time of cross-examination is insufficient to the extent, as in this case, that the requested materials are intended to assist the defence select its witnesses.

Conclusion

13. Accordingly, the Appeals Chamber finds that the Trial Chamber erred by narrowly construing the Prosecution's disclosure obligations under Rule 66 (B) of the Rules in a manner inconsistent with the plain language of the provision.

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[35] The Appeals Chamber has held that Rule 66 (B) is applicable on appeal as well if the material sought was not available at trial. See *Georges Rutaganda v. The Prosecutor*, Case N°ICTR 96-3-A, Decision on the Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66 (B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions, 28 June 2002, p. 2.

[36] See, e.g., Impugned Decision, para. 6 ("Rule 66 (B) cannot be interpreted as laying down a blanket obligation for the Prosecutor to disclose documents pertinent to its cross-examination of defence witnesses.").

[37] *The Prosecutor v. Tihomir Blaškić*, Case N°IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 40.

[38] Impugned Decision, para. 3.

[39] See Impugned Decision, para. 6 ("In relation to the requested immigration documents, the Chamber observes that the Defence is aware of the identify and country of residence of its witnesses and may make inquires as to whether they have been interviewed by immigration authorities. The Defence is therefore in a position to carry out the necessary investigations to prepare its case and, on this basis, select its witnesses."); Prosecution Appeal, para. 8.

[40] Appeal, paras. 26-29.

[41] Prosecution Response, para. 22.

[42] Impugned Decision, para. 12.

[43] *The Prosecutor v. Edouard Karemera et al.*, Case N°ICTR, 98-44-A73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, paras. 7, 8.

Disposition

14. For the foregoing reasons, the Appeal is GRANTED, and the Impugned Decision is REVERSED. The Prosecution is ORDERED to permit inspection by the defence of all the requested immigration documents that it intends to use as exhibits during cross-examination. Furthermore, with respect to the other immigration documents not intended for use as exhibits, the Appeals Chamber REMITS this matter to the Trial Chamber for reconsideration consistent with this decision on whether they are material to the preparation of the defence.

Done in English and French, the English version being authoritative.

Done this 25th day of September 2006, At The Hague, The Netherlands.

[Signed]: Fausto Pocar

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Decision on Disclosure of Closed Session testimony of Witness FMB 26 September 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Gratien Kabiligi – Juvénal Kajelijeli – Disclosure of Closed Session testimony, Prospective witness in the Bagosora case – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 75 (G) (ii)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgement, 23 May 2005 (ICTR-98-44A) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Disclosure of Closed Session Testimony of BDR-1 and LK-2, 29 August 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion to Request the Communication of the Closed Sessions Transcripts of … Witness FMB", etc., filed by the Kabiligi Defence on 22 September 2006;

HEREBY DECIDES the motion.

1. The Kabiligi Defence in the *Bagosora et al*. trial requests disclosure of the closed session testimony of Witness FMB in the case of *The Prosecutor v. Juvenal Kajelijeli*. This same witness will

shortly appear as a Kabiligi witness in the *Bagosora* case. The Defence wishes to review the witness's prior testimony as part of its preparation.

2. As no Chamber is currently seized of the *Kajelijeli* trial, this request is properly made before this Chamber under Rule 75 (G) (ii) of the Rules of Procedure and Evidence[1]. The witness has apparently revealed his protected status to the Defence; accordingly, there is no reason not to order the disclosure of these Tribunal records, on the understanding that the applicable witness protection orders will apply *mutatis mutandis* to any party in the present case in receipt of the protected information[2].

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Registry to disclose the closed session transcripts and sealed exhibits of Witness FMB to the Kabiligi Defence;

ORDERS that the Kabiligi Defence and any other party in receipt of the protected information, including the Accused, are bound *mutatis mutandis* by the terms of the witness protection order governing the testimony of Witness FMB.

Arusha, 26 September 2006.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[1] Final judgement on appeal was rendered on 23 May 2005.
[2] See *Bagosora et al*., Decision on Disclosure of Closed Session Testimony of BDR-1 and LK-2 (TC), 29 August 2006, para. 4.

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Decision on Nsengiyumva's Extremely Urgent and Confidential Motion for Disclosure of Closed Session Testimony of Witness DO and his Unredacted Statements and Exhibits
27 September 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

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

Anatole Nsengiyumva – Disclosure of Closed Session Testimony, Protective measures ordered in any proceedings before the Tribunal shall continue to have effect in any other proceedings before the Tribunal, Factual nexus between the two cases – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A), 74 (F) (i), 75 (F) (i) and 75 (G) (i)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEISED OF the "Extremely Urgent Confidential Motion for Disclosure of Closed Session Testimony of Witness DO and his Unredacted Statements and Exhibits in *Prosecutor v. Ndindiliyimana* (ICTR-00-56-T)" filed by the Defence for Anatole Nsengiyumva on 11 September 2006 (the "Motion");

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 74 (F) (i) of the Rules;

NOTING that the Prosecution has not filed a response;

HEREBY DECIDES the Motion on the basis of the written submissions filed by the Defence for Nsengiyumva pursuant to Rule 73 (A) of the Rules.

1. Anatole Nsengiyumva, an Accused in the trial of *The Prosecutor v. Bagosora et al.* (also known as the *Military I* case), requests disclosure of the closed session transcripts, unredacted statements and exhibits in respect of protected Witness DO, who testified for the Prosecution in the present case. The Motion is brought pursuant to Rule 75 (G) (i)

2. The Chamber notes Rule 75 (F) (i) which provides that once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal, such protective measures shall continue to have effect in any other proceedings before the Tribunal unless and until they are rescinded, varied or augmented in accordance with the procedure set out in the Rules.

3. In two recent decisions, the Chamber held that confidential *inter partes* material may be disclosed to a party in another case provided that the applicant demonstrates that it "is likely to assist

that applicant's case materially, or […] there is a good chance that it would."[1] The Chamber further held that this standard can be met by showing that there is a factual nexus between the two cases.[2]

4. Nsengiyumva wishes to have access to the said material in order to prepare his defence. He submits that the testimony of Witness DO is exculpatory in nature since Witness DO recants himself in his testimony in the Military II case from what he said in the Military I case.

5. The Chamber notes that Witness DO testified in both the Military I case and the present case on the same issues. The Chamber is therefore satisfied that a sufficient factual nexus between the two cases is established.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion;

ORDERS the Prosecution and the Registry to transmit to the Nsengiyumva Defence the closed session transcripts of Witness DO's testimony, his unredacted statements and any exhibit filed under seal during his testimony before this Chamber;

DECLARES that the Nsengiyumva Defence and the Accused shall be bound *mutatis mutandis*, upon receipt of the confidential material, by the terms of the witness protection orders issued in the present case.[3]

Arusha, 27 September 2006.

[Signed]: Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

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[1] *Prosecutor v. Ndindiliyimana et al.,* Case N°ICTR-00-56-T, Decision on Nsengiyumva's Extremely Urgent and Confidential Motion for Disclosure of Closed Session Testimony of Witness OX and the Witness' Unredacted Statements and Exhibits, 23 August 2006, para. 3; Decision on Nyiramasuhuko's Extremely Urgent Motion for Disclosure of Closed Session Transcripts of Witness ANL/CJ**,** 30 August 2006, para. 2.

[2] Ibid.

[3] The Prosecutor v. Augustin Ndindiliyimana, Innocent Sagahutu, François-Xavier Nzuwonemeye, ICTR-2000-56-I, Order for Protective Measures for Witnesses, 12 July 2001; Le Procureur contre Augustin Bizimungu, Augustin Ndindiliyimana, Innocent Sagahutu, François-Xavier Nzuwonemeye, Affaire N°ICTR-2000-56-I, Décision sur la Requête du Procureur aux Fins de Modification et d'Extension des Mesures de Protection des Victims et des Témoins, 19 March 2004.

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Decision on Motion for Reconsideration 4 October 2006 (ICTR-98-41-AR73)

(Original: English)

Appeals Chamber

Judges : Mohamed Shahabuddeen, Presiding Judge ; Mehmet Güney ; Liu Daqun ; Theodor Meron ; Wolfgang Schomburg

Aloys Ntabakuze – Edouard Karemera et al. – Reconsideration of a decision in a case to which the applicant is not a party, Only a party to a decision of the Appeals Chamber may ask the Chamber to reconsider that decision, Advance of an alternative to the "genocide hypothesis", Inherent power of the Appeals Chamber to reconsider its decisions in instances, Absence of prejudice to the applicant – Motion dismissed

International Instrument cited :

Rules of Procedure and Evidence, rules 74 and 107

International Case cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 (ICTR-98-44)

1. THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of the "Alloys Ntabakuze Motion for Reconsideration of an Appeals Chamber Decision (or to Intervene in Such a Motion) and Ancillary Alternative Motion for Clarification of the Decision" filed on 14 July 2006 ("Motion") in which the Applicant requests

(i) A reconsideration of a decision on interlocutory appeal concerning judicial notice rendered in another case ("Impugned Decision");[1] or, in the alternative,

(ii) Leave to intervene in motions for reconsideration of the Impugned Decision filed by the accused in that case; and

(iii) Clarification of the Impugned Decision.

2. The Prosecution filed a Response opposing the Motion and the Applicant subsequently filed his Reply thereto.[2]

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[1] *The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ("Impugned Decision").

[2] "Prosecutor's Response to 'Aloys Ntabakuze Motion for Reconsideration of an Appeals Chamber Decision (or to Intervene in Such a Motion) and Ancillary Alternative Motion for Clarification of the Decision'", 21 July 2006 ("Response"); "Ntabakuze Reply to 'Prosecutor's Response to Alloys Ntabakuze Motion for Reconsideration of an Appeals Chamber Decision (or to Intervene in Such Motion) and Ancillary Alternative Motion for Clarification of the Decision'", 25 July 2006 ("Reply"). "Appendix to Aloys Ntabakuze Motion for Reconsideration of an Appeals Chamber Decision (or to Intervene in Such a Motion) and Ancillary Alternative Motion for Clarification of the Decision", 20 September 2006, was not considered due to its late filing. Consequently, "The Prosecutor's Motion to Object to the Filing of 'Appendix to Aloys Ntabakuze Motion for Reconsideration of an Appeals Chamber Decision (or to Intervene in Such a Motion) and Ancillary Alternative Motion for Clarification of the Decision'" of 25 September 2006, is moot. The Appeals Chamber will accordingly not

3. HEREBY RENDERS ITS DECISION as follows:

I. Background

4. On 16 June 2006, the Appeals Chamber issued the Impugned Decision, in which it directed the Trial Chamber in the *Karemera et al.* case to take judicial notice of facts 2, 5 and 6 listed in Annex A of the Prosecution's Interlocutory Appeal.[3] These facts are

> (i) The following state of affairs existed in Rwanda between 6 April 1994 to 17 July 1994: There were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed or caused serious bodily or mental harm to persons perceived to be of a Tutsi ethnic identity;
>
> (ii) Between 1 January 1994 and 17 July 1994 in Rwanda there was an armed conflict not of an international character;
>
> (iii) Between 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group.[4]

5. In support of the Motion, the Applicant submits that he has the requisite standing to independently bring this matter before the Appeals Chamber. However, should it be held that he does not have standing, he requests leave to intervene in motions for reconsideration filed by the appellants in the *Karemera et al.* case.[5]

6. The Applicant avers that the findings in the Impugned Decision affect all pending cases before the Tribunal and his case in particular.[6] He argues that he has "an immediate, compelling interest" in this matter which he distinguishes from other accused, including the appellants in the *Karemera et al.* case.[7] According to the Applicant, his defence is based on advancing an alternative to the "genocide hypothesis", and his Defence team already introduced evidence in this regard.[8] However, the Impugned Decision has the impact of cutting off the presentation of evidence and eliminating defences which are still the subject of active litigation in his case and while evidence in his defence is still being presented.[9] The Applicant, in his view, is therefore immediately and severely prejudiced based on principles of fair trial.[10]

7. The Applicant submits that the Appeals Chamber has the inherent power to reconsider its decisions in instances where there are new circumstances or where such decisions were erroneous and caused prejudice.[11]

8. The Applicant also, as an alternative remedy, seeks clarification of the Impugned Decision. He submits that the precise parameters of the Impugned Decision must be clearly delineated to avoid any

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consider it or the Applicant's Response of 26 September 2006, entitled "Ntabakuze Response to 'The Prosecutor's Motion to Object to the Filing of Appendix to Aloys Ntabakuze Motion for Reconsideration of an Appeals Chamber Decision (or to Intervene in Such a Motion) and Ancillary Alternative Motion for Clarification of the Decision'".

[3] Impugned Decision, para. 57, referring to The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera, Case N°ICTR-98-44-AR73(C) ("Karemera et al. case").

[4] *The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-AR73(C), The Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (Rule 73 (c)). 9 December 2005, Annex A.

[5] Motion, para. (i).

[6] Motion, para. 1.

[7] Motion, para. 2.

[8] Motion, para. 2.

[9] Motion, para. 3

[10] Motion, para. 3.

[11] Motion, para. 13.

error as to any permissible inferences that may be drawn from it.[12] This will enable him to determine the evidence that may or may not be presented in concluding his case and the treatment that will be accorded to the evidence already on record.[13]

9. The Prosecution responds that the Applicant has no standing to bring the Motion.[14] In its view, only Rules 74 and 107 of the Rules of Procedure and Evidence of the Tribunal ("Rules") could allow the Appeals Chamber to grant the Applicant standing in this case, but the Applicant has failed to satisfy the criteria set forth therein. Furthermore, the Applicant's request for reconsideration constitutes an exceptional discretionary remedy, and would only be justified where a clear error in reasoning, or injustice was demonstrated.[15] The Motion fails to satisfy this test.[16]

10. In addition, the Prosecution argues that the Applicant did not seek standing to intervene in motions for reconsideration filed in the *Karemera et al*. case in a timely manner.[17] He failed to intervene when the matter relating to the judicial notice of facts was being considered by the Trial Chamber and Appeals Chamber in the *Karemera et al*. case.[18] The Prosecution further argues that the Applicant's request for clarification of the Impugned Decision is baseless. The Prosecution avers that the Impugned Decision is sufficiently clear, and that it is up to the Trial Chamber in the Applicant's case to determine the scope of its application.[19] Accordingly, the Prosecution submits that the Motion should be dismissed in its entirety.

11. The Applicant replies that there is no predetermined regulatory regime that deals with the question of standing in this instance.[20] Rule 74 of the Rules is not applicable in his case as it is apparent that an *Amicus Curiae* is intended to assist a Chamber by being a "friend of the court" where someone else's interests are at stake.[21] In the present case, it is the Applicant's own interests that are at stake.[22] The Applicant argues that reconsideration procedure is based on the inherent jurisdiction and discretion of the Appeals Chamber to act in the interests of justice.[23] The exceptional remedy of reconsideration was created because there is no higher court to litigate matters that have been decided by the Appeals Chamber. It should therefore not be foreclosed to any one seeking redress on an issue that is causing him or her grave prejudice.[24]

12. The Applicant also submits in reply that there is no explicit Rule that limits standing to the original parties in the dispute. Any party that has been prejudiced by an Appeals Chamber decision may have standing to seek reconsideration in order to redress the prejudice suffered by that party.[25] The Applicant consequently maintains that he has standing to submit the Motion.

13. According to the Applicant, the Prosecution's submission that he failed to intervene before either the Trial Chamber or Appeals Chamber in the *Karemera et al*. case, has no merit.[26] Unlike the Office of the Prosecutor, which functions as one unit, Defence teams are barred from sharing information as they are bound by witness protection orders and counsel-client confidentiality.[27] The

[12] Motion, para. 40.
[13] Motion, paras. 38-41.
[14] Motion, para.6.
[15] Response, para. 8
[16] Response, paras. 8.
[17] Response, para. 9.
[18] Response para. 9.
[19] Response, para. 22.
[20] Reply, para. 12.
[21] Reply, para. 11.
[22] Reply, para. 11.
[23] Reply, para. 12.
[24] Reply, para. 12.
[25] Reply, para. 13.
[26] Reply, para. 14.
[27] Reply, para. 14.

Applicant avers that in his case, the issue of judicial notice has already been decided and the Trial Chamber did not take judicial notice of genocide, or of the ethnic character of the widespread or systematic violence.[28] Consequently, prejudice only became a live issue with the rendering of the Impugned Decision.[29]

II. Discussion

14. The Appeals Chamber notes that the Applicant seeks reconsideration of a decision on interlocutory appeal in a case to which he is not a party. He acknowledges that neither the Statute of the Tribunal ("Statute") nor the Rules prescribe who has standing to seek reconsideration and argues that any party that is prejudiced by a decision may have standing to seek its reconsideration in order to redress the prejudice suffered by that party.[30] The Appeals Chamber confirms that neither the Statute nor the Rules expressly settle the question of standing to seek reconsideration of a decision. However, the Appeals Chamber rejects the assertion that any person who alleges some form of prejudice as a consequence of a particular decision has the requisite standing to seek its reconsideration.

15. As a general principle, only a party to a decision of the Appeals Chamber may ask the Chamber to reconsider that decision. To hold otherwise would open the Appeals Chamber's reconsideration procedures to any non-party who is affected by a decision of the Chamber. In this case, the Applicant is a stranger to the *Karemera et al*. case. Accordingly he has no standing to seek reconsideration of the Appeals Chamber's decision. Also, the Appeals Chamber does not propose to entertain the Applicant's request for intervention at this stage. Moreover, his request for clarification in another case to which he is not a party has no merit.

16. The Appeals Chamber observes that the Applicant is in no way prejudiced. If the Trial Chamber in his own case takes judicial notice of the same or similar facts, he may challenge the matter there in accordance with his right to be heard. Finally, if the Applicant wants to seek further clarification [see above paragraph 1 (iii)] he may also do so in his own case.

III. Disposition

17. For the aforementioned reasons, the Appeals Chamber DISMISSES the Applicant's Motion in its entirety.

Done in English and French, the English text being authoritative.

Done this 4 October 2006, At The Hague, The Netherlands.

[Signed]: Mohamed Shahabuddeen

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[28] Reply, para. 15.
[29] Reply, para. 15.
[30] Motion, para. 15.

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Decision on Video-Conference Testimony of Kabiligi Witnesses KX-38 and KVB-46 5 October 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Gratien Kabiligi – Video-Conference Testimony, Interests of justice, Showing that the witness has a credible basis for the refusal oral testimony, Witness prominent opponent of the present Government of Rwanda, Witness former senior Rwandese official subsequently became a leader of an opposition group – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 54 and 75

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on the Prosecutor's Application to Add Witness X to Its List of Witnesses and for Protective Measures, 14 September 2001 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 October 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Testimony by Video-Conference, 20 December 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Disclosure of Closed Session Testimony of BDR-1 and LK-2, 29 August 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Kabiligi Defence "Motion to Request the Testimony of Witnesses KX-38 and KVB-46 via Video Link", filed on 20 September 2006;

HEREBY DECIDES the motion.

Introduction

1. The Kabiligi Defence requests that two of its witnesses be heard by video-conference. Both are willing to testify, but refuse to travel to Arusha on the basis that, as prominent opponents of the present Government of Rwanda, their security would be at risk.

Deliberations

2. Testimony by video-conference may be ordered pursuant either to Rule 54 of the Rules of Procedure and Evidence, on the basis that it is "in the interests of justice"; or as a witness protection

measure under Rule 75, which requires that the video-conference be "necessary to safeguard the witness's security".[1] The Kabiligi Defence invokes both Rules in support of the present application.

3. Whether video-conference testimony is in the interests of justice under Rule 54 depends on three factors: the importance of the testimony; the witness's inability or unwillingness to attend; and whether a good reason has been adduced for that inability or unwillingness.[2] Although it is not absolutely necessary that the reason for the refusal to attend be objectively justified, a showing must at least be made that the witness has a credible basis for the refusal, and that those grounds are genuinely held.[3]

4. Witness KX-38 refuses to travel to Arusha on the basis that he is a prominent opponent of the present Government of Rwanda. He went into exile in 1994. The motion suggests that the witness's fears are based on the untimely and unexplained deaths of other members of the opposition and on alleged ongoing harassment. He is said to have known the Accused for a long time and is in a position to testify that the Accused was not racially prejudiced or an extremist. The witness's refusal to travel to Arusha is manifest in an email from the witness to counsel for the Defence, which is contained in a confidential and *ex parte* annex to the motion.[4]

5. Witness KVB-46 is a former senior Rwandese official who subsequently became a leader of an opposition group. The motion indicates that he has first-hand knowledge that the Accused supported the Arusha Accords. The witness states in an email to Counsel for Kabiligi that his refusal to testify in Arusha is "a matter of life or death".[5]

6. The Defence has established that both witnesses refuse to travel to Arusha on the basis of genuinely-held fears. Although the Chamber is not in a position to determine the objective justification of those fears, the Defence has shown that both witnesses are high-profile individuals who may be particularly anxious about their security. The witnesses appear to be able to give potentially exculpatory testimony in respect of clearly-defined issues. On this basis, the Chamber considers that it is in the interests of justice to allow these witnesses to testify by video-conference.

FOR THE ABOVE REASONS, THE CHAMBER

AUTHORIZES the taking of the testimony of Witness KX-38 and Witness KVB-46 by video-conference;

INSTRUCTS the Registry, in consultation with the parties, to make all necessary arrangements, in respect of the testimony of Witness KX-38 and Witness KVB-46 by video-conference and to videotape the testimony for possible future reference by the Chamber.

Arusha, 5 October 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[1] *Bagosora et al*., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004, paras. 5-8; *Nahimana et al*., Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures (TC), 14 September 2001.
[2] *Bagosora et al*., Decision on Prosecution Request for Testimony of Witness BT via Video Link, 8 October 2004, para 6; *Bagosora et al*., Decision on Testimony by Video-Conference (TC), 20 December 2004, para. 4.
[3] *Bagosora et al*., Decision on Testimony of Witness Amadou Deme by Video-Link (TC), 29 August 2006, para. 5; *Bagosora et al*., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004, paras. 6, 13.
[4] Motion, Annex B.
[5] Motion, Annex D.

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Decision on Ntabakuze Motion for Disclosure of Prosecution files 6 October 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Aloys Ntabakuze – Disclosure Obligation of the Prosecutor, Presumption of good faith of the Prosecutor in the execution of its obligation, Definition of the exculpatory material – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 68 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Gratien Kabiligi, Decision on the Defence motion Seeking Supplementary Investigations, 1 June 2000 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Clément Kayishema, Decision (deuxième requête de C. Kayishema aux fins de présentation à la Chambre d'appel de nouveaux moyens de preuve à partir du mémorandum rédigé par M. Hourigan), 28 September 2000 (ICTR-95-1) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba, Décision relative à la requête de Joseph Nzirorera aux fins d'obtenir la coopération du Gouvernement français, 23 February 2005 (ICTR-98-44) ; Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgement, 23 May 2005 (ICTR-98-44A) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses, 27 September 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Reconsideration of Oral Ruling of 1 June 2005 on Evidence Relating to the Crash of the Plane Carrying President Habyarimana, 23 February 2006 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A), 8 March 2006 (ICTR-998-41) ; Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Ntabakuze Motion for Exclusion of Evidence, 29 June 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Casimir Bizimungu's Requests for Disclosure of the Bruguière Report and the Cooperation of France, 25 September 2006 (ICTR-99-50)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Zejnil Delalić et al., Decision on the Request by the Accused Hazim Delić Pursuant to Rule 68 for Exculpatory Information, 24 June 1997 (IT-96-21) ; Appeals Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Decision on Motion by Dario Kordić for Access to Unredacted Portions of October 2002 Interviews with Witness "AT", 23 May 2003 (IT-95-14/2) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Judgement, 29 July 2004 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Radoslav Brđanin, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004 (IT-99-36)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion for the Disclosure of Exculpatory Evidence", filed by the Ntabakuze Defence on 7 November 2005;

CONSIDERING the Prosecution Response, filed on 10 November 2005; and the Reply to the Prosecutor's Response, filed on 14 November 2005;

HEREBY DECIDES the motion.

Introduction

1. The Defence for Ntabakuze requests an order requiring the Prosecution to disclose "any and all evidence gathered by the Office of the Prosecutor concerning actions of members of the RPF".[1] The Defence claims that this information is exculpatory and must, accordingly, be disclosed in accordance with Rule 68 of the Rules of Procedure and Evidence. The Prosecution responds that Rule 68 requires disclosure only of material which shows that the RPF, rather than the Accused, committed the very crimes with which the Accused are charged. The Prosecution asserts that its review of the material in its possession does not reveal any such evidence.[2]

Deliberations

2. Rule 68 (A) provides that the Prosecution has an obligation to disclose

> "any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence".

The Appeals Chamber has consistently interpreted the words "actual knowledge" to require that the information be in the Prosecution's possession.[3] Accordingly,

> "[t]he initial decision as to whether material has to be disclosed under Rule 68 has to be made by the Prosecutor".[4]

This determination "is primarily a facts-based judgement made by and under the responsibility of the Prosecution", which is presumed to discharge its obligation in good faith.[5] If the Defence claims that the obligation has been violated, it must: (i) define the exculpatory material with reasonable specificity; (ii) establish that the material is in the custody and control of the Prosecution; and (iii) present a *prima facie* case that the material is exculpatory.[6]

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[1] Defence Motion, p. 5.
[2] Prosecution Response, para. 6.
[3] *Kajelijeli*, Judgement (AC), 23 May 2005, para. 262 ("Defence must first establish that the evidence was in the possession of the Prosecution"); *Brđanin*, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials (AC), 7 December 2004 (application must "be accompanied by all *prima facie* proofs tending to show that it is likely that the evidence is exculpatory and is in the possession of the Prosecution"); *Blaskic*, Judgement (AC), 29 July 2004, para. 268 (applicant must establish that material "might prove exculpatory for the accused and is in the possession of the Prosecution"); *Bagosora et al*., Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses (TC), 27 September 2005, para. 3 ("a request for production of documents has to be sufficiently specific as to the nature of the evidence sought and its being in the possession of the addressee of the request").
[4] *Kordic and Cerkez*, Decision on Motion by Dario Kordic for Access to Unredacted Portions of October 2002 Interviews with Witness "AT" (AC), 23 May 2003, para. 24.
[5] *Blaskic*, Judgement (AC), 29 July 2004, para. 264; *Bagosora et al*., Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses (TC), 27 September 2005, para. 3 ("a request for production of documents has to be sufficiently specific as to the nature of the evidence sought and its being in the possession of the addressee of the request").
[6] *Blaskic*, Judgement (AC), 29 July 2004, para. 268; *Karemera et al*., Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 13 ("To establish a violation of the Rule 68 disclosure obligation, the Defence must (i) establish

3. A previous decision of this Chamber has expressed its view that a *prima facie* basis exists to believe that information concerning some – but not all – RPF activities may be exculpatory.[7] The Chamber ordered partial disclosure of the statements of two witnesses describing such activities:

> The Chamber is of the view, having examined the statements of Witness DM-46 and DM-80, that some of the information may be exculpatory. For example, descriptions of infiltration into areas of government control by RPF soldiers disguised as civilians could provide context or background information which may assist the Chamber in understanding some of the conduct about which the Chamber has heard testimony during the Prosecution case. Information concerning the assassination of President Habyarimana may also assist the Chamber in understanding the background to events in April 1994. The admission of any particular element of evidence will depend on the purpose for which it is tendered; whether the extent of detail is necessary for that purpose; and the Chamber's discretion to avoid needless consumption of time.
>
> On the other hand, some of the information in the statements of the two witnesses is not exculpatory. Descriptions of crimes committed by RPF forces against civilians in geographic areas physically distant from combat between the opposing armed forces in 1994 would not suggest the innocence or mitigate the guilt of the accused. The impact of such events on the criminal conduct with which the accused are charged is too remote and indirect. The Defence submissions have not demonstrated that such information would assist in disproving any element of the offences with which the Accused are charged, or how it could sustain a valid excuse or justification for their alleged conduct. The possible uses of such information suggested by the Defence would not, in the Chamber's view, be exculpatory.[8]

4. Information is exculpatory only if it tends to disprove a material fact alleged against the Accused, or if it undermines the credibility of evidence intended to prove those material facts. This depends on the nature of the charges and evidence heard against the Accused.[9] Evidence of widespread infiltration by RPF operatives dressed as civilians, or operating in specific locations relevant to the Indictment, could be germane to crimes alleged against the Accused or those under his command.[10] The presence of RPF soldiers at specific locations where the Accused or his subordinates are alleged to have committed crimes could, depending on the nature of the information, also be exculpatory.

5. On the other hand, evidence of RPF activities which have only a remote connection to the crimes alleged against the Accused is not exculpatory. For this reason, evidence of RPF operations at times or places unrelated to the crimes alleged against the Accused is not exculpatory. Furthermore, no criminal responsibility is alleged or implied against the Accused for the death of President Habyarimana. Paragraph 6.2 of the Indictment states that:

> "On 6 April 1994 at about 8:30 p.m., the plane carrying, among other passengers, the President of the Republic, Juvénal Habyarimana, was shot down on its approach to Kigali Airport, Rwanda."

This event is characterized as the trigger for the alleged crimes which followed, but nowhere does the Indictment or the Pre-Trial Brief suggest that the Accused or any of his alleged co-conspirators were involved. Indeed, the Prosecution has declared unequivocally that the Accused is not charged

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that additional material exists in the possession of the Prosecution; and (ii) present a *prima facie* case that the material is exculpatory").

[7] *Bagosora et al*., Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A) (TC), 8 March 2006.

[8] *Id*., paras. 6-7 (citations omitted).

[9] *Bagosora et al*., Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006, para. 10.

[10] The Defence has made clear its intention to pursue this strategy in defence of the Accused: e.g., T. 28 April 2005 pp. 66-67.

with any involvement whatsoever in the former President's death.[11] Accordingly, although the fact of the shooting down of the plane is relevant to the case as providing context or background, the Defence has not shown that detailed information concerning the responsibility of any particular person is relevant to the charges against the Accused.[12]

6. Although some of the material within the category defined by the Defence may be exculpatory, this does not justify an order for disclosure of the entire category. The Prosecution is presumed to have diligently and in good faith discharged its obligation to disclose such information as may be exculpatory, in accordance with this and other rulings.[13] Disclosure of an entire category of documents will only be ordered under Rule 68 where the category is accurately tailored to the exculpatory content. A very similar request for information concerning the conduct of enemy forces was rejected on this basis in *Delalić et al*.:

> [A]ny request for disclosure of information should clearly specify the material desired. The Request before the Trial Chamber fails to do so. It generally refers to all the evidence in the hands of the Officer of the Prosecutor concerning the conduct of forces of the Republic of Serbia, the Bosnian Serbs and others. The Rules permitting disclosure of certain documents cannot be used freely as a means to obtain all information from the Prosecution and then subsequently to determine whether it can be used or not.[14]

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 6 October 2006.

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[11] Prosecution Response to "Bagosora Defence Urgent Motion for Investigation and Production of (Additional) Evidence …", etc., filed on 19 December 2005.

[12] This approach is confirmed in numerous decisions in relation to identically or similarly worded indictments: *Kayishema*, Decision (AC), 28 September 2000, p. 3 ("*CONSIDERANT qu'au soutien de sa demande le Requérant affirme que le Mémorandum Hourigan donne des indications sur les auteurs présumés de l'attentat contre l'avion du Président rwandais; que le Procureur du Tribunal de l'époque a cru devoir arrêter les enquêtes menées à ce sujet par M. Hourigan; que ces faits, qui n'étaient pas connus lors du procès du Requérant, rouvriraient le débat sur la question de la culpabilité de celui ci; CONSIDERANT que le Mémorandum Hourigan n'était bien entendu pas disponible lors du procès en première instance, mais que sa teneur, que le Requérant cite, ne pouvait avoir un rapport avec les questions relatives au génocide sur lesquelles la Chambre de première instance devait se prononcer; qu'il n'est pas dès lors dans l'intérêt de la justice de l'admettre comme moyen de prevue supplémentaire en appel*"); *Bizimungu et al*., Decision on Casimir Bizimungu's Requests for Disclosure of the Bruguière Report and the Cooperation of France (TC), 25 September 2006, para. 27; *Bizimungu et al*., Reconsideration of Oral Ruling of 1 June 2005 on Evidence Relating to the Crash of the Plane Carrying President Habyarimana (TC), 23 February 2006, paras. 10-11 ("The potential involvement or responsibility of the RPF or other forces not associated with the government of Rwanda cannot relieve the Accused of responsibility for the crimes they have been charged with. The Chamber is of the opinion that evidence as to who is responsible for the crash of the President's plane would not assist the Chamber in its decision as to the guilt or innocence of the Accused … the jurisprudence of the Tribunal shows that questions relating to the responsibility of the shooting down of the plane may be put to a witness provided that this line of questioning does not go into great detail"); *Karemera et al*., *Décision Relative à la Requête de Joseph Nzirorera aux Fins d'Obtenir la Coopération du Gouvernement Français* (TC), 23 February 2005, para. 11 (denying a motion for the Chamber to issue a request to the government of France to disclose to the Defence a report concerning those responsible for shooting down the Presidential plane); *Karemera et al*., Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2003, para. 14 ("The Defence has not shown how such materials, if they exist, could suggest the innocence of the Accused, who is not charged with taking part in the assassination, or how such materials could tend to mitigate the Accused's personal guilt or affect the credibility of the prosecution evidence"); *Kabiligi*, Decision on the Defence motion Seeking Supplementary Investigations (TC), 1 June 2000, para. 19 ("Defence Counsel has failed to establish any causal link between the requested investigation into the responsibility for the plane crash and the acts and omissions which form the basis of the charges against Kabiligi in the Indictment").

[13] *Karemera et al*., Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 17 ("The Trial Chamber is entitled to assume that the Prosecution is acting in good faith").

[14] *Delalic et al*., Decision on the Request of the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information (TC), 24 June 1997, para. 15.

[Signed]: Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68 6 October 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Aloys Ntabakuze – Disclosure Obligation of the Prosecutor, Facts-based judgement made by and under the responsibility of the Prosecution as to the documents to disclose, Obligation of the Prosecutor to review, identify and disclose any documents which may be exculpatory – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 68 (A)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgement, 23 May 2005 (ICTR-98-44A) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses, 27 September 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A), 8 March 2006 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Ntabakuze Motion for Information from the UNHCR and a Meeting With One of Its Officials, 6 October 2006 (ICTR-98-41)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Decision on Motion by Dario Kordić for Access to Unredacted Portions of October 2002 Interviews with Witness "AT", 23 May 2003 (IT-95-14/2) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Judgement, 29 July 2004 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Radoslav Brđanin, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004 (IT-99-36)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF a "Motion for an Order Compelling the Prosecutor to Disclose Various Exculpatory Documents Pursuant to Rule 68", filed by the Ntabakuze Defence on 2 June 2006;

CONSIDERING the Prosecution Response, filed on 7 June 2006, and the Ntabakuze Reply, filed on 27 June 2006;

HEREBY DECIDES the motion.

Introduction

1. The Ntabakuze Defence seeks disclosure from the Prosecution of eight categories of documents, on the basis that the documents may be exculpatory under Rule 68 (A) of the Rules of Procedure and Evidence. The documents consist of reports by UN agencies or the Office of the Prosecutor itself concerning events in Rwanda in 1994. One of the categories of documents – concerning reports prepared by the United Nations High Commissioner for Refugees – is the object of a separate motion filed by the Ntabakuze Defence which requests substantially the same relief on the same grounds. A separate decision, filed today, will address that request.[1]

Deliberations

2. Rule 68 (A) provides that the Prosecution has an obligation to disclose

> "any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence".

The Appeals Chamber has consistently interpreted the words "actual knowledge" to require that the information be in the Prosecution's possession.[2] Accordingly, "[t]he initial decision as to whether material has to be disclosed under Rule 68 has to be made by the Prosecutor".[3] This determination "is primarily a facts-based judgement made by and under the responsibility of the Prosecution", which is presumed to discharge its obligation in good faith.[4] If the Defence claims that the obligation has been violated, it must: (i) define the exculpatory material with reasonable specificity; (ii) establish that the material is in the custody and control of the Prosecution; and (iii) present a *prima facie* case that the material is exculpatory.[5]

3. The Prosecution denies possessing any documents in four of the eight categories requested by the Defence: alleged files arising from an investigation by Michael Hourigan into the assassination of President Habyarimana on 6 April 1994; an alleged report by Mr. Hourigan to Louise Arbour concerning the assassination of President Habyarimana on 6 April 1994; reports by human rights observers regarding demographic changes in Rwanda; and documents from the United Nations Rwanda Emergency Office.[6] The Defence has not contested this submission. In the absence of any indication to the contrary, the Chamber accepts this submission and denies any order in respect of these four categories.

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[1] *Bagosora et al*., Decision on Ntabakuze Motion for Information from the UNHCR and a Meeting With One of Its Officials (TC), 6 October 2006.

[2] *Kajelijeli*, Judgement (AC), 23 May 2005, para. 262 ("Defence must first establish that the evidence was in the possession of the Prosecution"); *Brđanin*, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials (AC), 7 December 2004 (application must "be accompanied by all *prima facie* proofs tending to show that it is likely that the evidence is exculpatory and is in the possession of the Prosecution"); *Blaskic*, Judgement (AC), 29 July 2004, para. 268 (applicant must establish that material "might prove exculpatory for the accused and is in the possession of the Prosecution"); *Bagosora et al*., Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses (TC), 27 September 2005, para. 3 ("a request for production of documents has to be sufficiently specific as to the nature of the evidence sought and its being in the possession of the addressee of the request").

[3] *Kordic and Cerkez*, Decision on Motion by Dario Kordic for Access to Unredacted Portions of October 2002 Interviews with Witness "AT" (AC), 23 May 2003, para. 24.

[4] *Blaskic*, Judgement (AC), 29 July 2004, para. 264; *Bagosora et al*., Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses (TC), 27 September 2005, para. 3 ("a request for production of documents has to be sufficiently specific as to the nature of the evidence sought and its being in the possession of the addressee of the request").

[5] *Blaskic*, Judgement (AC), 29 July 2004, para. 268; *Karemera et al*., Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 13 ("To establish a violation of the Rule 68 disclosure obligation, the Defence must (i) establish that additional material exists in the possession of the Prosecution; and (ii) present a *prima facie* case that the material is exculpatory").

[6] Response, paras. 3 (d), 3 (e), 3 (f) and 3 (h).

4. Three categories of documents remain for consideration: "Human Rights Field Office for Rwanda ("HRFOR") reports related to individual massacre and/or burial sites, as well as summaries and reports relating to the 1994 events in Rwanda"; "OTP Special Investigation Unit ("SIU") reports related to individual massacre and/or burial sites, as well as summaries and reports relating to the 1994 events in Rwanda"; "Weekly summary reports by UNAMIR Military Observers to Headquarters in Kigali for all of 1994 and the first six months of 1995".[7] The Defence submits that the documents will support the "Ntabakuze theory of the case as described in the Ntabakuze pre-defence brief", and explains how the categories described could potentially contain exculpatory documents. The Prosecution does not deny possession of documents in these categories, but submits that the documents have been reviewed and that any exculpatory information has already been disclosed.[8]

5. The Chamber must accept that the Prosecution has reviewed the documents in its possession in good faith and has complied with its disclosure obligations. The categories of documents are not so specific as to require disclosure of every document falling within their ambit. Under these circumstances, the Prosecution is obliged to review, identify and disclose any documents which may be exculpatory. In the absence of any showing that it has done otherwise, there is no basis for any order under Rule 68.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 6 October 2006.

[Signed] : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[7] Motion, para. 1.
[8] Prosecution Response, paras. 3 (b), 3 (c) and 3 (g).

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Decision on Request for Cooperation of the Government of France 6 October 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Cooperation of the States, France, Bruguière Report, Relevancy of the report to the Trial, Relevancy of the assassination of President Habyarimana to the Trial, Matter of contextual significance – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rule 89 (C) ; Statute, art. 28

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request to the Kingdom of The Netherlands for Cooperation and Assistance, 7 February 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A), 8 March 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion for Request of Cooperation from the Government of France Pursuant to Article 28 of the Statute", filed by the Ntabakuze Defence on 28 April 2006;

CONSIDERING the Prosecution Response, filed on 28 April 2006; and the Ntabakuze Reply, filed on 2 May 2006;

HEREBY DECIDES the motion.

Introduction

1. The Ntabakuze Defence asks the Chamber to issue a request to the Government of France, pursuant to Article 28 of the Statute, for the disclosure of a report concerning the attack on President Habyarimana's airplane on the night of 6 April 1994. The so-called "Bruguière Report", which allegedly blames the RPF for the attack, is said to be "indispensable" to the Defence.

Deliberations

2. Article 28 of the Statute imposes an obligation on States to

> "cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law".

A request to a Chamber to make an order under Article 28 must set forth the nature of the information sought; its relevance to the trial; and the efforts that have been made to obtain it. The type of assistance sought should also be defined with particularity.[1]

6. The key question in the present application is whether the report, as described by the Defence, is relevant to this trial. Paragraph 6.1 of the Indictment states that:

> "On 6 April 1994 at about 8:30 p.m., the plane carrying, among other passengers, the President of the Republic, Juvénal Habyarimana, was shot down on its approach to Kigali Airport, Rwanda."

This event is characterized as the trigger for the alleged crimes which followed, but nowhere does the Indictment or the Pre-Trial Brief suggest that the Accused or any of his alleged conspirators were involved, directly or indirectly. Indeed, the Prosecution has declared unequivocally that the Accused is not charged with any involvement whatsoever in the former President's death.[2]

4. This Chamber has previously addressed the extent to which the assassination of President Habyarimana may be relevant to the present trial in the context of a request for disclosure of exculpatory material. It held that

> "[i]nformation concerning the assassination of President Habyarimana may also assist the Chamber in understanding the background to events in April 1994".[3]

In a subsequent decision, however, the Chamber explained that

> "although the fact of the shooting down of the plane is relevant to the case as providing context or background, the Defence has not shown that detailed information concerning the responsibility of any particular person is relevant to the charges against the Accused".[4]

The scope of relevance has been described by another Trial Chamber as meaning that

> "questions relating to the responsibility for the shooting down of the plane may be put to a witness provided that this line of questioning does not go into great detail".[5]

The approach adopted in these decisions may be summarized as follows: the fact of the shooting down of the plane is relevant to the case as providing context or background, but detailed information concerning the responsibility of any particular person is not.[6]

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[1] *Bagosora et al*., Decision on Request to the Kingdom of The Netherlands for Cooperation and Assistance (TC), 7 February 2005, para. 5; *Bagosora et al*., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4.

[2] *Bagosora et al*., Prosecution Response to "Bagosora Defence Urgent Motion for Investigation and Production of (Additional) Evidence …", etc., filed on 19 December 2005.

[3] *Bagosora et al*., Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A) (TC), 8 March 2006, para. 6.

[4] *Bagosora et al*., Decision on Ntabakuze Motion for Disclosure of Prosecution Files (TC), 3 October 2006, para. 5.

[5] *Bizimungu et al*., Reconsideration of Oral Ruling of June 2005 on Evidence Relating to the Crash of the Plane Carrying President Habyarimana (TC), 23 February 2006, para. 11.

[6] This approach is confirmed in numerous decisions in relation to identically or similarly worded indictments: *Kayishema*, Decision (AC), 28 September 2000, p. 3 ("*CONSIDERANT qu'au soutien de sa demande le Requérant affirme que le Mémorandum Hourigan donne des indications sur les auteurs présumés de l'attentat contre l'avion du Président rwandais; que le Procureur du Tribunal de l'époque a cru devoir arrêter les enquêtes menées à ce sujet par M. Hourigan; que ces faits, qui n'étaient pas connus lors du procès du Requérant, rouvriraient le débat sur la question de la culpabilité de celui ci; CONSIDERANT que le Mémorandum Hourigan n'était bien entendu pas disponible lors du procès en première instance, mais que sa teneur, que le Requérant cite, ne pouvait avoir un rapport avec les questions relatives au génocide sur lesquelles la Chambre de première instance devait se prononcer; qu'il n'est pas dès lors dans l'intérêt de la justice de l'admettre comme moyen de prevue supplémentaire en appel*"); *Bizimungu et al*., Reconsideration of Oral Ruling of 1 June 2005 on Evidence Relating to the Crash of the Plane Carrying President Habyarimana (TC), 23 February 2006, paras. 10-11 ("The potential involvement or responsibility of the RPF or other forces not associated with the government of Rwanda cannot relieve the Accused of responsibility for the crimes they have been charged with. The Chamber is of the opinion that evidence as to who is responsible for the crash of the President's plane would not assist the Chamber in its decision as to the

5. The Defence argues that the existence of an RPF plot to shoot down the Presidential plane, if proven, could be probative of a broader plan to unleash an armed conflict with government forces, an inevitable consequence of which was "widespread killings".[7] The implication, it seems, is that criminal responsibility for the whole course of events between April and July 1994 could, by virtue of this information, be shifted from the Accused to other persons.

6. As discussed in another decision of this Chamber decided today, the applicant for a request under Article 28 must indicate how the information is relevant to an issue before the Judge or Trial Chamber and necessary for a fair determination of that issue.[8] The Defence has failed to discharge its burden of showing by specific references how the information in the alleged report is relevant to disproving elements of the Prosecution case. The identity of the killers of President Habyarimana is undoubtedly a matter of contextual significance for the events described in the Indictment against the Accused. On this basis, the Chamber has admitted some evidence concerning this event. On the other hand, the Chamber must exercise its discretion under Rule 89 (C) to ensure that the focus of the present trial is maintained. Even if the report attributed responsibility for the attack on the Presidential plane to persons other than the Accused or their alleged co-conspirators, it is not clear to the Chamber how this would tend to disprove elements of the Prosecution case in this trial.[9] The admission of detailed evidence on what is, essentially, a matter of collateral and indirect relevance would not assist the Chamber in determining the core issues of this trial.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 6 October 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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guilt or innocence of the Accused … the jurisprudence of the Tribunal shows that questions relating to the responsibility of the shooting down of the plane may be put to a witness provided that this line of questioning does not go into great detail"); *Karemera et al*., Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2003, para. 14 ("The Defence has not shown how such materials, if they exist, could suggest the innocence of the Accused, who is not charged with taking part in the assassination, or how such materials could tend to mitigate the Accused's personal guilt or affect the credibility of the prosecution evidence").

[7] *Bagosora et al*., Ntabakuze Defence Motion for the Disclosure of Exculpatory Evidence, filed on 7 November 2005, fn. 11.

[8] *Bagosora et al*., Decision on Ntabakuze Motion for Information From the UNHCR and a Meeting With One of Its Officials (TC), para. 7.

[9] Previous requests for assistance in obtaining the Bruguière report have also been denied by other Chambers: *Bizimungu et al*., Decision on Casimir Bizimungu's Requests for Disclosure of the Bruguière Report and the Cooperation of France (TC), 25 September 2006, para. 27; *Karemera et al*., *Décision Relative à la Requête de Joseph Nzirorera aux fins d'Obtenir la Coopération du Gouvernement Français* (TC), 23 February 2005, para. 11 ("*La Chambre rappelle que, par la suite, la jurisprudence a établi que la responsabilité éventuelle du FPR ou de ses agents dans l'assassinat du Président Habyarimana n'avait aucune incidence sur l'imputation des actes criminels commis en 1994 au Rwanda*"); *Kabiligi*, Decision on the Defence Motion Seeking Supplementary Investigations (TC), 1 June 2000, para. 19 ("Defence Counsel failed to establish any causal link between the requested investigation into the responsibility for the plane crash and the acts and omissions which form the basis of the charges against Kabiligi in the Indictment").

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Decision on Request for Subpoenas of United Nations Officials 6 October 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Issuance of subpoenas to UN Official, Officials in charge of the Department of Peacekeeping Operations in 1994, Former investigator of the Office of the Prosecutor, Specificity of the identification of prospective testimony, Directness of a witness's observation of events as an important criterium for the issuance of a subpoena, Information justifying issuance of subpoena, State of contemporaneous knowledge of a plan to commit genocide, Legal relevance as the standard for determining the admission of evidence, Identity of the killers of President Habyarimana as a matter of contextual significance – Nature of the conspiracy charge – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 89 (C)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Gratien Kabiligi, Decision on the Defence motion Seeking Supplementary Investigations, 1 June 2000 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Clément Kayishema, Decision (deuxième requête de C. Kayishema aux fins de présentation à la Chambre d'appel de nouveaux moyens de preuve à partir du mémorandum rédigé par M. Hourigan), 28 September 2000 (ICTR-95-1) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Proposed Testimony of Witness DBY, 18 September 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Request for a Subpoena Regarding Witness BT, 25 August 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Bagosora Defence's Request for a Subpoena Regarding Mamadou Kane, 22 October 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Motions for Judgement of Acquittal, 2 February 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Décision relative à la Requête de Joseph Nzirorera aux fins d'obtenir la coopération du Gouvernement français, 23 February 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Motion Requesting Subpoenas to Compel the Attendance of Defence Witnesses DK 32, DK 39, DK 51, DK 52, DK 31 1 and DM 24, 26 April 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al.,Decision on Defence Motion for Issuance of Subpoena to Witness T, 8 February 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Reconsideration of Oral Ruling of 1 June 2005 on Evidence Relating to the Crash of the Plane Cariying President Habyarinmna, 23 February 2006 *(ICTR-99-50) ;* Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A), 8 March 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3, 12 July 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for a Subpoena for Major Jacques Biot, 14 July 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on

Request for a Subpoena Compelling Witness DAN to Attend for Defence Cross-Examination, 31 August 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for a Subpoena, 11 September 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Ntabakuze Motion for Information From the UNHCR and a Meeting With One of Its Officials, 6 October 2006 (ICTR-98-41)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Radislav Krstić, Decision on Application for subpoenas, 1 July 2003 (IT-98-33) ; Appeals Chamber, The Prosecutor v. Sejér Halilović, Decision on Issuance of Subpoenas, 21 June 2004 (IT-01-48) ; Trial Chamber, The Prosecutor v. Slobodan Milošević, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Shröder, 9 December 2005 (ICTR-02-54)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Request for *Subpoenas* of Kofi Annan, Iqbal Riza, Shaharyar Khan and Michael Hourigan Pursuant to Rule 54", filed by the Ntabakuze Defence on 25 August 2006;

CONSIDERING the Submissions filed by the Bagosora Defence on 5 September 2006; the Submissions of the United Nations Office of Legal Affairs, dated 7 September 2006; and the Memorandum and Annexes filed by the Ntabakuze Defence on 15 September 2006;

HEREBY DECIDES the motion.

Introduction

1. The Ntabakuze Defence requests that *subpoenas* be issued to Kofi Annan and Iqbal Riza, who were officials of the Department of Peacekeeping Operations ("DPKO") in New York in 1994; Shaharyar Khan, who became the Special Representative of the Secretary-General ("SRSG") in Rwanda in the middle of 1994; and Michael Hourigan, a former investigator of the Office of the Prosecutor. The Defence requests that the *subpoenas* require the latter three to appear before the Chamber to give testimony, whereas the request in respect of Mr. Annan is only that he be compelled to submit to an interview.

2. The Office of Legal Affairs of the United Nations has responded to the motion arguing that the Defence has not yet articulated the legal and factual basis for the appearance of the witnesses, or the need to interview Mr. Annan. The Office of Legal Affairs claims that it has offered extensive cooperation and assistance to the Defence and wishes to continue to do so; its opposition to the requests for *subpoenas* "does not stem from our unwillingness or refusal to assist [the Defence] but from [its] failure to comply with arrangements that [it] has already repeatedly acknowledged and from which [it] has repeatedly benefited."[1]

Deliberations

(I) General Principles

3. The applicant for a *subpoena* requiring a person to give testimony or submit to an interview must show that three conditions are satisfied: (i) reasonable attempts have been made to obtain the voluntary cooperation of the witness; (ii) the prospective witness has information which can materially

[1] Submissions, p. 6.

assist the applicant in respect of clearly identified issues relevant to the trial; and (iii) the witness's testimony must be necessary and appropriate for the conduct and fairness of the trial.[2] It has been said that "*subpoenas* should not be issued lightly" and that a Chamber must consider "not only the usefulness of the information to the applicant but … its overall necessity in ensuring that the trial is informed and fair".[3] The Appeals Chamber has elaborated that:

> The applicant seeking a *subpoena* must make a certain evidentiary showing of the need for the *subpoena*. In particular, he must demonstrate a reasonable basis for his belief that the prospective witness is likely to give information that will materially assist the applicant with respect to clearly identified issues in the forthcoming trial. To satisfy this requirement, the applicant may need to present information about such factors as the position held by the prospective witness in relation to the events in question, any relation the witness may have had with the accused which is relevant to the charges, any opportunity the witness may have had to observe or learn about those events, and any statements the witness made to the Prosecution or others in relation to them. The Trial Chamber is vested with discretion in determining whether the applicant succeeded in making the required showing, this discretion being necessary to ensure that the compulsive mechanism of the *subpoena* is not abused. As the Appeals Chamber has emphasized, "*Subpoenas* should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction".[4]

Chambers have considered factors such as the specificity with which the prospective testimony is identified and whether the information can be obtained other than through the prospective witness.[5]

(II) APPLICATION

(a) Kofi Annan and Iqbal Riza

4. The Defence argues that, as the officials who were in charge of the Department of Peacekeeping Operations in 1994, Mr. Annan and Mr. Riza have information relevant to the trial. They are in a position to "explain the circumstances" surrounding the correspondence between UNAMIR officials in Rwanda and DPKO in New York, much of which has been admitted into evidence and on which General Roméo Dallaire and Major Brent Beardsley, among others, have given testimony. The Defence wishes to elicit evidence that the DPKO had no information suggesting that, in the months leading up to April 1994, there was any plan or conspiracy to commit genocide as is alleged in the Indictment. Mr. Annan and Mr. Riza are said to be in a position to testify as to what they were told by General Dallaire and others, on a variety of issues which are specifically enumerated in the motion, and their understanding of events based on that information.[6]

5. The directness of a witness's observation of events is an important criterion in determining whether a *subpoena* should be issued. Every witness to whom a *subpoena* has been issued in the present case was an eyewitness to the conduct of the Accused or their subordinates.[7] Although the

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[2] *Prosecutor v. Krstic*, Case N°IT-98-33-A, Decision on Application for Subpoenas (AC), 1 July 2003, para. 10; *Prosecutor v. Halilovic,* Case N°IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 7 ("*Halilovic* Decision"); *Bagosora et al*., Decision on Request for a Subpoena (TC), 11 September 2006, para. 5; *Karemera et al*., Case No. ICTR-98-44-T, Decision on Defence Motion for Issuance of Subpoena to Witness T (TC), 8 February 2006, para. 4.

[3] *Halilovic* Decision, para. 7.

[4] *Id*., para. 6.

[5] *Bagosora et al*., Decision on Request for a Subpoena (TC), 11 September 2006, para. 6; *Karemera et al*., Decision on Nzirorera's *Ex Parte* Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3 (TC), 12 July 2006, para. 12; *Prosecutor v. Milosevic*, Case N°IT-02-54-T, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder (TC), 9 December 2005, paras. 30, 33.

[6] Motion, paras. 11-13, 18-20, 24, 26-27.

[7] *Bagosora et al*., Decision on Request for a Subpoena (TC), 11 September 2006 (General Marcel Gatsinzi, former Chief of Staff of Rwandan Army); *Bagosora et al*., Decision on Request for a Subpoena Compelling Witness DAN to Attend for Defence Cross-Examination (TC), 31 August 2006 (eyewitness of conduct by soldiers allegedly under the command of the

Defence attempts to characterize Mr. Annan and Mr. Riza as "eye-witnesses or participants in the events", their prospective testimony concerns information sent to them by UNAMIR officials in Rwanda, and possibly other sources. They are said to be "the only persons who can explain the circumstances described" in the various memos, faxes and code cables exchanged between UNAMIR and the DPKO in New York.[8]

6. The Chamber disagrees that Mr. Annan and Mr. Riza are eyewitnesses. The Defence has not shown that either of them can draw on any personal observation of events for their testimony. Although Mr. Riza did apparently visit Rwanda in May or June 1994, the Defence does not suggest that it wishes to question him about this visit.[9] By contrast, this Chamber has heard from numerous members of UNAMIR who were on the ground in Rwanda: Jacques Roger Booh-Booh, General Dallaire, Major Beardsley, Lt. Colonel Frank Claeys, Colonel Joseph Dewez, Major Donald MacNeil, Colonel Aouilli Tchemi Tchambi, Major Petrus Maggen, Major Robert Van Putten, and Lieutenant Colonel Babacar El Hadj Faye. Indeed, the code cables to United Nations Headquarters in New York City were based on the direct eyewitness observation of these individuals and other UNAMIR officials posted in Rwanda at the time. The impressions of the recipients of those reports in United Nations Headquarters would be of limited weight in comparison to this direct and primary testimony, and does not constitute information which is necessary and appropriate for the conduct and fairness of the trial.

7. The perspective of the DPKO, as the central repository of UNAMIR documents, may have a distinct value in one respect. The Defence wishes the DPKO witnesses to confirm that they had no basis to believe that there was a conspiracy or plan to commit genocide leading up to April 1994. To a large extent, however, the documents already disclosed by the DPKO to the Defence, many of which have been entered as exhibits without any dispute as to authenticity, provide a more direct indication as to the information available to the DPKO over time. To the extent that any further confirmation is required from witnesses, the Office of Legal Affairs has offered to continue to cooperate with the Ntabakuze Defence in the preparation of a statement in lieu of oral testimony.[10] In light of this ongoing cooperation, and the nature of the information sought, the Chamber does not consider that the first condition for the issuance of a *subpoena* – the exhaustion of reasonable attempts to obtain the voluntary cooperation of the witness – is satisfied. Accordingly, there is no need to further consider whether the information is sufficiently important to satisfy the second and third conditions for a *subpoena*.

8. Under these circumstances, the Chamber shall not order that a *subpoena* be issued to either Mr. Annan or Mr. Riza.

(b) Shaharyar Khan

9. The Defence requests a *subpoena* for Mr. Khan, the SRSG in Kigali from July 1994 until March 1996, in relation to a letter he wrote in 1995 stating that neither the DPKO nor UNAMIR had any warning of an impending genocide prior to April 1994. Furthermore, Mr. Khan purportedly drafted the first list of suspects to be investigated for war crimes in the summer of 1995. The absence of the

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Accused); *Bagosora et al*., Decision on Request for a Subpoena for Major Jacques Biot (TC), 14 July 2006 (military observer present in Gisenyi from 6 to 13 April 1994); *Bagosora et al*., Decision on Motion Requesting Subpoenas to Compel the Attendance of Defence Witnesses DK 32, DK 39, DK 51, DK 52, DK 311 and DM 24 (TC), 26 April 2005; *Bagosora et al*., Decision on Defence's Request for a Subpoena Regarding Mamadou Kane (TC), 22 October 2004 (political adviser to the Special Representative of the Secretary-General in Rwanda from December 1993 until May 1994); *Bagosora et al*., Decision on Prosecutor's Request for a Subpoena Regarding Witness BT (TC), 25 August 2004 (witness allegedly overheard statement made by one of the Accused); *Bagosora et al*., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004 (subpoena to sector commander of UNAMIR).

[8] Motion, para. 11.

[9] Motion, Annex 4, p. 9.

[10] Submissions, p. 4.

Accused from that list is said to be an important fact. Finally, Mr. Khan has, according to the Defence, information about a report prepared by the UNHCR concerning alleged massacres of Hutu refugees.[11]

10. The Chamber does not consider that any of the information supposedly in the possession of Mr. Khan justifies the issuance of a *subpoena*. The state of contemporaneous knowledge of a plan to commit genocide has been addressed in the previous section in relation to the DPKO witnesses, who appear to be in a better position than Mr. Khan to respond to this inquiry. Indeed, the Defence has not indicated that Mr. Khan has any knowledge of this issue other than his retrospective review of the documents which are already in the possession of the Defence. The lack of any mention of the Accused on a list of suspects prepared by Mr. Khan in 1995 constitutes indirect evidence of limited value, and does not justify the issuance of a *subpoena*. Finally, the relevance of the UNHCR report to the present trial is discussed in a separate decision, rendered today.[12] In light of that decision, Mr. Khan's alleged knowledge of that report does not constitute a valid basis for the issuance of a *subpoena*.

(c) Michael Hourigan

11. Mr. Hourigan, a former investigator of the Office of the Prosecutor, is said to be able to testify about his investigations into the shooting down of the Presidential airplane on the night of 6 April 1994.[13]

12. The Indictment does not attribute responsibility for the attack on the Presidential airplane to any of the Accused or their alleged co-conspirators. Paragraph 6.2 of the Indictment states neutrally that:

> "On 6 April 1994 at about 8:30 p.m., the plane carrying, among other passengers, the President of the Republic, Juvénal Habyarimana, was shot down on its approach to Kigali Airport, Rwanda."

This event is characterized as the trigger for the massacres which ensued; but, unlike other paragraphs of the Indictment, no involvement of the Accused is alleged. Nor did the Prosecution present evidence during its case-in-chief to prove any responsibility by the Accused in the assassination. The only such suggestion was made during the cross-examination of the Accused Bagosora, when the Prosecution put to Colonel Bagosora that he had been involved in the attack on the Presidential airplane. The Prosecution has made clear, in responding to separate motion by the Bagosora Defence, that this question was posed only for the purpose of challenging the witness's credibility, as he had himself discussed responsibility to the attack during his examination-in-chief. The Prosecution did not suggest, and indeed specifically renounced, that it was seeking to hold the Accused criminally responsibility for the President's assassination.[14]

13. Despite the absence of any charge against the Accused of involvement in the attack on the Presidential airplane, the Defence argues that responsibility for the attack is nevertheless relevant to the trial. The assassination of President Habyarimana is characterized by the Defence as

> "the initiation of the RPA 'final offensive' to seize power, which knowingly touched off the predicted civilian retaliation killings … rather than [the result of] any 'plan' or 'conspiracy' by a

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[11] Motion, paras. 14-20.
[12] *Bagosora et al*., Decision on Ntabakuze Motion for Information From the UNHCR and a Meeting With One of Its Officials (TC), 6 October 2006 (denying requests for orders requiring the UNHCR to provide information concerning the report).
[13] Motion, paras. 21-24.
[14] Prosecution Response to "Bagosora Defence Urgent Motion for Investigation and Production of (Additional) Evidence…", etc., filed on 19 December 2005.

military that … lacked the resources to BOTH repel the RPA offensive AND stop the predicted civilian-on-civilian massacres".[15]

14. Legal relevance, as the standard for determining the admission of evidence, is defined in Rule 89 (C): "A Chamber may admit any relevant evidence which it deems to have probative value." This Rule implicates three criteria:

> First, the evidence must be in some way relevant to an element of a crime with which the Accused is charged. Second, the evidence must have some value in proving [or disproving] the elements of the crimes with which an accused is charged. The separate reference to "probative value", and to the requirement that the Chamber must "deem" that the evidence has that quality, suggests that probative value is a different and more complex hurdle than relevance. Third, even where these two criteria are met, Rule 89 (C) does not command, but merely permits, admission of the evidence.
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> …
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> Probative value … has been described simply as "'evidence that tends to prove an issue'" and is sometimes conceived as overlapping with the concept of relevance: "For one fact to be relevant to another, there must be a connection or a nexus between the two which makes it possible to infer the existence of one from the other. One fact is not relevant to another if it does not have real probative value with respect to the latter."
>
> …
>
> Relevance, probative value and even prejudice are all relational concepts. The content of the putative facts must be defined and then evaluated in relation to their possible value as proof of the existence of a crime as described in the indictment. The nature of this evaluation explains the discretion conferred on the Trial Chamber by Rule 89 (C).[16]

The putative fact invoked by the Defence is that the RPF is responsible for the attack on the Presidential airplane on the night of 6 April. The question is whether this fact, if true, would tend to disprove any element of any crime with which the Accused has been charged in this case.

15. The conspiracy in which the Accused is alleged to have participated does not include the attack on the Presidential airplane on 6 April 1994. The Chamber summarized the nature of the conspiracy charge against the Accused in its decision on the Defence motions for dismissal following the close of the Prosecution case:

> The Prosecution asserts that the inter-relationship of the Accused as senior officers within the military sets the stage for what appears to be a series of co-ordinated or even common actions: the promulgation of the definition of the enemy, which may arguably have targeted Tutsi civilians; the dissemination of that definition amongst soldiers in the army by the Accused; the uncanny repetition of that definition by the four Accused on various occasions; support for the *Interahamwe* using the resources of the military; and, finally, the direct evidence of some of the Accused being together on various occasions during one or more acts – speeches, preparing lists, ordering killings – which arguably encouraged the commission of genocide.[17]

Evidence that persons other than the Accused or his alleged co-conspirators were involved in shooting down the Presidential plane does not make any of these allegations any less likely.

16. Nor does responsibility for the assassination of President Habyarimana have any bearing on the offences alleged to have been committed by the Accused and his subordinates after 6 April 1994.

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[15] Motion, para. 22.
[16] *Bagosora et al.*, Decision on Admissibility of Proposed Testimony of Witness DBY (TC), 18 September 2003, paras. 4, 15, 18 (citations omitted).
[17] *Bagosora et al.*, Decision on Motions for Judgement of Acquittal (TC), 2 February 2005, para. 15.

Culpability for those crimes would not be reduced because someone other than the Accused created the conditions that led to the commission of those crimes. As this Chamber has previously held in relation to a similar issue:

> Descriptions of crimes committed by RPF forces against civilians in geographic areas physically distant from combat between the opposing armed forces in 1994 would not suggest the innocence or mitigate the guilt of the accused. The impact of such events on the criminal conduct with which the accused are charged is too remote and indirect. The Defence submissions have not demonstrated that such information would assist in disproving any element of the offences with which the Accused are charged, or how it could sustain a valid excuse or justification for their alleged conduct.[18]

This said, the Defence is perfectly entitled, of course, to lead evidence concerning the armed conflict with the RPF, the relative strength of forces, and the impact of this context on the crimes for which the Accused is alleged to be responsible.

17. The identity of the killers of President Habyarimana is undoubtedly a matter of contextual significance for the events described in the Indictment against the Accused. On this basis, the Chamber has admitted some evidence concerning this event. On the other hand, the Chamber must exercise its discretion under Rule 89 (C) to ensure that the focus of the present trial is maintained. The admission of detailed evidence on what is, essentially, a matter of collateral and indirect relevance would not assist the Chamber in determining the core issues of this trial.

18. The Defence has failed to establish that the prospective witness has information which can materially assist it in respect of clearly identified issues relevant to the trial, or that his testimony is necessary and appropriate for the conduct and fairness of the trial.[19] Accordingly, no *subpoena* shall be issued to Mr. Hourigan.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

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[18] *Bagosora et al*., Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A) (TC), 8 March 2006, para. 7.

[19] This approach is confirmed in numerous decisions in relation to identically or similarly worded indictments: *Kayishema*, Decision (AC), 28 September 2000, p. 3 ("*CONSIDERANT qu'au soutien de sa demande le Requérant affirme que le Mémorandum Hourigan donne des indications sur les auteurs présumés de l'attentat contre l'avion du Président rwandais; que le Procureur du Tribunal de l'époque a cru devoir arrêter les enquêtes menées à ce sujet par M. Hourigan; que ces faits, qui n'étaient pas connus lors du procès du Requérant, rouvriraient le débat sur la question de la culpabilité de celui ci; CONSIDERANT que le Mémorandum Hourigan n'était bien entendu pas disponible lors du procès en première instance, mais que sa teneur, que le Requérant cite, ne pouvait avoir un rapport avec les questions relatives au génocide sur lesquelles la Chambre de première instance devait se prononcer; qu'il n'est pas dès lors dans l'intérêt de la justice de l'admettre comme moyen de prevue supplémentaire en appel*"); *Bizimungu et al*., Reconsideration of Oral Ruling of 1 June 2005 on Evidence Relating to the Crash of the Plane Carrying President Habyarimana (TC), 23 February 2006, paras. 10-11 ("The potential involvement or responsibility of the RPF or other forces not associated with the government of Rwanda cannot relieve the Accused of responsibility for the crimes they have been charged with. The Chamber is of the opinion that evidence as to who is responsible for the crash of the President's plane would not assist the Chamber in its decision as to the guilt or innocence of the Accused … the jurisprudence of the Tribunal shows that questions relating to the responsibility of the shooting down of the plane may be put to a witness provided that this line of questioning does not go into great detail"); *Karemera et al*., *Décision Relative à la Requête de Joseph Nzirorera aux Fins d'Obtenir la Coopération du Gouvernement Français* (TC), 23 February 2005, para. 11 (denying a motion for the Chamber to issue a request to the government of France to disclose to the Defence a report concerning those responsible for shooting down the Presidential plane); *Karemera et al*., Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2003, para. 14 ("The Defence has not shown how such materials, if they exist, could suggest the innocence of the Accused, who is not charged with taking part in the assassination, or how such materials could tend to mitigate the Accused's personal guilt or affect the credibility of the prosecution evidence"); *Kabiligi*, Decision on the Defence motion Seeking Supplementary Investigations (TC), 1 June 2000, para. 19 ("Defence Counsel has failed to establish any causal link between the requested investigation into the responsibility for the plane crash and the acts and omissions which form the basis of the charges against Kabiligi in the Indictment").

Arusha, 6 October 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Ntabakuze Motion for Information from the UNHCR and a Meeting with one of its Officials 6 October 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Aloys Ntabakuze – Request for Exculpatory Material, No basis for compelling the Prosecution to review and obtain information – Cooperation of International Organization, UNHCR, Insufficiency of a general claim of relevance to justify the issuance of an order – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rule 68 (A) ; Statute, art. 28

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Ignace Bagilishema, Decision on the Request of the Defence for an Order for Disclosure By the Prosecution of the Admissions of Guilt of Witnesses Y, Z, and AA, 8 June 2000 (ICTR-95-1) ; Trial Chamber, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, Request for Cooperation (United Nations High Commissioner for Refugees), 18 December 2001 (ICTR-96-10 and ICTR-96-17) ; Trial Chamber, The Prosecutor v. Juvénal Kajelijeli, Decision on Kajelijeli's Motion for Extension of Judicial Cooperation to Certain States Pursuant to Article 28 of the Statute of the Tribunal, 9 May 2002 (ICTR-98-44A) ; Trial Chamber, The Prosecutor v. Jean de Dieu Kamuhanda, Decision on Kamuhanda's motions for Extension of Judicial Cooperation to Certain States and to the UNHCR Pursuant to Article 28 of the Statute and Resolution 955 of the Security Council, 9 May 2002 (ICTR-99-54) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on the Ex Parte Defence Motion for orders to the United Nations Department of Peace-Keeping Operations for the Production of Documents, 9 March 2004 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 10 March 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Defence Motion Seeking a Request for Cooperation, 25 August 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Aloys Simba, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68, 4 October 2004 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Request to the Republic of France for Cooperation and Assistance Pursuant to Article 28 of the Statute, 22 October 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation, 19 April 2005 (ICTR-98-44) ; Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgement, 23 May 2005 (ICTR-98-44A) ; Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana, Decision on Nzuwonomeye's Motion Requesting Cooperation From the Government of Ghana Pursuant to Article 28 of the Statute, 13 February 2006 (ICTR-2000-56)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Decision on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997 (IT-95-14) ; Trial Chamber, The Prosecutor v. Blagoje Simić et al., Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, 18 October 2000 (IT-95-9) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Judgement, 29 July 2004 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Radoslav Brđanin, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004 (IT-99-36)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Ntabakuze "Motion for an Order Compelling the Prosecutor to Disclose Exculpatory Information", etc., filed on 14 July 2006 ("Specific Motion"); and, in part, the "Motion for an Order Compelling the Prosecutor to Disclose Various Exculpatory Documents Pursuant to Rule 68", filed on 2 June 2006 ("General Motion");

CONSIDERING the Prosecution Response, filed on 7 June 2006; the "Strictly Confidential Ntabakuze Request for a Timely Decision", filed on 28 August 2006; the Ntabakuze Memorandum and Annexes, filed on 15 September 2006; the "Extremely Urgent Second Ntabakuze Request for a Timely Decision", etc., filed on 18 September 2006;

HEREBY DECIDES the motion.

Introduction

1. The Ntabakuze Defence requests the Chamber to: (i) order the Prosecution, pursuant to Rule 68 (A) of the Rules of Procedure and Evidence, to obtain reports from the United Nations High Commissioner for Refugees ("UNHCR") "relating to the 1994 events in Rwanda", including those prepared by a UNHCR official named Robert Gersony; and (ii) order the UNHCR, pursuant to Article 28 of the Statute, to facilitate an interview with Mr. Gersony, with a view to calling him as a witness.[1] In the alternative, the Defence requests a *subpoena* addressed to Mr. Gersony requiring that he meet with the Ntabakuze Defence; that he provide relevant UNHCR documents; and that he appear before the Chamber to give testimony.[2]

2. The Prosecution responds that it has already disclosed a UNHCR document to the Defence entitled "Summary of UNHCR Presentation Before Commission of Experts, 10 October 1994".[3]

Deliberations

(i) Request for Exculpatory Material Pursuant to Rule 68 (A)

3. Rule 68 (A) provides that the Prosecution has an obligation to disclose

> "any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence".

The Appeals Chamber has consistently interpreted the words "actual knowledge" to require that the information be in the Prosecution's possession.[4] Rule 68 does not provide a basis for compelling

[1] Specific Motion, pp. 11-12; General Motion, p. 7.
[2] Specific Motion, p. 12.
[3] Response, para. 3 (c).

the Prosecution to review and obtain information from other sources.[5] Accordingly, the Prosecution is not under any obligation to make inquiries and obtain exculpatory information from the UNHCR or any other source.

4. The Prosecution asserts that it has disclosed a document from the UNHCR to the Defence, implying that this exhausts its obligations under Rule 68. The Prosecution is presumed to have discharged its obligations in good faith.[6] In the absence of any showing to the contrary, the request is denied.

(ii) Order to the UNHCR Under Article 28

5. Article 28 of the Statute imposes an obligation on States to

> "cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law".

Such a request may be directed to an international organization, as well as individual states.[7] Indeed, the UNHCR has been the object of several such orders from this Tribunal in the past.[8]

6. The issuance of a request under Article 28 is subject to three conditions: (i) identification of the nature of the information sought with a reasonable degree of specificity; (ii) a showing that the information is relevant to the trial; and (iii) evidence that reasonable efforts have been undertaken to

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[4] *Kajelijeli*, Judgement (AC), 23 May 2005, para. 262 ("Defence must first establish that the evidence was in the possession of the Prosecution"); *Brđanin*, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials (AC), 7 December 2004 (application must "be accompanied by all *prima facie* proofs tending to show that it is likely that the evidence is exculpatory and is in the possession of the Prosecution"); *Blaskic*, Judgement (AC), 29 July 2004, para. 268 (applicant must establish that material "might prove exculpatory for the accused and is in the possession of the Prosecution"); *Bagosora et al*., Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses (TC), 27 September 2005, para. 3 ("a request for production of documents has to be sufficiently specific as to the nature of the evidence sought and its being in the possession of the addressee of the request").

[5] *Simba*, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68 (TC), para. 8 ("The Prosecution's disclosure obligations under the Statute and the Rules do not extend to pursuing every possible avenue of investigation into a witness's credibility on behalf of the Defence"); *Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure By the Prosecution of the Admissions of Guilt of Witnesses Y, Z, and AA (TC), 8 June 2000, para. 6 ("A literal interpretation [of Rule 68 (A)] might suggest that mere knowledge of exculpatory evidence in the hands of a third party would suffice to engage the responsibility of the Prosecutor under that provision. However, to adopt such a meaning, would, in the extreme, allow for countless motions to be filed with the sole intention of engaging the Prosecutor into investigations and disclosure of issues which the moving party considered were 'known' to the Prosecutor. This would not be in conformity with Article 15 of the Statute [enshrining the independence of the Prosecutor]").

[6] *Blaskic*, Judgement (AC), 29 July 2004, para. 264; *Karemera et al*., Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 17 ("The Trial Chamber is entitled to assume that the Prosecution is acting in good faith"); *Brđanin*, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials (AC), 7 December 2004 (stating that a Chamber "must assume that the Prosecution is acting in good faith" in discharging its responsibility).

[7] *Blaskic*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (AC), 29 October 1997, para. 50, n. 68 (stating that a subpoena duces tecum should not be issued to an officer of an international organization in order to obtain a document from the organization; rather "it would be more proper to address the international organization on behalf of which he was to produce the document"); *Karemera et al*., Decision on the *Ex Parte* Defence Motion for Order to United Nations Department of Peace-keeping Operations for Production of Documents (TC), 9 March 2004, paras. 9-19; *Simic et al*., Decision on Motion for Judicial Assistance to be Provided by SFOR and Others (TC), paras. 46-49.

[8] *Nyiramasuhuko et al*., Decision on the Defence Motion Seeking a Request for Cooperation, etc., (TC), 25 August 2004; *Kajelijeli*, Decision on Kajelijeli's Motion for Extension of Judicial Cooperation to Certain States Pursuant to Article 28 of the Statute of the Tribunal (TC), 9 May 2002; *Kamuhanda*, Decision on Kamuhanda's motions for Extension of Judicial Cooperation to Certain States and to the UNHCR Pursuant to Article 28 of the Statute and Resolution 955 of the Security Council (TC), 9 May 2002; *Ntakirutimana*, Request for Cooperation (United Nations High Commissioner for Refugees) (TC), 18 December 2001.

obtain the information without the intervention of the Chamber.[9] The second condition, relevance, requires the applicant to show that the information is relevant to any matter in issue before the Judge or Trial Chamber and that it is necessary for a fair determination of that matter.[10]

7. The Defence asks for an order to interview Robert Gersony.[11] Although not specifically requested, the Defence presumably also seeks disclosure of any reports or documents prepared by Mr. Gersony and his colleagues. Mr. Gersony is said to have knowledge of massacres of Hutu civilians "by the RPF during the invasion, and that such massacres were the result of a deliberate policy".[12] The motion claims that the "RPF was responsible for civilian massacres in the Eastern part of the country for which the Accused is being held responsible."[13] More broadly, the Defence argues that:

> To the extent that it can be shown that the massacres for which the Prosecution seeks to hold the Accused accountable either did not occur, or were the direct or indirect conscious product of the RPF war strategy, it reduces the potential liability of the Accused at all levels, including conspiracy, planning, war crimes and so forth.[14]

8. The documents submitted by the Defence suggest that Mr. Gersony was not in Rwanda before August 1994. His investigations appear to have been concerned with the treatment of Hutu refugees as they returned to their homes in the aftermath of the war between government forces and the Rwandese Patriotic Front.[15] In this context, the Defence submission that Mr. Gersony's knowledge extends to massacres "for which the Accused is being held responsible" is suprising. On the contrary, all indications suggest that Mr. Gersony's information concerns events that occurred after the departure of any troops potentially under the command of the Accused. In this respect, the Chamber recalls its previous decision concerning alleged RPF conduct in the Prosecution's possession:

> Descriptions of crimes committed by RPF forces against civilians in geographic areas physically distant from combat between the opposing armed forces in 1994 would not suggest the innocence or mitigate the guilt of the accused. The impact of such events on the criminal conduct with which the accused are charged is too remote and indirect. The Defence submissions have not demonstrated that such information would assist in disproving any element of the offences with which the Accused are charged, or how it could sustain a valid excuse or justification for their alleged conduct. The possible uses of such information suggested by the Defence would not, in the Chamber's view, be exculpatory.[16]

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[9] *Bagosora et al*., Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 10 March 2004.

[10] Relevance has not always been formulated in exactly the same words from one case to another. Some decisions, particularly where the relevance of the information is obvious, say no more than that the applicant must articulate its "relevance to the trial". *Ndindiliyimana et al*., Decision on Nzuwonomeye's Motion Requesting Cooperation From the Government of Ghana Pursuant to Article 28 of the Statute (TC), 13 February 2006, para. 6; *Bagosora et al*., Request to the Republic of France for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 22 October 2004, para. 3. Where relevance is contested, however, it has also been required that the information be "relevant to any matter in issue before the Judge or Trial Chamber", and that the information be "necessary for a fair determination" of that matter. *Karemera et al*., Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation (TC), 19 April 2005, para. 8. This language mirrors the standard codified in Rule 54 *bis* of the ICTY Rules which deals specifically with the conditions and modalities for issuing orders to States under Article 29 of the ICTY Statute. The Chamber considers this to be the appropriate standard. The limitation that the information be "necessary for a fair determination" of a question before the Chamber reflects a sensible concern that States and international organization not be burdened with numerous requests for information based on relevance alone, a standard which could potentially cast an unduly broad net. In addition, this is an area where a common standard amongst the international tribunals is desirable.

[11] Motion, p. 11.

[12] Motion, para. 17.

[13] Motion, para. 18.

[14] *Id*.

[15] Motion, Annex 5, pp. 1-2 (code cable from Shaharyar Khan to Annan, 14 October 1994).

[16] *Bagosora et al*., Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A) (TC), 8 March 2006, para. 7. Although that decision concerned disclosure under Rule 68 (A), the general propositions are equally germane to considerations of relevance.

A generalized claim of relevance is insufficient to justify the issuance of an order under Article 28. In the absence of a showing of how, specifically, any aspect of Mr. Gersony's information concerns matters in issue in this trial and, further, that the information is "necessary for a fair determination" of those issues, the relevance standard has not been satisfied. Accordingly, no order under Article 28 is justified.

(iii) Request for Subpoena to Mr. Gersony

9. The applicant for a *subpoena* must show that (i) reasonable attempts have been made to obtain the voluntary cooperation of the witness; (ii) the witness's testimony can materially assist the applicant in respect of clearly identified issues; and (iii) the witness's testimony must be necessary and appropriate for the conduct and fairness of the trial.[17] For the reasons described in the previous section, neither the second nor third conditions are satisfied.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 6 October 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[17] *Halilovic*, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 6; *Bagosora et al*,. Decision on Request for a Subpoena (TC), 11 September 2006, para. 5.

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Decision on the Prosecutor's Motion for Subpoena 6 October 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Issuance of subpoena, Evidence cannot be reasonably obtained elsewhere – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 54 and 73 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3, 12 July 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for a Subpoena, 11 September 2006 (ICTR-98-41)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Radislav Krstić, Decision on Application for subpoenas, 1 July 2003 (IT-98-33) ; Appeals Chamber, The Prosecutor v. Sejér Halilović, Decision on Issuance of Subpoenas, 21 June 2004 (IT-01-48)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEIZED OF the Prosecutor's "Motion for the *Subpoena* of Annonciata Kavaruganda Pursuant to Rule 54 of the Rules of Procedure and Evidence", filed on 25 September 2006 (the "Motion");

HAVING RECEIVED AND CONSIDERED

(i) "Nzuwonemeye's Response to Motion for *Subpoena* of Annonciata Kavaruganda Pursuant to Rule 54 of the Rules of Procedure and Evidence", filed on 27 September 2006;

(ii) The « *Réponse à la* "Motion for the *Subpoena* of Annonciata Kavaruganda Pursuant to Rule 54 of the Rules of Procedure and Evidence"», filed by Innocent Sagahutu on 29 September 2006;

(iii) The « *Réponse d'Augustin Ndindiliyimana au* "Motion for *Subpoena* of Annonciata Kavaruganda Pursuant to Rule 54 of the Rules of Procedure and Evidence"», filed on 2 October 2006;

(iv) The « Réponse de la Défense d'Augustin Bizimungu à la requête du Procureur intitulée "Motion for the Subpoena of Annonciata Kavaruganda"», filed on 2 October 2006.

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 54;

HEREBY DECIDES the Motion on the basis of the written submissions filed by the Parties pursuant to Rule 73 (A) of the Rules.

Submissions by the Parties

The Prosecution

1. The Prosecution requests that a *subpoena* be issued to Annonciata Kavaruganda. The Prosecution claims that because Madame Kavaruganda was the wife of late Joseph Kavaruganda, former President of the Constitutional Court in Rwanda at the beginning of the genocide in April 1994, she has a unique and special knowledge of the events leading to the abduction and killing of her husband by Rwandan Armed Forces on 7 April 1994.

2. Referring to paragraphs 22, 25, 48, 49 and 50 of the Amended Indictment, the Prosecution submits that Madame Kavaruganda's testimony is necessary to prove the existence and execution of a common scheme by the accused persons in collaboration with others mentioned in the Indictment to eliminate certain members of opposition parties and other important actors with a view to obstructing the implementation of the Arusha Accords. According to the Prosecution, this information will significantly corroborate prosecution evidence of a deliberate and systematic targeting and elimination of those political and other actors by the Rwandan Armed Forces in the early days of the genocide in April 1994.

3. The Prosecution further submits that Madame Kavaruganda is uniquely positioned to provide a useful insight into the activities of her husband within the framework of the implementation of the Arusha Accords and to inform the Court of her husband's activities.

4. Finally, the Prosecution submits that substantial and serious attempts have been made to secure the voluntary attendance of Madame Kavaruganda but to no avail.

Nzuwonemeye's Response

5. The Defence for Nzuwonemeye opposes the Motion and submits that the Prosecution has not addressed the reasons put forward by Madame Kavaruganda for her refusal to testify in this case, that is, that she does not hold the accused persons accountable for the death of her husband.

6. The Defence further submits that the Prosecution has omitted to mention that, according to Madame Kavaruganda, Major Protais Mpiranya from the Presidential Guard and Major Kabera, Officer *d'Ordonnance* of President Habyarimana, were involved in the killing of her husband. The Defence argues that there is no connection between the Presidential Guard and the Reconnaisance Battalion.

7. Finally, the Defence submits that leading this evidence with respect to Major Protais Mpiranya and the Presidential Guard, would only waste court time and delay the end of the Prosecution case.

Sagahutu's Response

8. The Defence for Sagahutu submits that the testimony of Madame Kavaruganda would not assist the Prosecution at all since Major Mpiranya and Major Kabera, whom the witness believes are responsible for the death of her husband, have not been tried and any attempt to convince the Chamber of a conspiracy is a waste of time.

9. The Defence further submits that Madame Kavaruganda's testimony is not necessary since it has no direct or indirect link to any of the accused persons in the present case and prays the Chamber to dismiss the Motion.

Ndindiliyimana's Response

10. The Defence for Ndindiliyimana adopts the submissions made by Nzuwonemeye's Defence and further submits that the Prosecution has not shown that Madame Kavaruganda is best placed to describe the contents of the Arusha Accords since she did not participate in their negotiation and the Prosecution has not indicated any public or political functions that Madame Kavaruganda held in Rwanda in 1994 that may have enabled her to form an opinion about the full details of the Arusha Accords and the obstacles to their implementation.

11. The Defence argues that Madame Kavaruganda would not assist in ascertaining the truth, in particular since the paragraphs of the Indictment on which the Prosecution tries to lead evidence through this witness, have been cited with regard to the testimonies of several other witnesses and will be the subject of General Dallaire's testimony.

Bizimungu's Response

12. The Defence for Bizimungu adopts the submissions made by Nzuwonemeye and Ndindiliyimana's Defence and, recalling the Chamber's decision of 24 November 2005, further submits that it had already on that occasion opposed the appearance of Madame Kavaruganda arguing that this witness's testimony could not go to proof of the count of conspiracy to commit genocide or to Bizimungu's superior responsibility.

Deliberations

13. The Chamber recalls Rule 54 of the Rules which authorizes a Trial Chamber to issue

> "orders, summonses, *subpoenas*, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation of the trial."

According to the jurisprudence of both this Tribunal and the International Criminal Tribunal for the former Yugoslavia (ICTY), an applicant for *subpoena* must show that (i) reasonable attempts have been made to obtain the voluntary cooperation of the witness; (ii) the witness's testimony can materially assist the applicant in respect of clearly identified issues; and (iii) the witness's testimony must be necessary and appropriate for the conduct and fairness of the trial.[1] The Chamber recalls that "*subpoenas* should not be issued lightly" and that it must consider

> "not only … the usefulness of the information to the applicant but … its overall necessity in ensuring that the trial is informed and fair."[2]

In this respect, it may also be considered whether the information sought can reasonably be obtained elsewhere.[3]

14. After having carefully read the material disclosed by the Prosecution in respect of this witness, the Chamber is satisfied that Madame Kavaruganda holds a special position with respect to the events leading to death of her husband and that she may provide insight into the activities of her husband within the framework of the implementation of the Arusha Accords. The Chamber notes paragraphs 48 and 50 of the Amended Indictment of 23 August 2004 which refer to the killing of Joseph Kavaruganda and the alleged obstruction of the implementation of the Arusha Accords. The Chamber further notes paragraph 49 of the Indictment which alleges that the *Gendarmerie* was, *inter alia*,

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[1] *Prosecutor v. Bagosora,* Case N°ICTR-98-41 T, Decision on Request for a Subpoena, 11 September 2006, para. 5; *Prosecutor v. Krstic,* Case N°IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para.10; *Prosecutor v. Karemara,* Case N°ICTR-9-44-T, Decision on Nzirorera's *Ex Parte* motion for order for Interview of Defence Witnesses NZ1, NZ2 and NZ3, 12 July 2006, para 9.
[2] *Prosecutor v. Halilovic*, Case N°IT-01-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, paras. 6, 7.
[3] *Prosecutor v. Bagosora,* Case N°ICTR-98-41 T, Decision on Request for a Subpoena, 11 September 2006, para. 7.

responsible for protecting Joseph Kavaruganda. Finally, the Chamber notes paragraph 22 of the Indictment which describes Major Mpiranya as a co-conspirator of the accused persons. Based on the aforementioned, the Chamber concludes that Madame Kavaruganda's testimony can materially assist the Prosecution case.

15. The Chamber is further satisfied that Madame Kavaruganda's evidence cannot be reasonably obtained elsewhere and, based on the material annexed to the Motion, that the Prosecution has made reasonable efforts to secure her voluntary cooperation, without success.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion;

ORDERS the Registrar to prepare a *subpoena*, in accordance with this decision, and to serve it, through appropriate channels in the Kingdom of Belgium, pursuant to Article 28 of the Statute, to Annonciata Kavaruganda, requiring her appearance before this Chamber to testify in the present case;

DIRECTS the Registry to communicate with the Prosecutor with respect to the timeframe within which the evidence of the witness would be heard.

Arusha, 6 October 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Certification of Appeal of Oral Decisions on the Scope of Cross-Examination of Jean Kambanda
17 October 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Jean Kambanda – Interlocutory appeal, Definition of categories of testimony – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (B) and 90 (G)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Bagosora Request for Certification Concerning Additional Questioning of Witness LE-1, 30 January 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Severance or Exclusion of Evidence Based on Prejudice Arising From Testimony of Jean Kambanda, 11 September 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Application for Certification to Appeal Oral Decisions of 12 and 13 July 2006", etc., filed by the Bagosora Defence on 19 July 2006;

CONSIDERING the Prosecution Response, filed on 20 July 2006; and the "Request for Timely Decision", filed by the Bagosora Defence on 5 October 2006;

HEREBY DECIDES the application.

Introduction

1. On 11, 12 and 13 July 2006, Jean Kambanda, a former Prime Minister of Rwanda who is serving a life sentence of this Tribunal for his role in events in Rwanda between April and July 1994, testified as a witness for Colonel Bagosora. During the witness's cross-examination, the Prosecution posed certain questions to which the Defence objected as going beyond the proper scope of cross-examination. After a number of oral rulings, the Chamber suspended the witness's testimony on 13 July 2006, indicating that this was "a matter that should be dealt with in a written decision" and inviting the Defence to file additional written observations by close of business" the following day.[1] The three Accused other than Bagosora filed such submissions as requested and, on 11 September 2006, the Chamber granted their request for exclusion of testimony in respect of all but one of the challenged areas.[2]

2. The present application was filed on 19 July 2006, six days after the Chamber had invited written submissions concerning the correctness of its oral rulings. Rather than arguing the merits of the Chamber's oral decisions, the Bagosora Defence asks for leave to litigate these decisions before the Appeals Chamber.

3. The Chamber's written decision of 11 September 2006 has rendered the present application moot in respect of "movement of arms", "Pauline Nyiramasuhuko", and "Kabiligi", either by excluding the evidence or offering additional reasons.[3] The areas of questioning which remain for consideration are: "civil defence"; "the death of Prime Minister Agathe and the Belgian peacekeepers"; and alleged involvement by soldiers in killings and rapes at Kabgayi.[4]

Deliberations

4. Leave to file an interlocutory appeal may be granted under Rule 73 (B) of the Rules of Procedure and Evidence where it "involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial" and where "immediate resolution may materially advance the proceedings".

5. The proposed appeal would challenge the Chamber's application of Rule 90 (G) to three narrowly-defined categories of testimony. The first category, concerning the alleged existence of a civil defence program in Rwanda, has been narrowed even further by the Chamber's written decision of 11 September 2006, which excluded any testimony to the effect that the Accused were "involved in a national scheme to supply a national civil defence program" with arms. This testimony substantially overlaps with evidence already heard by the Chamber during the Prosecution's case and, in any event,

[1] T. 13 July 2006 p. 39.
[2] *Bagosora et al*., Decision on Severance or Exclusion of Evidence Based on Prejudice Arising from Testimony of Jean Kambanda (TC), 11 September 2006.
[3] Application, paras. 15-18, 19-24, 36-40.
[4] *Id*. paras. 12-14, 25-32, 33-35.

does not implicate the Accused in any particular conduct.[5] The second category concerns responsibility for the death of the Prime Minister on 7 April 1994. The witness repeatedly denied knowing who was responsible for the death of the Prime Minister.[6] The third category is testimony concerning criminal acts by soldiers at Kabgayi. This testimony substantially repeats evidence heard during the Prosecution case.[7]

6. The testimony of the witness in these three categories, viewed individually or cumulatively, has not been shown to be of sufficient importance to significantly affect the fair conduct of the trial or its outcome.[8] This condition for granting an interlocutory appeal is, therefore, not satisfied.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the application.

Arusha, 17 October 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[5] *Bagosora et al*., Decision on Severance or Exclusion of Evidence Based on Prejudice Arising from Testimony of Jean Kambanda (TC), 11 September 2006, para. 10. Examples of civil defence testimony heard during the case-in-chief: T. 4 February 2004 p. 22 (Beardsley); T. 1 June 2004 pp. 64-66 (Witness A).
[6] T. 12 July 2006 pp. 73, 76.
[7] E.g. Exhibit P274 (92 *bis* statement of Witness DAZ); Exhibit P259 (92 *bis* statement of Witness UT); T. 11 June 2004 pp. 18-19 (Witness XXY).
[8] See e.g. *Bagosora et al*., Decision on Bagosora Request for Certification Concerning Additional Questioning of Witness LE-1 (TC), para. 7 ("Reversal of the present decision, and recalling the witness for further cross-examination by the Defence, would be of marginal significance to the outcome or conduct of the present trial").

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Decision on Requests for Disclosure and Investigations Concerning the Assassination of President Habyarimana 17 October 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Disclosure of Documents, Relevancy of evidence concerning the assassination of President Habyarimana to the Trial, No allegation implicating the Accused in the assassination of the President in the Indictment – Motion denied

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A), 8 March 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Subpoenas of United Nations Officials, 6 October 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Ntabakuze Motion for Disclosure of Prosecution Files, 6 October 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Cooperation of the Government of France, 6 October 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion for Investigation and Production of (Additional) Evidence", filed by the Bagosora Defence on 13 December 2005;

CONSIDERING the Prosecution Response, filed on 19 December 2005; the Ntabakuze Reply, filed on 9 January 2006; and the Bagosora Reply, filed on 10 February 2006;

HEREBY DECIDES the application.

Introduction

1. The Bagosora Defence seeks an order requiring the Prosecution to (i) disclose any and all evidence gathered during any investigation into the assassination of President Habyarimana on 6 April 1994; (ii) disclose any exculpatory information obtained as a result of such investigations; and (iii) undertake additional investigations into the assassination. The motion also requests that the United Nations be obliged to disclose any evidence in its possession concerning the assassination, including the flight recorder of the Presidential aircraft.[1] The Defence argues that although Colonel Bagosora is not charged with any involvement in the President's assassination, suggestions to that effect during the Prosecution cross-examination of the Accused has transformed the event into "a material fact to which

[1] Motion, p. 15; Reply paras. 24-26.

the Accused must now answer".[2] Various grounds for these orders are invoked, including Rules 66 (B), 68, and 98 of the Rules of Procedure and Evidence.

Deliberations

2. The relevance to this trial of evidence concerning the assassination of President Habyarimana, which the Defence attributes to agents of the Rwandan Patriotic Front, has been the object of several decisions of this Chamber.[3] The fullest discussion arose in connection with an Ntabakuze request for a *subpoena* to a former investigator of the Office of the Prosecutor:

> The Indictment does not attribute responsibility for the attack on the Presidential airplane to any of the Accused or their alleged co-conspirators. Paragraph 6.2 of the Indictment states neutrally that: "On 6 April 1994 at about 8:30 p.m., the plane carrying, among other passengers, the President of the Republic, Juvénal Habyarimana, was shot down on its approach to Kigali Airport, Rwanda." This event is characterized as the trigger for the massacres which ensued; but, unlike other paragraphs of the Indictment, no involvement of the Accused is alleged. Nor did the Prosecution present evidence during its case-in-chief to prove any responsibility by the Accused in the assassination. The only such suggestion was made during the cross-examination of the Accused Bagosora, when the Prosecution put to Colonel Bagosora that he had been involved in the attack on the Presidential airplane. The Prosecution has made clear, in responding to separate motion by the Bagosora Defence, that this question was posed only for the purpose of challenging the witness's credibility, as he had himself discussed responsibility to the attack during his examination-in-chief. The Prosecution did not suggest, and indeed specifically renounced, that it was seeking to hold the Accused criminally responsibility for the President's assassination.
>
> …
>
> The conspiracy in which the Accused is alleged to have participated does not include the attack on the Presidential airplane on 6 April 1994. The Chamber summarized the nature of the conspiracy charge against the Accused in its decision on the Defence motions for dismissal following the close of the Prosecution case:
>
> The Prosecution asserts that the inter-relationship of the Accused as senior officers within the military sets the stage for what appears to be a series of co-ordinated or even common actions: the promulgation of the definition of the enemy, which may arguably have targeted Tutsi civilians; the dissemination of that definition amongst soldiers in the army by the Accused; the uncanny repetition of that definition by the four Accused on various occasions; support for the *Interahamwe* using the resources of the military; and, finally, the direct evidence of some of the Accused being together on various occasions during one or more acts – speeches, preparing lists, ordering killings – which arguably encouraged the commission of genocide.
>
> Evidence that persons other than the Accused or his alleged co-conspirators were involved in shooting down the Presidential plane does not make any of these allegations any less likely.
>
> Nor does responsibility for the assassination of President Habyarimana have any bearing on the offences alleged to have been committed by the Accused and his subordinates after 6 April 1994. Culpability for those crimes would not be reduced because someone other than the Accused created the conditions that led to the commission of those crimes. As this Chamber has previously held in relation to a similar issue:

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[2] Motion, para. 8; Reply, para. 11.

[3] *Bagosora et al*., Decision on Request for Subpoenas of United Nations Officials (TC), 6 October 2006, paras. 12-18; *Bagosora et al*., Decision on Ntabakuze Motion for Disclosure of Prosecution Files (TC), 6 October 2006, para. 5; *Bagosora et al*., Decision on Request for Cooperation of the Government of France (TC), 6 October 2006, paras. 3-6; *Bagosora et al*., Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A) (TC), 8 March 2006, paras. 6-7.

> Descriptions of crimes committed by RPF forces against civilians in geographic areas physically distant from combat between the opposing armed forces in 1994 would not suggest the innocence or mitigate the guilt of the accused. The impact of such events on the criminal conduct with which the accused are charged is too remote and indirect. The Defence submissions have not demonstrated that such information would assist in disproving any element of the offences with which the Accused are charged, or how it could sustain a valid excuse or justification for their alleged conduct.
>
> This said, the Defence is perfectly entitled, of course, to lead evidence concerning the armed conflict with the RPF, the relative strength of forces, and the impact of this context on the crimes for which the Accused is alleged to be responsible.
>
> The identity of the killers of President Habyarimana is undoubtedly a matter of contextual significance for the events described in the Indictment against the Accused. On this basis, the Chamber has admitted some evidence concerning this event. On the other hand, the Chamber must exercise its discretion under Rule 89 (C) to ensure that the focus of the present trial is maintained. The admission of detailed evidence on what is, essentially, a matter of collateral and indirect relevance would not assist the Chamber in determining the core issues of this trial.[4]

3. Lead Counsel for Bagosora himself challenged the relevance of questions concerning the attack on the Presidential airplane.[5] The Chamber did allow a few brief questions to Colonel Bagosora on this topic on the basis that they were intended to contradict the witness's own statements during the examination-in-chief. No incriminating admissions were elicited. No allegation implicating the Accused in the assassination of the President is to be found in the Indictment, the Pre-Trial Brief or any other Prosecution communication. Indeed, no factual evidence in support of that allegation was heard during the Prosecution case. In these circumstances, the questions posed to Colonel Bagosora during cross-examination did not transform responsibility for the assassination of President Habyarimana into a material fact in the present trial. The Chamber need not further consider whether the specific requirements for the orders requested are met.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 17 October 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[4] *Bagosora et al*., Decision on Request for Subpoenas of United Nations Officials (TC), 6 October 2006, paras. 12-18 (citations omitted).

[5] T. 16 November 2005 pp. 47-48 ("Mr. Constant: My client has answered, and let me point out that I did not object. But I have a question regarding the relevance of this line of questioning. Let me remind the Court that my client is not on trial for the assassination of President Habyarimana. In fact, that is one of the peculiarities of this case. Even though it is the Prosecution theory, he is prosecuted for the murder of the Prime Minister, but not of the President. So I do not really understand the line of questioning vis-à-vis the logic of the indictment").

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Decision on Kabiligi Request for Certification to Appeal Decision on Exclusion of Evidence
18 October 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Gratien Kabiligi – Certification of appeal, Grounds of appeal already discussed, Procedural matter falling with the Trial Chamber's discretion – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (B) and 73 bis (E)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Kabiligi Motion for Exclusion of Evidence, 4 September 2006 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Aloys Ntabakuze's Interlocutory Appeal, 18 September 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Request for Certification of the 'Decision on Kabiligi Motion on Exclusion of Evidence' of 4 September 2006", filed by the Kabiligi Defence on 11 September 2006;

CONSIDERING the Prosecution Response, filed on 18 September 2006;

HEREBY DECIDES the request.

Introduction

1. The Kabiligi Defence requests leave to appeal the Chamber's Decision on Kabiligi Motion for Exclusion of Evidence, filed on 4 September 2006.[1] By virtue of that decision, the Chamber declared a portion of a witness's testimony inadmissible on the basis that the Defence was not given adequate notice thereof, but denied all other such requests.

Deliberations

2. Certification may be granted under Rule 73 (B) of the Rules of Procedure and Evidence when a decision

[1] *Bagosora et al*., Decision on Kabiligi Motion for Exclusion of Evidence (TC), 4 September 2006.

> "involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

3. The Kabiligi Defence wishes to appeal the Chamber's decision on three specific grounds: first, as to

> "whether an accused can be convicted … on the basis of new charges not pleaded in the Indictment";

second, that the Chamber misapplied the principle of "curing" so as to allow the Prosecution to provide notice of material facts which have no connection to the Indictment; and third, that the Chamber erroneously dismissed a Defence argument that Prosecution Witness XXQ had been improperly added to the Prosecution witness list in violation of Rule 73 *bis* (E).

4. Since this request for certification was filed, the Appeals Chamber has rendered a decision concerning another Defence request for exclusion of evidence on similar grounds.[2] The first two grounds of appeal proposed by the Kabiligi Defence have now, to at least some degree, been considered by the Appeals Chamber. Another appeal based on those same grounds would not materially advance the proceedings.

5. Certification on the third ground of appeal, concerning the alleged failure to amend the witness list, is essentially a procedural matter falling with the Trial Chamber's discretion. Furthermore, Witness XXQ's testimony is well-defined and can be addressed by the Defence on any appeal from a final judgement, should that be necessary. Under these circumstances, immediate resolution of this question would not materially advance the proceedings.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the request.

Arusha, 18 October 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[2] *Bagosora et al*., Decision on Aloys Ntabakuze's Interlocutory Appeal, etc., (AC), 18 September 2006.

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Decision on Requests to Hear Testimony in Closed Session 18 October 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Closed Session Testimony, Decision to be taken at the beginning of a witness's appearance – Motion denied

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion to Request the Hearing of the Testimony of Witnesses LX-1 and ALL-42 To Take Place in Closed Session", etc., and the "Motion to Request (1) the Hearing of the Entire Testimony of Witnesses LCH-01 and LAX-02 to Take Place in Closed Session", etc., filed by the Kabiligi Defence on 22 September and 2 October 2006;

HEREBY DECIDES the motion.

1. Requests to hear the testimony of a witness in closed session are customarily heard and decided orally at the beginning of a witness's appearance. This procedure enjoys the advantage of permitting the witness to be questioned by the Chamber as to the nature of their security concerns.[1] The Chamber considers this to be an appropriate procedure and will, accordingly, defer any decision on whether to hear the testimony of Witness ALL-42 and Witness LAX-02 entirely in closed session until such time as the witness appears in court to give testimony.

2. The requests concerning Witness LX-1 and Witness LCH-01 are moot, having been granted by the Chamber orally on 3 October 2006.[2]

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 18 October 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[1] E.g. T. 3 October pp. 15-18 (Witness LCH-1), 46-50 (Witness LX-1).
[2] *Id*.

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Decision on Video-Conference Testimony of Kabiligi Witnesses YUL-39 and LAX-23 and to Hear Testimony in Closed Session 19 October 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Gratien Kabiligi – Closed Session Testimony, Video-Conference Testimony, Interests of justice, Showing that the witness has a credible basis for refusing oral testimony at the Tribunal, Witness fearing that an international arrest warrant was issued against him at the behest of the Government of Rwanda, Witness having prominent position in the civil service of the former Government of Rwanda – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rules 54 and 75

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on the Prosecutor's Application to Add Witness X to Its List of Witnesses and for Protective Measures, 14 September 2001 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 October 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Testimony of Witness Amadou Deme by Video-Link, 29 August 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Video-Conference Testimony of Kabiligi Witnesses KX-38 and KVB-46, 5 October 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Requests to Hear Testimony in Closed Session, 18 October 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion to Request the Testimony of Witnesses YUL-39 and LAX-23 to be Heard Via Video Link and the Entirety of the Testimony of Witness LAX-23 in Closed Session", filed by the Kabligi Defence on 12 October 2006;

HEREBY DECIDES the motion.

Introduction

1. The Kabiligi Defence requests that Witness YUL-39 and Witness LAX-23 be permitted to give their testimony by video-conference. Both witnesses fear that their security would be placed at risk by travelling out of their countries of current residence, as they were both high-profile officials in the former Government of Rwanda. They believe that they may be arrested while in transit, or targeted for assassination.

Deliberations

2. Testimony by video-conference may be ordered pursuant either to Rule 54 of the Rules of Procedure and Evidence, on the basis that it is "in the interests of justice"; or as a witness protection measure under Rule 75, which requires that the video-conference be "necessary to safeguard the witness's security".[1] Whether video-conference testimony is in the interests of justice under Rule 54 depends on three factors: the importance of the testimony; the witness's inability or unwillingness to attend; and whether a good reason has been adduced for that inability or unwillingness.[2] Although it is not absolutely necessary that the reason for the refusal to attend be objectively justified, a showing must at least be made that the witness has a credible basis for the refusal, and that those grounds are genuinely held.[3]

3. Witness YUL-39 refuses to travel to Arusha on the basis that he may be the object of an international arrest warrant issued at the behest of the Government of Rwanda. He believes that he could be subject to arrest while on the territory of a country through which he must transit between his country of current residence and Tanzania. Materials in the confidential and *ex parte* annex to the motion demonstrate not only that the witness is genuinely afraid of this possibility, but that the fear may be well-founded. The witness is purportedly able to describe the duties and functions of the office of G3, and to directly contradict the testimony of Prosecution Witness XXQ regarding events in Ruhengeri.

4. Witness LAX-23 held a prominent position in the civil service of the former Government of Rwanda. The motion asserts that the witness believes that his name is amongst those on a list of persons to be assassinated. The list includes the name of at least one person who was allegedly assassinated in Kenya in 1998.[4] The witness is said to have direct knowledge of the date of the Accused's return to Rwanda in April 1994 and, accordingly, can provide important alibi evidence.

5. The Defence has established that both witnesses refuse to travel to Arusha on the basis of genuinely-held fears. Although more direct evidence of Witness LAX-23's views would have been preferable, the Chamber is willing in the present case to accept the assertions in the Defence motion as an accurate reflection of the state of mind of these witnesses. Both witnesses appear to be able to give potentially exculpatory testimony in respect of clearly-defined issues. On this basis, the Chamber considers that it is in the interests of justice to allow these witnesses to testify by video-conference.

6. Requests to hear the entirety of a witness's testimony in closed session are usually decided orally after the Chamber has had the opportunity to hear the reasons for the witness's sensitivity.[5] The Chamber has generally adopted a liberal approach to such concerns, and has exercised caution in protecting witness's identities.[6] No order in respect of hearing Witness LAX-23 entirely in closed session shall be made until the Chamber has had the opportunity to hear from the witness at the beginning of his testimony.

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[1] *Bagosora et al*., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004, paras. 5-8; *Nahimana et al*., Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures (TC), 14 September 2001.
[2] *Bagosora et al*., Decision on Video-Conference Testimony of Kabiligi Witnesses KX-38 and KVB-46 (TC), 5 October 2006, para. 3; *Bagosora et al*., Decision on Testimony by Video-Conference (TC), 20 December 2004, para. 4; *Bagosora et al*., Decision on Prosecution Request for Testimony of Witness BT via Video Link (TC), 8 October 2004, para. 6.
[3] *Bagosora et al*., Decision on Video-Conference Testimony of Kabiligi Witnesses KX-38 and KVB-46 (TC), 5 October 2006, para. 3; *Bagosora et al*., Decision on Testimony of Witness Amadou Deme by Video-Link (TC), 29 August 2006, para. 5; *Bagosora et al*., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004, paras. 6, 13.
[4] Motion, para. 26.
[5] *Bagosora et al*., Decision on Requests to Hear Testimony in Closed Session (TC), 18 October 2006, para. 1.
[6] E.g. T. 3 October pp. 15-18 (Witness LCH-1), 46-50 (Witness LX-1).

FOR THE ABOVE REASONS, THE CHAMBER

AUTHORIZES the taking of the testimony of Witness YUL-39 and Witness LAX-23 by video-conference;

INSTRUCTS the Registry, in consultation with the parties, to make all necessary arrangements, in respect of the testimony of Witness YUL-39 and Witness LAX-23 by video-conference and to videotape the testimony for possible future reference by the Chamber;

DENIES as premature the request to hear the entirety of Witness LAX-23's testimony in closed session.

Arusha, 19 October 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Request for Subpoena of Ami R. Mpungwe 19 October 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Issuance of subpoena, Former official of the Government of Tanzania (facilitator during the negotiation of the Arusha Accords), Sufficient basis established to suggest that the prospective witness may have relevant information, Reasonable efforts to obtain the witness's voluntary cooperation – Motion granted

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Edouard Karemera et al.,Decision on Defence Motion for Issuance of Subpoena to Witness T, 8 February 2006 (ICTR-98-44); Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Bagosora Defence Request for Subpoena of Ambassador Mpungwe and Cooperation of the United Republic of Tanzania, 29 August 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for a Subpoena, 11 September 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Subpoenas of United Nations Officials, 6 October 2006 (ICTR-98-41)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Radislav Krstić, Decision on Application for subpoenas, 1 July 2003 (IT-98-33) ; Appeals Chamber, The Prosecutor v. Sejér Halilović, Decision on Issuance of Subpoenas, 21 June 2004 (IT-01-48)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Request for Trial Chamber to Order the Government of Tanzania to Cooperate and For *Subpoena* for Ambassador Mpungwe", filed by the Bagosora Defence on 29 September 2006;

CONSIDERING the "Submissions in Support", filed by the Bagosora Defence on 12 October 2006;

HEREBY DECIDES the motion.

1. The Bagosora Defence requests that a *subpoena* be issued to Ami R. Mpungwe, requiring his appearance before this Chamber to give testimony. Mr. Mpungwe, a former official of the Government of Tanzania, acted as a facilitator during the negotiation of the Arusha Accords in 1992 and 1993.

2. The applicant for a *subpoena* compelling the appearance of a person as a witness must show that three conditions are satisfied: (i) reasonable attempts have been made to obtain the voluntary cooperation of the witness; (ii) the prospective witness has information which can materially assist the applicant in respect of clearly identified issues relevant to the trial; and (iii) the witness's testimony must be necessary and appropriate for the conduct and fairness of the trial.[1]

3. This Chamber previously considered a request, filed on 7 July 2006, for a *subpoena* requiring Mr. Mpungwe to meet with the Defence, and for the assistance of the Government of Tanzania in facilitating such a meeting. In a decision of 29 August 2006, the Chamber held that the second and third conditions for the issuance of a *subpoena* were satisfied:

> A sufficient basis has been established to suggest that Mr. Mpungwe may have information concerning the conduct of Colonel Bagosora during the Arusha negotiations, on which this Chamber has heard direct and potentially incriminating evidence. Further, the evidence relates to a specific allegation in paragraph 5.10 of the Indictment that the Accused "openly manifested his opposition to the concessions made by the Government representative … to the point of leaving the negotiation table. Colonel Théoneste Bagosora left Arusha saying that he was returning to Rwanda to 'prepare the apocalypse'". The Defence has a reasonable basis to believe that Ambassador Mpungwe may have information which could be material to these allegations.[2]

4. The request for a *subpoena* was, nonetheless, denied on the basis that reasonable efforts to obtain the witness's cooperation had not yet been exhausted. Although the Defence, in conjunction with the Registry, had been trying to arrange a meeting with Mr. Mpungwe since 28 April 2006,[3] the impasse appeared attributable to the witness's good faith belief that official authorization was required before he could meet with the Defence:

> It appears that [Mr. Mpungwe] is willing to attend a meeting voluntarily, provided that he is given authorization to do so by the Tanzanian government. The Chamber observes, however, that the meeting must be held expeditiously. The trial is in its closing stages, and the Defence must be given a reasonable opportunity to ascertain the nature of the witness's knowledge and, if necessary, to call him as a witness.[4]

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[1] *Prosecutor v. Krstic*, Case N°IT-98-33-A, Decision on Application for Subpoenas (AC), 1 July 2003, para. 10; *Prosecutor v. Halilovic,* Case N°IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 7; *Bagosora et al*., Decision on Request for Subpoenas of United Nations Officials (TC), 6 October 2006, para. 3; *Bagosora et al*., Decision on Request for a Subpoena (TC), 11 September 2006, para. 5; *Karemera et al*., Decision on Defence Motion for Issuance of Subpoena to Witness T (TC), 8 February 2006, para. 4.

[2] *Bagosora et al*., Decision on the Bagosora Defence Request for Subpoena of Ambassador Mpungwe and Cooperation of the United Republic of Tanzania (TC), 29 August 2006, para. 3.

[3] *Bagosora et al*., Decision on the Bagosora Defence Request for Subpoena of Ambassador Mpungwe and Cooperation of the United Republic of Tanzania (TC), 29 August 2006, para.1.

[4] *Id*. para. 4.

5. Despite the Chamber's instruction that the "meeting must be held expeditiously" and "as soon as possible", five more weeks elapsed before a meeting was finally held on 5 October 2006.[5] On 11 October 2006, after a Defence request for answers to additional written questions, Mr. Mpungwe's lawyer advised the Defence that no further responses would be forthcoming. The following day, the Defence requested, through Mr. Mpungwe's lawyer, the witness's immediate appearance before the Chamber, and filed the present motion.[6] According to the trial schedule, the deadline for the close of the Bagosora Defence case was 13 October 2006, and the close of the trial is scheduled for 13 December 2006.

6. The Chamber considers that the Defence has made reasonable efforts to obtain the witness's voluntary cooperation, and that a *subpoena* is now required to ensure his timely appearance. The lengthy delays cannot be attributed to the Defence, which appears to have acted in a diligent manner to secure the witness's testimony before the scheduled close of its case. In light of the imminent completion of the present trial, and the history of delays described above, a *subpoena* is now required to ensure that Mr. Mpungwe appears during the next trial session.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Registrar to prepare a *subpoena* in accordance with this decision, addressed to Ami R. Mpungwe, requiring his appearance before this Chamber to give testimony in the present case;

DIRECTS the Registry to communicate the *subpoena* to Mr. Mpungwe through appropriate diplomatic channels, accompanied by a copy of this Decision.

Arusha, 19 October 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[5] *Id*. p. 3.
[6] Submissions, paras. 6-7.

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Decision on Bagosora Request for the Government of France to Authorize the Appearance of a Witness
20 October 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora – Cooperation of the States, France, Information can be obtained other than through the prospective witness, Precedent meetings with the prospective witness shows that he has a limited knowledge of the Accused, General knowledge of the Rwandan Armed Forces and of events in Kigali between 7 and 14 April 1994 – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rule 92 bis ; Statute, art. 28

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, 10 March 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Request to the Republic of France for Cooperation and Assistance Pursuant to Article 28 of the Statute, 22 October 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation, 19 April 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana, Decision on Nzuwonomeye's Motion Requesting Cooperation From the Government of Ghana Pursuant to Article 28 of the Statute, 13 February 2006 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Subpoenas of United Nations Officials, 6 October 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "*Requête ... en vue d'obtenir la Coopération de la République Française*", etc., filed by the Bagosora Defence on 13 Decernber 2005;

CONSIDERING "Submissions" and the "*Mémoire Additionel*", filed by the Bagosora Defence on 21 September and 16 October 2006, respectively;

HEREBY DECIDES the motion

Introduction

1. The Bagosora Defence wishes to call as a witness a French military officer who was present in Rwanda during some of the events described in the Indictment. The Defence asks the Chamber to issue a request to the Government of France to permit the witness to testify. Since the filing of the motion at the end of 2005, the Defence has twice interviewed the officer, with the consent and cooperation of the French authorities. France has also expressed its willingness to allow the officer to

appear as a witness on certain conditions, some of which have been rejected by the Bagosora Defence[1].

Deliberations

2. Article 28 of the Statute imposes an obligation on States to

> "cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law".

The issuance of such a request is subject to three conditions: (i) identification of the nature of the information sought with a reasonable degree of specificity; (ii) a showing that the information is relevant to the trial; and (iii) evidence that reasonable efforts have been undertaken to obtain the information without the intervention of the chamber[2]. The second condition requires the applicant to show that the information is relevant to any matter in issue before the Judge or Trial Chamber and that it is necessary for a fair determination of that matter[3]. A similar condition applies to the issuance of a *subpoena* and, in that context, Chambers have considered "whether the information can be obtained other than through the prospective witness"[4].

3. The Defence asserts that the prospective witness can give testimony as to his knowledge of the Rwandan Armed Forces and events in Kigali in 1994. In particular, he is said to have been present at the *Etat major* on the night of 6 to 7 April 1994[5].

4. As mentioned above, the prospective witness has met with the Defence on two occasions and, as a result of one of those meetings, produced written answers to questions posed by the Defence. Those answers, which have been communicated to the Chamber and to the Defence, demonstrate that the prospective witness has only limited knowledge concerning the Accused[6]. He appears to have met the Accused on two unremarkable occasions in 1992 and 1993. On the night of 6 April 1994, he saw Bagosora at the *Etat major*, but apparently did not hear him say anything of substance. He met Bagosora again during two short meetings, one on 7 April in the presence of another French official, and then finally on 9 April 1994. The witness recalls the nature of the requests made by him and his colleague during those two meetings, but apparently has little or no recollection of Colonel Bagosora's response or his attitude[7].

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[1] Mémoire additionel, para. 35.
[2] *Bagosora* et al., Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 10 March 2004.
[3] Relevance has not always been formulated in exactly the same words from one case to another. Some decisions, particularly where the relevance of the information is obvious, say no more than that the applicant must articulate its "relevance to the trial". *Ndindiliyimana et al*., Decision on Nzuwonomeye's Motion Requesting Cooperation From the Government of Ghana Pursuant to Article 28 of the Statute (TC), 13 February 2006, para. 6; *Bagosora et al*., Request to the Republic of France for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 22 October 2004, para. 3. Where relevance is contested, however, it has also been required that the information be "relevant to any matter in issue before the Judge or Trial Chamber", and that the information be "necessary for a fair determination" of that matter. *Karemera et al*., Decision on Joseph Nzirorera's Motion For a Requcst for Govermental Cooperation (TC), 19 April 2005, para. 8. This language mirrors the standard codified in Rule 54 *bis* of the ICTY Rules which deals specifically with the conditions and modalities for issuing orders to States under Article 29 of the ICTY Statute. The Chamber considers this to be the appropriate standard. The limitation that the information be "necessary for a fair determination" of a question before the Chamber reflects a sensible concern that States and international organization not be burdened with numerous requeçts for information based on relevance alone, a standard which could potentially cast an unduly broad net. In addition, this is an area where a common standard amongst the international tribunals is desirable.
[4] *Bagosora et al*., Decision on Request for Subpoenas of United Nations Officials (TC), 6 October 2006, para. 3.
[5] Requête, paras. 20-23.
[6] Interoffice Memorandum, 10 July 2006, from Registry to Lead Counsel for Bagosora, Ref (ICTR/IOR/ERSPS/07/06/82-RD)
[7] Answers to questions 3 and 53.

5. The prospective witness's written answers reflect a general knowledge of the Rwandan Armed Forces and of events in Kigali between 7 and 14 April 1994. The Chamber does not, however, consider that the witness's testimony on these matters is necessary and appropriate for the conduct and fairness of the trial. The Chamber has already heard extensive testimony from both Defence and Prosecution witnesses on these general issues. Further, statements which do not concern the acts and conduct of the Accused may be placed before the Chamber without necessarily requiring the witness's appearance, in appropriate circumstances[8]. Considering the general nature of the evidence, its duplicative character in relation to evidence already heard, and the alternative mechanisms by which it might be admitted, the Chamber cannot conclude that a request for the appearance of the witness is necessary and appropriate for the conduct of the trial.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion

Arusha, 20 October 2006

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[8] Rule 92 *bis* of the Rules of Procedure and Evidence.

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Further Request to the Government of Rwanda for Cooperation and Assistance 26 October 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Cooperation of the States, Rwanda, Need for a response as soon as possible of the Government of Rwanda concerning documents already asked, Documents relevant to the proceedings – Motion partially granted

International Instrument cited :

Statute, art. 28

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, 10 March 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request to the Kingdom of The Netherlands for Cooperation and Assistance, 7 February 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute, 31 October 2005 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Mose, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Requête de la Défense de Bagosora visant la collaboration de l'Etat du Rwanda", filed by the Defence on 28 March 2006;

CONSIDERING the correspondence filed ex *parte* by the Bagosora Defence on 4 October 2006;

HEREBY DECIDES the motion.

Introduction

1. In its Decision of 10 March 2004, following a request by the Bagosora Defence, the Chamber asked the Government of Rwanda to determine whether it possessed any of the documents listed in Annex A of its Decision and, if so, to transmit them to the Registry as soon as possible for disclosure to the Defence[1]. The Defence submits that the Rwandan authorities have not provided a complete response. Furthermore, the Defence has attempted in vain to obtain additional information necessary for the Accused to prepare his defence[2]. As a result, the Defence requests the Chamber to ensure the cooperation of the Government of Rwanda.

[1] *Prosecutor* v. *Bagosora et al*., Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 10 March 2004 (the "10 March 2004 Decision").
[2] Motion, paras. 9-10.

2. Since the present motion was filed, the Rwandan Ministry of Foreign Affairs has provided additional information regarding two of the documents that the Defence had requested[3]. Moreover, in its 4 October 2006 filing, the Defence advised the Chamber that it has received additional communications from the Rwandan Government[4].

Discussion

3. Article 28 of the Statute imposes an obligation on States to

> "cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law".

A request to a Chamber to make an order under Article 28 must set forth the nature of the information sought, its relevance to the trial, and the efforts that have been made to obtain it. Requests for assistance under Article 28 should also identify the nature of the assistance required with particularity[5].

(i) Documents Already Covered by the Chamber's 10 March 2004 Decision

4. The Chamber has already found that the documents referenced in its 10 March 2004 Decision were properly sought by the Bagosora Defence. The Defence has obtained information as to some of these documents[6]. The Chamber is persuaded that a response from the Government of Rwanda as to the remaining documents, listed in Annex A to this Decision, is appropriate, and emphasizes the need for a response as soon as possible.

(ii) Additional Documents

5. The remaining documents requested by the Defence are as follows:

a. A copy of the judicial file established in 1996 by the Parquet Général de Kigali supporting the request for extradition of Bagosora made to the Cameroonian authorities;
b. The complete copy of the 1993 agenda of Bagosora;
c. The declaration of Mr. Jean-Bosco Nkulikiyinka, made at the Auditorat Militaire in 1998, on the subject of a roadblock in Kigali;
d. The list and composition of the class for 3rd year "A" of élétromécanique at the school called EFOTEC for the school year 1993-1994;
e. The school records with the different classes attended by three particular students;
f. An interview with Mr. Faustin Twagiramungu, from June 1992, giving his point of view on the attack of the RPF made in the same period;
g. The speech given by Mr. Froduald Karamira in October 1993, after the assassination of the president of Burundi, Melchior Ndadaye; and
h. The speech given by Mr. Fdicien Gatabazi, made in January or February 1994 during a meeting of his party, the PSD.

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[3] *Note Verbale,* 10 July 2006, from the Rwandan Ministry of Foreign Affairs and Cooperation to the Registry of the Tribunal (regarding the Defence request for copies of civilian, military and diplomatic passports of Colonel Bagosora between 1990 and 1994, and the list and duration of his missions from June 1992 to July 1994).
[4] The filing noted that the Defence had received information as to lists of students from 1993-1994 EFOTEC classes and as to telephone files from Rwandatel-Terracorn.
[5] *Bagosora et al,,* Decision on Request to the Kingdom of The Netherlands for Cooperation and Assistance (TC), 7 February 2005, para. 5; *Bagosora et al.,* Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 ofthe Statute (TC), 31 October 2005, para. 2.
[6] See footnotes 3 and 4 above.

6. The Chamber finds that the Defence adequately sets forth the nature of the dqcuments sought. The Defence has provided detailed descriptions and documentation showing its efforts to procure these documents.

7. The Chamber considers that documents relating directly to Bagosora (categories a-b, above) are clearly relevant to the proceedings against him. In addition, the two categories (d and e) relating to the EFOTEC school may be relevant to the trial. The declaration of Mr. Nkulikiyinka (category c) is also likely relevant, as it apparently addresses a subject (a certain roadblock said to have been set up in Kigali in April 1994) about which testimony has been given during trial[7]. As noted in the Chamber's 10 March 2004 Decision, evidence has been admitted at trial of events in 1992 which the Prosecution says is probative of an ongoing conspiracy through 1994[8]. The Chamber finds that the interview with Mr. Twagiramungu (category f) and the speeches made by Mr. Karamira and Mr. Gatabazi (categories g and h, respectively) may also be relevant to that question[9]. These documents are listed in Annex B to this Decision.

FOR THE ABOVE REASONS, THE CHAMBER

REMINDS the Government of Rwanda of its obligation to cooperate with the Tribunal, pursuant to Article 28 of the Statute;

REQUESTS the Government of Rwanda to provide as soon as possible a response to the Request for Cooperation and Assistance of 10 March 2004 as to documents listed in Annex A of this Decision;

FURTHER REQUESTS the Government of Rwanda to determine whether it possesses any of the documents listed in Annex B of this Decision, and if so, to transmit them to the Registry as soon as possible for disclosure to the Defence;

DIRECTS the Registrar to contact the relevant authorities of the Government of Rwanda forthwith, to continue dealing with the matter until a response to the Request for Cooperation and Assistance of 10 March 2004 is received, and to report thereon to the Chamber; and

DENIES the Motion in all other respects.

Arusha, 26 October 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Annex A

List of Remaining Documents Requested From the Government of Rwanda in Accordance With the Decision of 10 March 2004 of Trial Chamber I of the International Criminal Tribunal for Rwanda

1. Journaux Officiels from July 1993 through December 1993

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[7] T. 17 September 2003 pp. 15-16; T. 19 September 2003 pp. 56-57; T. 11 November 2003 pp. 11, 14.
[8] 10 March 2004, Decision, para. 10
[9] For example, the Prosecution has provided expert witness testimony regarding the impact in Kigali of the assassination of President Ndadaye; the testimony specifically describes the speech made by Froduald Karamira and its alleged role in rallying the forces that led to the so-called "Hutu power" movement. T. 18 September 2002 pp. 8-12.

2. Military, Administrative or Personal Files at the Ministry of Defence of Colonel Théoneste Bagosora for the period from January 1992 through July 1994

3. Administrative files of the following persons at the Ministry of Defence for the period January 1992 through July 1994:

a. Pierre Celestin Rwagafilita (3rd promotion ESM)

b. Stanislas Mayuya (4th promotion ESM)

c. Elie Sagatwa (5th promotion ESh4)

d. Leonidas Rusatira (6th promotion ESM)

e. Augustin Ndinliyiamana (7th promotion ESM)

f. Marcel Gatsinzi (9th promotion ESM)

g. Anastase BizumuremuyiI (24th promotion ESM)

3*.[10] *Ordres de bataille* and/or *liste nominative des militaires* of the Paracommando Battalion dated or issued on 1 October 1993 and 1 January 1994

4. *Ordres de bataille* and/or *liste nominative des militaires* of the Reconnaissance Battalion dated or issued on 1 January 1994

5. *Ordres de bataille* and/or *liste nominative des militaires* of the Presidential Guard dated or issued on 1 October 1993 and 1 January 1994

5. *Ordres de bataille* and/or *liste nominative des militaires* of the *Gendarmerie Nationale* dated or issued on 1 October 1993, 1 January 1994 and 1 March 1994

7. A directive dated or issued by the Ministry of Defence in late January or early February 1993 limiting the powers of the chef de cabinet

8. A letter from Colonel Théneste Bagosora to the commander of UNAMIR, dated late February or early March 1994, protesting provocative acts against him by Belgian UNAMIR troops

9. Records of judicial proceedings conducted afier July 1994 concerning the following individuals:

a. Pasteur Bizimungu

b. Isidore Bwanakweli

C. Banzi Wellars (trial in Gisenyi; President of MRND, Gisenyi)

d. Faziri Hakizimana (trial in Gisenyi; *conseiller du secteur* de Gisenyi)

e. Zainabo Mikundufite (formerly in charge of the Rubavu *Cellule* and the daughter of Faziri Hakizimana) (trial in Gisenyi)

f. 2nd Lt. Eustache Dusabeyezu (student at St. Fidkle or Mudende University) (trial in Gisenyi)

g. Father Francois Kayiranga (Court of Appeal of Ruhengeri)

h. Father Edward Nturiye (Court of Appeal of Ruhengeri)

Annex B

List of Documents Requested From the Government of Rwanda in Accordance With the Decision of 26 October 2006 of Trial Chamber I of the International Criminal Tribunal for Rwanda

1. A copy of the judicial file established in 1996 by the *Parquet Général* de *Kigali* supporting the request for extradition of Bagosora made to the Carneroonian authorities

2. The complete copy of the 1993 agenda of Bagosora

3. The declaration of Mr. Jean-Bosco Nkulikiyinka, made at the *Auditorat Militaire* in 1998, on the subject of a roadblock in Kigali

4. The list and composition of the clasr for 3rd year "A" of *éléctromécanique* at the school called EFOTEC for the schooI year 1993-1994

5. The school records for EFOTEC with the different classes attended by the students named below:

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* The wrong numbering of the following paragraphs is due to an error of the Tribunal.

a. François-Régis Renzaho
b. Théogène Sibomana
c. Lucien Telimbere

6. An interview with Mr. Faustin Twagiramungu, fiom June 1992, giving his point of view on the attack of the RPF made in the same period

7. The speech given by Mr. Froduald Karamira in October 1993, after the assassination of the president of Burundi, Melchior Ndadaye

8. The speech given by Mr. Félicien Gatabazi, made in January or February 1994 during a meeting of his Party, the PSD

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Decision on Alleged Deficiencies in the Kabiligi Pre-Defence Brief 30 October 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Gratien Kabiligi – Obligation to provide information identifying Defence witnesses, Failure to provide the witness identifying information in accordance with the deadline constitutes a default, Obligation to disclose statements of Defence witnesses – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rule 73 ter (B) (iii) (a)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Sufficiency of Defence Witness Summaries, 5 July 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Commencement of Kabiligi Defence and Filing of Pre-Defence Brief, 21 June 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Nsengiyumva Motion to Add Six Witnesses to its Witness List, 11 September 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Bagosora Motion to Modify its Witness List, 11 September 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Prosecution's "Motion Regarding Defence Refusal to Provide Witness Statements and Requesting Certain Relief for Deficiencies in Kabiligi Pre-Defence Brief", filed on 5 October 2006;

CONSIDERING the Defence Response, filed on 10 October 2006;

HEREBY DECIDES the motion.

Introduction

1. The Prosecution requests that Kabiligi Defence witnesses be precluded from testifying because information concerning their identity or expected testimony is lacking. Specifically, the Prosecution complains that: (i) extremely limited personal information has been provided in respect of five witnesses; (ii) no statements have been disclosed in respect of twenty-one witnesses; and (iii) seventeen witnesses have not been listed on the sequence of witnesses during the final trial session, which commences on 6 November 2006.[1]

Deliberations

(i) Witness Identities

2. The scope of the Defence's obligation to provide information identifying its witnesses is defined in a previous decision of the Chamber in this case:

> The Chamber has ruled pursuant to Rule 73 *ter* (B) (iii) (a) that personal information of each Defence witness must be provided in the same format as had been provided by the Prosecution in respect of its witnesses. The information of particular importance is the witness's activities in 1994, parentage and birthplace, and country of present residence. The Chamber accepts that the Defence may not be in possession of all this information in respect of each and every witness, but would expect deficiencies to be rare and remedied quickly. Alleged feelings of insecurity by witnesses provide no justification for withholding their place of residence. Exigent witness protection measures are in place to satisfy those concerns. The Defence cannot rely upon expressions of insecurity by witnesses as a basis for refusing to provide witness identifying information.[2]

The Kabiligi Defence does not appear to dispute this obligation, but asserts that it

> "does not intend to call witnesses without providing witness particulars at least 35 days in advance."[3]

Although the Chamber has, in the exercise of its discretion, permitted Defence witnesses to be added to witness lists provided that at least thirty-five days' notice is given before their appearance, this is not a procedure or a time-period which can be accepted as automatic.[4] On the contrary, the Chamber has already specifically ordered that

> "the Kabiligi Pre-Defence Brief, which shall include witness identifying information and summaries of expected testimony, shall be filed no later than 7 July 2006."[5]

Failure to provide the witness identifying information in accordance with that deadline constitutes a default. The Chamber's previous decision acknowledges that there may be circumstances which excuse such a default, but that such occasions should be "rare and remedied quickly". It appears from the emails annexed to the Prosecution motion that at least some of the deficiencies may be attributable to lack of information, rather than to a wilful disregard of the Chamber's order.[6] Further, some of those annexes suggest that the Defence may have complied, to a certain degree, with the Chamber's order in respect of some of the witnesses.

3. The Chamber affirms its previous order requiring the defence to disclose the following information concerning its witnesses: name, nationality, sex, parentage, birthplace, birthdate, present

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[1] Three of the five witnesses in the first category also fall into the second category. The categories do not otherwise appear to overlap.
[2] *Bagosora et al.,* Decision on Sufficiency of Witness Summaries (TC), 5 July 2005, para. 8.
[3] Response, para. 13.
[4] *Bagosora et al.,* Decision on the Nsengiyumva Motion to Add Six Witnesses to its Witness List (TC), 11 September 2006 and *Bagosora et al.,* Decision on Bagosora Motion to Modify its Witness List (TC), 11 September 2006.
[5] *Bagosora et al.*, Decision on Commencement of Kabiligi Defence and Filing of Pre-Defence Brief (TC), 21 June 2006, p. 2.
[6] Motion, Annex 1.

occupation and occupation in April 1994, and country of current residence. Should any deficiencies remain as of the date of this decision, the Prosecution may make further detailed submissions as to the nature of the information lacking, the insufficiency of any explanation given by the Defence, and the consequences of such failure on investigations.

(ii) Witness Statements

4. The Kabiligi Defence denies that it owes any obligation to disclose statements of its witnesses to the Prosecution.

5. Although the Defence is under no obligation to take statements from its witnesses, it must disclose any statements which have been taken. The Chamber did not specifically recapitulate this obligation in its written decision setting the date for disclosure of the Kabiligi Pre-Defence Brief, but that obligation was clearly stated in respect of the general disclosure requirements of all four Defence teams.[7] To the extent that any statements given by the twenty-one witnesses identified by the Prosecution exist and are in the possession of the Defence, they must be disclosed forthwith.

(iii) Sequencing

4. Failure to list a witness among the sequence of expected witnesses is not a deficiency that warrants precluding testimony. Such scheduling is understood to be provisional, and may depend on matters beyond the control of the party calling the witnesses. Some flexibility is required to ensure that a party is able to present its case effectively. Any last minute changes are, of course, subject to the Chamber's control to ensure that proceedings are fair and that no party is unfairly surprised.

FOR THE ABOVE REASONS, THE CHAMBER

AFFIRMS that the Defence has an immediate obligation to disclose the identities of its witnesses, in accordance with the Chamber's previous decision;

ORDERS the Defence to disclose immediately any statements of its witnesses as may exist and are in its possession;

DENIES the motion in all other respects.

Arusha, 30 October 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[7] T. 21 December p. 41: ("MR. PRESIDENT: Tomorrow or the 3rd of January you will provide the pseudonyms of each witness, the summary of the facts on which each witness will testify; the points in the indictment as to which witness will testify; and the estimated length of the time required for each witness. On the 7th you will give the names and the identifying information of these witnesses, unredacted statements of declarations given previously by the witness. MR. TREMBLAY: Mr. President, I have problems understanding why and -- why on the basis of what we have to disclose unredacted statements. I do not see any provision in the Rule that obligates us to disclose this to the Prosecutor; I don't see that. MR. PRESIDENT: 73 (B), last paragraph, yes. This -- it's being done in all other cases."). T. 16 May 2005 p. 30: ("MR. PRESIDENT: And there is a summary there. So you did very helpfully, Mr. White, provide us with this page concerning relief in this motion, and this discussion was useful … 'Provide statements where available, and, if not, to provide comprehensive will-say statements.' Well, that leads to the - to the question of which statements are lacking, which we will come back to later, but the obligation is there.")

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Decision on Kabiligi Motion for Cooperation of the Government of France and Subpoena of Former Officers 31 October 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Gratien Kabiligi – Cooperation of the States, France, Cooperation without undue delay, Issuance of subpoenas requiring testimony premature – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 54 ; Statute, art. 20 (4) (e), 28 and 28 (2)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Bagosora Defence Request for Subpoena of Ambassador Mpungwe and Cooperation of the United Republic of Tanzania, 29 August 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Subpoenas of United Nations Officials, 6 October 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Bagosora Request for the Government of France to Authorize the Appearance of a Witness, 20 October 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion for Cooperation from the Government of France Pursuant to Article 28 of the Statute of the ICTR and Issuance of *Subpoenas* Pursuant to Rule 54 of the Rules of Procedure and Evidence", filed by the Kabiligi Defence on 4 October 2006;

CONSIDERING the Registrar's Submissions, filed on 10 October 2006;

HEREBY DECIDES the motion.

Introduction

1. The Kabiligi Defence asks the Chamber to issue a request to the Government of France to authorize interviews with four retired military officers, with a view to calling them as witnesses. In accordance with procedures previously insisted upon by the French authorities in respect of current or former officials, the Defence requests assistance and authorization for the officers to provide answers to a written questionnaire, and then to attend informal interviews and formal hearings during which pre-determined questions are posed to the prospective witnesses. Citing lengthy delays and the imminent deadline for the close of the trial, the Defence asks the Chamber to set a specific date for the interviews prior to the start of the next trial session on 6 November 2006, and to issue *subpoenas* commanding the appearance of the officers before the Chamber.

Deliberations

2. Article 28 of the Statute imposes an obligation on States to

> "cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violation of international humanitarian law". T

he "investigation and prosecution of persons" encompasses not only Prosecution investigations, but the entire trial process, including the right of the Accused in Article 20 (4) (e) to "obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her".[1] Article 28 (2) requires more particularly that States act "without undue delay" to respond to requests for "the taking of testimony and the production of evidence".

3. On 16 March 2006, a Defence request for assistance in facilitating and authorizing the completion of written questionnaires by four former military officers was conveyed by the Registrar to the Government of France.[2] Additional requests were relayed on 2 June and 12 July 2006.[3] On 16 August 2006, the French authorities undertook to assist the Defence in its inquiries by communicating the answers to the written questionnaires "*dans les meilleurs délais possibles*" and by facilitating the interviews and hearings of the four witnesses, which are prescribed by French law as a pre-condition for the appearance of the individuals as witnesses in trial proceedings. It doubted, however, that both the informal interviews and formal hearings of all four prospective witnesses could be scheduled during a single Defence visit to France.

4. This trial is scheduled to close on 13 December 2006. Under these circumstances, the need for the Government of France to expeditiously fulfil its commitment to provide written answers to the questionnaires, and to permit interviews with the witnesses, is urgent and immediate.

5. Issuance of *subpoenas* requiring testimony of the four prospective witnesses is premature. Although the Kabiligi Defence has provided a general indication as to the nature of the expected testimony of the witnesses, the Chamber cannot at this stage evaluate its relevance to the trial, or whether it is necessary for its fair conduct.[4] Nor does the Chamber consider it necessary or appropriate to establish specific dates for the informal interviews and formal hearings. Despite the delays that have followed the first Defence request on 16 March 2006, the Chamber has no reason to doubt that the Government of France will now act expeditiously to ensure that the requested information is produced in a timely manner, and with due regard to the urgency of the trial calendar.

FOR THE ABOVE REASONS, THE CHAMBER

REQUESTS the Government of France to comply immediately with its commitment to provide written answers to the questionnaires to each of the four prospective witnesses;

REQUESTS the Government of France to complete the procedures prescribed by its own law as expeditiously as possible, in light of the calendar described in the present decision.

DENIES the request for *subpoenas* and a specific hearing schedule as premature.

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[1] *Bagosora et al.,* Decision on the Bagosora Defence Request for Subpoena of Ambassador Mpungwe and Cooperation of the United Republic of Tanzania, (TC), 29 August 2006, para. 2.
[2] *Note verbale*, Ref. ICTR/IOR/ERSPS/03/06/38-RD, 16 March 2006.
[3] *Note verbale*, Ref. ICTR/RO/06/06/262-sw, 2 June 2006; *Note verbale*, Ref. ICTR/IOR/ERSPS/07/06/83-RD, 12 July 2006.
[4] *Bagosora et al.,* Decision on Request for Subpoenas of United Nations Officials (TC), 6 October 2006, para. 3 (the prospective testimony must be "necessary and appropriate for the conduct and fairness of the trial" for the issuance of a subpoena); *Bagosora et al*., Decision on Bagosora Request for the Government of France to Authorize the Appearance of a Witness (TC), 20 October 2006, para. 5 (issuance of subpoena denied on the basis that the expected testimony was not "necessary and appropriate for the conduct and fairness of the trial").

Arusha, 31 October 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Bagosora Request for Certification to Appeal Decision on Request for Assistance Under Article 28
6 November 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Interlocutory appeal, Cooperation of States, Standard for the issuance of subpoenas, Standard for the admission of evidence, Absence of effect on the outcome of the trial – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rules 73 (B) and 97 ; Statute, art. 28 and 28 (2)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Request to the Republic of France for Cooperation and Assistance Pursuant to Article 28 of the Statute, 22 October 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation, 19 April 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana, Decision on Nzuwonomeye's Motion Requesting Cooperation From the Government of Ghana Pursuant to Article 28 of the Statute, 13 February 2006 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 February 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Bagosora Request for the Government of France to Authorize the Appearance of a Witness, 20 October 2006 (ICTR-98-41)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Sejér Halilović, Decision on Issuance of Subpoenas, 21 June 2004 (IT-01-48)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Request for Certification of a Decision of 20 October 2006", filed by the Bagosora Defence on 27 October 2006;

CONSIDERING the Prosecution Response, filed on 27 October 2006;

HEREBY DECIDES the request.

Introduction

1. The Bagosora Defence requests leave to file an interlocutory appeal against a decision of this Chamber of 20 October 2006 (the "Impugned Decision"), declining to issue a request for cooperation to the Government of France, pursuant to Article 28 of the Statute.[1] The nature of the requested assistance was for the appearance before this Chamber of a military officer to give testimony.

Deliberations

2. Leave to file an interlocutory appeal of a decision "may" be granted under Rule 73 (B) where it

> "involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial"

and where "immediate resolution may materially advance the proceedings".

(i) Materially advances the proceedings

3. The Defence advances several grounds upon which the Impugned Decision is said to be erroneous, immediate resolution of which would materially advance the proceedings.[2] The Defence contends that the Chamber erred by requiring not only that the information be "relevant to the trial", but also that it be "necessary for a fair determination" of any matter before the Chamber.[3] The jurisprudence concerning the issuance of requests to States under Article 28 does not, according to the Defence, support such a standard. The Chamber failed to appreciate a distinction between a mere request for cooperation under Article 28, sought by the Bagosora Defence in this case, and a binding order to a State, which might arguably be subject to the higher standard.[4] Furthermore, the Impugned Decision is said to create an inappropriate distinction between the standard for admission of evidence, which is relevance alone, and the standard for requests for the production of evidence.[5]

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[1] *Bagosora et al*., Decision on Bagosora Request for the Government of France to Authorize the Appearance of a Witness (TC), 20 October 2006.

[2] *Bagosora et al*., Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeals (TC), 16 February 2006, para. 4 ("Numerous Trial Chamber decisions – and not only by this Trial Chamber – have applied this concept more generally, and inquired into the basis of the prospective appeal … It must be "the opinion of the Trial Chamber" that certification could "materially advance the proceedings": in the absence of any reasonably articulated ground of appeal, certification could not materially advance the proceedings. This does not mean, of course, that a Trial Chamber should simply substitute its own opinion for that of the Appeals Chamber; rather, the appropriate inquiry is whether a showing has been made that the appeal could succeed. That threshold would be met, for example, by showing some basis to believe that the Chamber committed an error as to the applicable law; that it made a patently incorrect conclusion of fact; or that it was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion").

[3] Motion, paras. 6-7. The Defence refers to footnote 3 of the Impugned Decision, which reads: "Relevance has not always been formulated in exactly the same words from one case to another. Some decisions, particularly where the relevance of the information is obvious, say no more than that the applicant must articulate its 'relevance to the trial'. *Ndindiliyimana et al*., Decision on Nzuwonomeye's Motion Requesting Cooperation From the Government of Ghana Pursuant to Article 28 of the Statute (TC), 13 February 2006, para. 6; *Bagosora et al*., Request to the Republic of France for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 22 October 2004, para. 3. Where relevance is contested, however, it has also been required that the information be 'relevant to any matter in issue before the Judge or Trial Chamber', and that the information be 'necessary for a fair determination' of that matter. *Karemera et al*., Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation (TC), 19 April 2005, para. 8. This language mirrors the standard codified in Rule 54 *bis* of the ICTY Rules which deals specifically with the conditions and modalities for issuing orders to States under Article 29 of the ICTY Statute. The Chamber considers this to be the appropriate standard. The limitation that the information be 'necessary for a fair determination' of a question before the Chamber reflects a sensible concern that States and international organization not be burdened with numerous requests for information based on relevance alone, a standard which could potentially cast an unduly broad net. In addition, this is an area where a common standard amongst the international tribunals is desirable."

[4] Motion, paras. 8, 10-19.

[5] *Id*., paras. 8-9.

4. The Impugned Decision explicitly acknowledges that the relevance of information sought from a State has been accepted on some occasions as sufficient for the issuance of a request under Article 28, without the need for also showing that it is "necessary for a fair determination" of an issue before the Chamber.[6] Indeed, in 2004 this Chamber made such a request in respect of this very witness.[7] On that occasion, however, the Defence sought only an informal meeting with the prospective witness, to ascertain the extent of his knowledge. The question before the Chamber in the Impugned Decision, however, was not whether the "necessary for a fair determination" standard is applicable to any and all Article 28 requests, but whether it applies to the specific request for the personal appearance of the state official before the Chamber to give testimony.

5. The Defence argues that the standard for the issuance of a *subpoena* is inapposite as it concerns a binding order, whereas the Defence in the present case sought only a non-binding request under Article 28. This purported distinction between binding and non-binding requests is unsustainable. Article 28 does not contemplate non-binding orders to States. Article 28 (2) provides that

> "States *shall comply* without undue delay with any request for assistance or an order issued by a Trial Chamber…" (emphasis added).

Whether the term "request" or "order" is used is immaterial to its binding character. Furthermore, the content of the specific requests by the Defence were sought as a specific remedy for the alleged non-compliance of the State.[8] The intervention of the Chamber would serve no purpose if its requests to States pursuant to Article 28 were not binding. Furthermore, nothing short of the actual appearance of the witness before the Chamber would have complied with the requests as proposed by the Defence. Accordingly, no basis has been presented to believe that the Chamber's consideration of the standard for the issuance of *subpoenas* was misplaced or erroneous.

6. The standard for the admission of evidence does not dictate the standard for the issuance of requests or orders for the production of evidence, as is amply demonstrated by the conditions for the issuance of a *subpoena*.[9] This consequence of the Impugned Decision does not constitute a ground to believe that it is erroneous.

7. The Defence also complains that the Chamber improperly relied on a *procès-verbal* of a hearing of the witness before the *Tribunal de Grande Instance de Paris*, arguing that this document is "defence privileged work product", and that it had been inappropriately transmitted by the Registry to the Chamber. Rule 97 of the Rules of Procedure and Evidence prescribes that "[a]ll communications between lawyer and client shall be regarded as privileged", subject to two conditions which are not relevant here. The document in question does not reflect any private communications between any lawyer and his or her client. Rather, it describes a formal hearing of a prospective witness before a French judicial officer, in the presence of counsel for the Accused.[10] It was entirely appropriate in these circumstances for the Registry to inform the Chamber of its efforts to secure the witness's

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[6] Impugned Decision, fn. 3.

[7] *Bagosora et al*., Request to the Republic of France for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 22 October 2004.

[8] The original request was reformulated in a submission of. 16 October 2006, to: "Requérir la coopération de la République française afin qu'elle adhère aux modalités proposées par la défense de Colonel Bagosora et qu'elle facilite la comparution du [témoin] devant la Chambre de céans avant … [le] 13 décembre 2006". Mémoire additionel, etc., filed on 16 October 2006. The Chamber was also asked to "Déclarer applicables à l'audition du [témoin] devant la Chambre de céans les modalités proposés par la défense". In several respects, those proposed modalities conflicted with those proposed by the French authorities.

[9] *Halilovic*, Case N°IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 7.

[10] The Chamber's first Article 28 decision in respect of this witness requested the Government of France to facilitate an informal meeting. *Bagosora et al*., Request to the Republic of France for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 22 October 2004. On 16 December 2005, the Bagosora Defence filed its motion for the appearance of the witness. Consideration of that motion was deferred after representations from the Bagosora Defence that progress was being made, with the assistance of the Registry, to secure the witness's appearance without the need for an Article 28 request. E.g. T. 5 July 2006 p. 2.

testimony, including the results of the formal hearing of the witness. No impropriety or breach of privilege has been established in relation to the *procès-verbal* which could constitute a viable ground of appeal.

(ii) Fair and expeditious proceedings

8. Even assuming that the appeal would materially advance the proceedings, neither the fair and expeditious conduct of proceedings nor the outcome of the trial is affected by the absence of this witness. The *procès-verbal* shows that the witness has only limited knowledge of the Accused, and little or no recollection of his responses or attitude on those few occasions when they did meet. The Defence has failed to identify more general elements of the witness's prospective testimony which are of such significance as to affect the fair and expeditious conduct of proceedings or their outcome. Furthermore, evidence which does not concern the acts and conduct of the Accused may, in appropriate circumstances, be placed before the court by way of written statements.[11] The witness's appearance before the Chamber has not, therefore, been shown to be of sufficient importance to significantly affect the fair and expeditious conduct of the trial or its outcome.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 6 November 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[11] Impugned Decision, para. 5.

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Decision requesting Additional Submissions Concerning the Video-Conference Testimony of Witness Delta 6 November 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Video-Conference testimony, Necessary additional submissions

International Case cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Video-Conference Testimony of Kabiligi Witness Delta and to Hear Testimony in Closed Session, 1 November 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

CONSIDERING the Prosecution "Response to Kabiligi Motion to Request the Testimony of Witness Delta to be Heard Via Video-Conference and in Closed Session", filed on 1 November 2006;

HEREBY ISSUES the following decision *proprio motu*.

INTRODUCTION

On 1 November, the Chamber granted a Kabiligi Defence request to hear one of its witnesses by video-conference.[1] Later that same day, the Prosecution filed a response to the motion which suggested that a factual predicate of the motion was incorrect. The Chamber considers that the matters raised in the Prosecution response warrant additional submissions by the Defence, and hereby requests, in light of the urgent need to resolve this question expeditiously, that such submissions be made no later than 7 November 2006.

FOR THE ABOVE REASONS, THE CHAMBER

REQUESTS that the Kabiligi Defence file submissions in relation to the Prosecution Response concerning testimony of Witness Delta by video-conference no later than 7 November 2006.

Arusha, 6 November 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[1] *Bagosora et al*., Decision on Video-Conference Testimony of Kabiligi Witness Delta and to Hear Testimony in Closed Session (TC), 1 November 2006.

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Decision on Nsengiyumva Request for Certification to Appeal Decision on Exclusion of Evidence 6 November 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Anatole Nsengiyumva – Certification of appeal, Legal questions resolved by the Appeals Chamber – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 73 (B)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 February 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Certification of Decision on Exclusion of Evidence, 14 July 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Request for Certification to Appeal the Decision on Nsengiyumva Motion for Exclusion of Evidence", etc., filed by the Nsengiyumva Defence on 21 September 2006;

CONSIDERING the Prosecution Response, filed on 2 October 2006;

HEREBY DECIDES the request.

Introduction

1. The Nsengiyumva Defence requests leave to appeal a decision of this Chamber dated 15 September 2006 concerning exclusion of evidence alleged to be outside the scope of the Indictment[1]. On 18 September 2006, the Appeals Chamber decided an interlocutory appeal from a decision concerning one of the other Accused in the present case on the same question[2]. The Appeals Chamber decision, in accordance with the scope of the questions certified, addressed only the legal principles applied by the Trial Chamber, as distinct from their application to specific evidence. The Appeals

[1] *Bagosora et al*., Decis ion on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 September 2006.
[2] *Bagosora et al*., Decision on Aloys Ntabakuze's Interlocutory Appeal, etc., (AC), 18 September 2006.

Chamber largely affirmed those principles, but instructed this Chamber to reconsider its decision on the basis of two additional criteria[3].

Deliberations

2. Certification may be granted under Rule 73 (B) of the Rules of Procedure and Evidence when a decision

> "involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

3. The present request for certification was filed after the Appeals Chamber's decision. To some degree, the request seems to be based on the additional criteria articulated by the Appeals Chamber[4]. Such arguments are more appropriately presented in the form of a motion for reconsideration, rather than certification.

4. In other respects, the present motion recapitulates legal arguments which have already been resolved by the Appeals Chamber, or challenge s the Chamber's application of those legal principles to specific evidence. Certification on these grounds would not, in the Chamber's view, materially advance the proceedings. No useful purpose would be served by requesting the Appeals Chamber to revisit legal principles which it has only recently affirmed. Nor would certification be appropriate in respect of the ir application to specific evidence. That assessment, which depends heavily on the nature of the evidence in relation to the Indictment and any subsequent timely, clear and consistent clarification of the material facts alleged against the Accused, involves an evaluation of factual questions which are primarily for the trier of fact to weigh[5].

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the request.

Arusha, 6 November 2006

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[3] *Id*. para. 48.
[4] E.g. Motion, para. 10.
[5] *Bagosora et al*., Decision on Request for Certification of Decision on Exclusion of Evidence (TC), 14 July 2006, para. 7. See *Nyiramasuhuko et al*., Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5 ("It is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of the trial; it is not for the Appeals Chamber to assume this responsibility. As the Appeals Chamber previously underscored, certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence") (citations omitted); *Bagosora et al*., Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeals (TC), 16 February 2006, para. 5.

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Decision on Motion for Subpoena of State Official
7 November 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Issuance of subpoena, Cooperation and the witness's willingness to testify – Motion denied

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED of the "Motion for a *Subpoena* to Compel the Attendance and Testimony of a Witness", filed by the Ntabakuze Defence on 25 October 2006;

CONSIDERING the Prosecution Response, filed on 26 October 2006;

HEREBY DECIDES the motion.

The Chamber has been advised by the Registry that arrangements are being made for the witness's imminent appearance before the Chamber, in conjunction with the assistance of the State of which he is an official. A letter of 7 November 2006 from the State describing those arrangements is attached hereto as Annex A, filed separately as a confidential document, as it contains information which could identify a protected witness. In light of this cooperation and the witness's apparent willingness to testify, no *subpoena* is required.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 7 November 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Bagosora Request for Certification Concerning Admission of Prosecution Exhibit P-417
15 November 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Certification of appeal, Responsibility of the Trial Chambers to determine which evidence to admit during the course of the trial – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 73 (B)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Request for Certification of Appeal on Admission of Testimony of Witness DBY, 2 October 2003 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Certification Of Appeal Concerning Access To Protected Defence Witness Information, 29 July 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Certification of Decision on Exclusion of Evidence, 14 July 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Kabiligi Request for Certification to Appeal Decision on Exclusion of Evidence, 18 October 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Request for Certification", filed by the Bagosora Defence on 5 October 2006;

CONSIDERING the Prosecution Response, filed on 9 October 2006;

HEREBY DECIDES the request.

Introduction

1. The Bagosora Defence requests leave to appeal the Chamber's oral decision to admit as Exhibit P-417, a single page from a larger document whose most notable feature is a pie-chart purporting to show the percentage of killings in which various groups – including *Interahamwe*, soldiers, gendarmes – participated in Kigali-Ville. The page was prepared, disclosed and filed with the Registry as part of an expert report for the Ntabakuze Defence, but which was never tendered as such. The Prosecution first used the pie-chart during the cross-examination of a Defence witness on 25 September 2006. The Chamber denied objections to questions soliciting the witness's comment on the chart, but reserved its position as to whether the single-page document, or the entire report, should be admitted as an exhibit.[1] The Prosecution used the document in a similar way during the cross-examination of a different witness on 28 September 2006, and the Bagosora Defence objected again. The Chamber allowed the questions and ruled that "we will allow page 29411 to be an exhibit in this case. It was used during [cross-]examination".[2]

Deliberations

[1] T. 25 September 2006 pp. 6-9.
[2] T. 28 September 2006 p. 15.

2. Certification may be granted under Rule 73 (B) of the Rules of Procedure and Evidence when a decision

> "involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings"[3].

The Appeals Chamber has held that:

> It is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of the trial; it is not for the Appeals Chamber to assume this responsibility. As the Appeals Chamber has previously underscored, certification of an appeal has to be the absolute exception when deciding on the admissibility of evidence.[4]

Such an exception could arise where the decision involves a "substantial" or "broad" category of evidence, "or where it determines particularly crucial matters of procedure and evidence".[5]

3. The Defence has not shown that the decision to admit Exhibit P-417 involves a broad or substantial category of evidence, or that it otherwise raises a crucial matter of procedure or evidence, so as to affect the fair and expeditious conduct of proceedings or the outcome of the trial. The document was used only for the purpose of eliciting comment from the witnesses. No aspect of the document or its use during trial proceedings warrants an interlocutory appeal.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the request.

Arusha, 15 November 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[3] Rule 73 (B), The Rules of Procedure and Evidence; *Bagosora et al*., Decision on Kabiligi Request for Certification to Appeal Decision on Exclusion of Evidence (TC), 18 October 2006, para. 2; *Bagosora et al*., Decision on Request for Certification of Decision on Exclusion of Evidence (TC), 14 July 2006, para. 2.

[4] *Nyiramasuhuko et al*., Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5.

[5] *Bagosora et al*., Certification of an Appeal Concerning Access to Protected Defence Witness Information (TC), 29 July 2005, para. 2; *Bagosora et al*., Decision on Prosecution Request for Certification of Appeals on Admission of Testimony of Witness DBY (TC), 2 October 2003, para. 4.

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Decision on Nsengiyumva Motion for Adjourment Due to Illness of the Accused 17 November 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Anatole Nsengiyumva – Right of an accused to be tried in his or her presence, Right subject to restrictions, No implied waiver when an accused shows good cause such as the existence of a medical condition, Production of professional medical assessment, No undue restriction on the Accused's right to be present at his trial by permitting a testimony to be heard – Motion denied

International Instrument cited :

Statute, art. 20 (4) (d)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Jean Bosco Barayagwiza, Decision on Defence Counsel Motion to Withdraw, 2 November 2000 (ICTR-97-19) ; Appeals Chamber, The Prosecutor v. Protais Zigiranyirazo, Decision on Interlocutory Appeal, 30 October 2006 (ICTR-2001-73)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Radislav Krstić, Decision Adjourning the Trial, 15 January 2001 (IT-98-33)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion Requesting Suspension of Trial on Medical Grounds", filed by the Nsengiyumva Defence on 8 November 2006;

CONSIDERING the Registrar's Submissions, filed on 13 November 2006;

HEREBY DECIDES the motion.

Introduction

1. Presentation of evidence by the Nsengiyumva, Bagosora, and Ntabakuze Defence teams closed on 13 October 2006.[1] With the exception of four Bagosora witnesses and one Ntabakuze witness, the present and final session of the trial is devoted exclusively to hearing witnesses on behalf of Kabiligi.[2]

2. On 8 November 2006, Lead Counsel for Nsengiyumva announced that his client was ill and unable to attend proceedings. He indicated that the Accused had no intention of waiving his right to be

[1] T. 13 October 2006 p. 1 (Status Conference).
[2] *Bagosora et al.*, Decision on Bagosora Motion to Present Additional Witnesses and Vary Its Witness List (TC), 17 November 2006; T. 13 October 2006 p. 6 (Status Conference).

present, and requested a suspension of the trial until his client was able to return to court.[3] A written motion, filed simultaneously, argued that "most of the witnesses about to take the stand, e.g. ALL 42 and Kambanda are particularly important witnesses whose testimony he absolutely must follow".[4] After an adjournment to allow the Defence time to more fully consult with their client, the Chamber received a medical report from the Registry indicating that "one week rest is recommended for his condition to improve".[5]

3. The Chamber asked whether there were any witnesses of less importance to the Nsengiyumva Defence whom the Accused would consent to be heard in his absence. Lead Counsel responded:

> Now, as I said in the morning, the other witnesses may have nothing obvious, on the face of it, that will have an impact on the defence of the Accused person. But, we do not know what is likely to come out of the cross-examination of those witnesses by the Prosecution, and that is where our difficulty is. So that out of abundant caution, it will be safe that the Accused person is in court to give instructions when issues that are likely to be prejudicial arise during cross-examination either by the Prosecution or by the other Defence teams.[6]

In respect of Witnesses Kambanda and ALL-42, Lead Counsel explained that the situation

> is slightly different. It's both the prejudicial testimony and also the possibility of getting exculpatory testimony from those two witnesses. We will lose that if the Accused is not in court, because we believe that they have important – particularly, the first one, ALL-42, he has important information that we could elicit from him…[7]

4. After hearing the parties, the Chamber ruled orally that it would proceed with the examination-in-chief of Witness ALL-42, but would reserve its position as to the timing of any possible Nsengiyumva and Prosecution cross-examination of the witness.[8] Upon completion of the witness's examination-in-chief and cross-examination by the two other Defence teams, the Nsengiyumva Defence re-affirmed that it was not in a position to decide whether to cross-examine the witness. The Chamber decided to postpone the remainder of the witness's testimony.[9]

5. The Kabiligi Defence then called Witness YC-03. At the end of the examination-in-chief and the Prosecution cross-examination the following day, 9 November 2006, the Nsengiyumva Defence indicated that it was not able to take a position in respect of any additional cross-examination of the witness. The Chamber decided that the witness would remain in Arusha, subject to possible recall by the Nsengiyumva Defence, which should consult with its client on the basis of the transcripts in order to determine whether to cross-examine the witness.[10] After the completion of the examination-in-chief of the next Kabiligi witness, Witness LAX-2, the Nsengiyumva Defence again reserved its right to conduct a cross-examination.[11] On 13 November 2006, the Nsengiyumva Defence repeated its objection to hearing evidence in the absence of the Accused. The Chamber nevertheless heard Kabiligi Witness FB-25, who had previously appeared in the trial as Ntabakuze Witness DM-190.

6. On 13 November 2006, the Chamber received a second medical report from the Registry stating that the Accused would be able to attend trial hearings effective 14 November 2006, subject to being able to take a ten-minute break every two hours, and to elevate his leg.[12] The next day, the Accused

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[3] T. 8 November 2006 pp. 1-2; T. 14 November 2006 p. 24 (draft).
[4] Motion, para. 6.
[5] Registrar's Submissions, filed on 13 November 2006; Exhibit DNS-229A.
[6] T. 8 November 2006 p. 8.
[7] T. 8 November 2006 p. 9.
[8] *Id*. pp. 9-11.
[9] T. 9 November 2006 p. 30.
[10] *Id*. p. 75.
[11] T. 10 November 2006 p. 5. The other Defence teams declined to cross-examine the witness.
[12] Registrar's Submissions, filed on 13 November 2006; Exhibit DNS-229B.

was present in court, but complained that he was in significant pain that made it difficult for him to consult meaningfully with his counsel.[13]

Deliberations

7. Article 20 (4) (d) of the Statute recognizes the right of an accused "to be tried in his or her presence". This right, however, is not absolute; it is subject to

> "the proportionality principle, pursuant to which any restriction on a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective".[14]

Furthermore, implied waiver of this right may arise where an accused is given the opportunity to attend trial, but declines to do so without establishing good cause for the absence.[15] No implied waiver will arise where an accused shows good cause, such as the existence of a medical condition that makes attending trial impossible.[16]

8. Failure to attend proceedings because of illness must be substantiated by a professional medical assessment.[17] The Chamber accepts, on the basis of the first medical report submitted by the Registry, that the Accused was unable to attend trial proceedings on 8, 9, 10 and 13 November 2006. On 14 November 2006, the Accused came to court and addressed the Chamber, saying that he was in pain which prevented him from following the proceedings or engaging in meaningful consultations with his lawyers.[18] Although the Chamber is sympathetic to this claim, it must be guided by the medical report prepared by the attending physician. That report says that the Accused was sufficiently recovered to attend the trial on 14 November 2006. As of that date, the Accused's absence from court has not been substantiated by a professional medical opinion. The Chamber must infer in such circumstances that the Accused's absence is not justified by good cause.[19] Having said this, the Chamber remains open to any further medical reports that may suggest the contrary, and is anxious to ensure that the Accused is closely monitored to ensure that he receives the highest possible standard of health care.[20]

9. The Chamber does not consider that any unjustifiable restriction has been placed on the Accused's right to be present at his trial. First and foremost, the case for the Accused has already closed. None of the witnesses now being called by the other Defence teams appear to be adverse to the Accused. Nsengiyumva argues, nonetheless, that prejudicial testimony might be elicited by the Prosecution from those witnesses, in particular of Witness ALL-42 and Kambanda, and that the Defence might be able to obtain exculpatory testimony from these and other Kabiligi witnesses.

10. The Chamber has taken measures to address the concerns raised by the Nsengiyumva Defence, to the extent that they are justified. The Prosecution cross-examination of Witness ALL-42 was deferred until 16 November 2006. The testimony of other witnesses has been heard, but the Chamber has indicated its openness to specific submissions to allow the recall of these witnesses for additional questioning and, in one case, directed that a witness remain in Arusha to provide the Nsengiyumva Defence, in consultation with the Accused, an opportunity to decide whether to do so.[21] Transcripts

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[13] T. 14 November 2006 p. 2 (draft).
[14] *Zigiranyirazo*, Decision on Interlocutory Appeal (AC), 30 October 2006, para. 14.
[15] *Barayagwiza*, Decision on Defence Counsel Motion to Withdraw (TC), 2 November 2000, paras. 6-7.
[16] *Kajelijeli*, T. 2 October 2001 p. 33; *Krstic*, Case N°IT-98-33-T, Decision Adjourning the Trial (TC), 15 January 2001, para. 27.
[17] See e.g. *Naletilic and Martinovic*, T. 31 May 2002 pp. 12117-12118; *Kajelijeli*, T. 2 October 2001 p. 33; *Krstic*, Case N°IT-98-33-T, Decision Adjourning the Trial (TC), 15 January 2001, para. 27. In these cases, the Chambers found that there was an implied waiver of the Accused's right to be present.
[18] T. 14 November 2006 p. 2.
[19] *Naletilic and Martinovic*, T. 31 May 2002 p. 12117-12118; *Kajelijeli*, T. 2 October 2001 p. 33.
[20] T. 14 November 2006 pp. 1-3.
[21] T. 9 November 2006 p. 76.

and video-recordings of the testimony are available to the Accused so that he can meaningfully and knowledgeably consult with his Defence team about the need to cross-examine the witness or, at least, to offer more specific submissions concerning the relevance of the their testimony to the Accused.

11. The Nsengiyumva Defence has been unable to show the relevance to the Accused of any testimony heard in his absence. The only specific area of potential interest identified by the Nsengiyumva Defence during the testimony so far concerns a few questions posed to Witness LAX-2 concerning his knowledge of a Prosecution witness.[22] Witness LAX-2 made no reference to Nsengiyumva in his testimony, and the context in which he mentions the Prosecution witness is unrelated to any testimony by that witness against the Accused.[23] The Chamber considers the connection between this testimony and Nsengiyumva to be, at its highest, marginal. No undue restriction is placed on the Accused's right to be present at his trial by permitting this testimony to be heard under the conditions described above.

12. The Defence has invoked the recent Appeals Chamber decision in *Zigiranyirazo* to reverse a Trial Chamber decision to hear a witness in The Netherlands while the Accused observed proceedings by video-link in Arusha, accompanied by his counsel. A series of factors show that precedent to be inapposite. The witness being heard in that case was considered a "key Prosecution witness" against the accused, whereas the witnesses here are appearing on behalf of another co-Accused and no showing has been made that these witnesses have any particular relevance to Nsengiyumva.[24] A further consideration was the Appeals Chamber's opinion that other options could have been explored to ensure that the Accused was present during the hearing of the witness. The Appeals Chamber did not accept as determinative or as sufficiently established the claims that the witness's security would be at risk by travelling to Arusha, and that the Accused was barred from entering The Netherlands for the hearing.[25] No such considerations are relevant in the present case. Finally, Mr. Zigiranyirazo was being tried alone. Here, the Chamber must consider the potential impact of an adjournment on, in particular, the rights of the Accused Kabiligi. Significant, long-term efforts are often required to ensure the appearance of witnesses before this Tribunal. The risk of losing witnesses poses a much greater threat of prejudice to the Accused Kabiligi than the speculative and remote prejudice to the Accused Nsengiyumva.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 17 November 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[22] *Id*. pp. 83-84; T. 10 November 2006 pp. 1-2.
[23] T. 9 November 2006 pp. 87-88; T. 10 November 2006 p. 5.
[24] *Zigiranyirazo*, Decision on Interlocutory Appeal (AC), 30 October 2006, para. 21.
[25] *Id*., paras. 18, 20.

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Decision on Bagosora Motion to Present Additional Witnesses and Vary its Witness List
17 November 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora – Witness List, Interests of justice, Obligation to show good cause, Analysis of the potential effect of prolonging proceedings – Motion filed more than ten days after the expiration of the deadline for hearing evidence, Significance and probative value of the prospective testimonies do not outweigh the lateness of the motion – Extension of Time to Present Evidence – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rule 73 ter (E)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Prosecutor's Motion for Joinder, 29 June 2000 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Continuation or Commencement de novo of Trial, 11 June 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E), 26 June 2003 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Théoneste Bagosora et al.,Decision (Appeal of the Trial Chamber I 'Decision on Motions By Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses' of 9 September 2003), 28 October 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E), 21 May 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Motions for Judgement of Acquittal, 2 February 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on Accused's Motion to Expand and Vary the Witness List, 28 March 2006 (ICTR-2000-55) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Commencement of Kabiligi Defence and Filing of Pre-Defence Brief, 21 June 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Bagosora Defence Request for Subpoena of Ambassador Mpungwe and Cooperation of the United Republic of Tanzania, 29 August 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Bagosora Motion to Modify its Witness List, 11 September 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Nsengiyumva Motion to Add Six Witnesses to its Witness List, 11 September 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Subpoena of Ami R. Mpungwe, 19 October 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Bagosora Request for the Government of France to Authorize the Appearance of a Witness, 20 October 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Bagosora Request for Certification to Appeal Decision on Request for Assistance Under Article 28, 6 November 2006 (ICTR-98-41)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Slobodan Milošević, Decision on the Interlocutory Appeal by the Amici Curiae against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004 (IT-02-54) ; Appeals Chamber, The Prosecutor v.

Slobodan Milošević, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004 (IT-02-54) ; Trial Chamber, The Prosecutor v. Milan Martić, Decision on Defence's Motion for Postponement of Commencement of Trial, 6 December 2005 (IT-95-11) ; Trial Chamber, The Prosecutor v. Momčilo Krajišnik, Decision on Defence's Rule 74 bis Motion; Amended Trial Schedule , 27 February 2006 (IT-00-39)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion to Present Its Witnesses Prior to Resting Its Case and Request for Leave to Vary Witness List", filed by the Bagosora Defence on 26 October 2006;

CONSIDERING the Prosecution Response, filed on 30 October 2006;

HEREBY DECIDES the motion.

Introduction

1. The Bagosora Defence requests authorization to: (i) add five witnesses to its witness list, two of whom are proposed as replacements for existing witnesses; (ii) call these five plus six other witnesses whose names already appear on the witness list, notwithstanding that the deadline for hearing the Bagosora Defence case, as prescribed by the trial schedule, has passed; and (iii) file additional documentary evidence.

Deliberations

(i) Variation of the Witness List

2. Rule 73 *ter* (E) of the Rules of Procedure and Evidence ("the Rules") provides that:

> After commencement of the Defence case, the Defence, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called.

Amendments to a witness list, whether of the Prosecution or the Defence, must be supported by "good cause" and be in the "interests of justice". A variety of factors are weighed as part of this evaluation:

> the sufficiency and time of disclosure of the witness' information; the materiality and probative value of the proposed testimony in relation to existing witnesses and allegations in the indictment; the ability of the other party to make an effective cross-examination of the witness; and the justification offered by the party for the addition of the witness.[1]

A request to add new witnesses late in a party's case will be scrutinized closely, particularly where it may have the effect of prolonging proceedings.[2] As this Chamber recently held in granting a Bagosora request to amend its witness list:

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[1] *Bagosora et al*., Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, para. 14; *Bagosora et al*., Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) (TC), 21 May 2004, paras. 8-10.

[2] *Muvunyi*, Decision on Accused's Motion to Expand and Vary the Witness List (TC), 28 March 2006, para. 17 ("in light of the very advanced stage of these proceedings, and considering the fact that the Defence has already called the final witness on its original list, the Chamber is of the view that it would not be in the interests of justice to allow the Defence Motion");

> Furthermore, the limited time required to hear these witnesses suggests that the orderly appearance of witnesses within the time scheduled before the end of the [Defence] case will not be disturbed, particularly in light of the withdrawal of a number of other witnesses. No basis arises from the present motion to alter the present trial schedule, which requires the Bagosora Defence to call all of its factual witnesses by the end of the present session on 13 October 2006.[3]

A request by the Nsengiyumva Defence to amend its witness list just before its last trial session for presenting evidence was granted subject to the provison that

> "[t]he opportunity to call these witnesses depends on the Defence's own ability to fit them within the existing judicial calendar".[4]

3. The present motion was filed on 24 October 2006, more than ten days after the expiration of the deadline for hearing evidence from the Bagosora, Nsengiyumva and Ntakabuze Defence teams. As discussed below in more detail, this deadline was fixed well in advance, and based on a thorough and ongoing consideration of the progress of the Defence case, and the overriding need to ensure that the Defence had adequate time to present its evidence. The Chamber considers that the deadline reflects a reasonable exercise of its discretion to establish a trial schedule, informed by an anxious consideration of the challenges faced by the Defence in locating and calling witnesses, balanced against the right of the Accused to be tried without undue delay, as well as the interests of judicial economy. The addition of new witnesses at this late stage would extend that carefully chosen deadline, and undermine the orderly progress of the trial. The timing of the present request weighs against the Defence request to add witnesses.

4. The significance and probative value of the testimony of prospective witnesses AZ, G-08 and O-03 does not outweigh the lateness of their proposed addition to the witness list. Their expected testimony is described in general terms and none of them has yet been interviewed.[5] The Defence cannot confirm when, or even if, they are available to testify. Adding these individuals to the witness list, and keeping the Bagosora defence case open on the basis of these speculative conditions, is not in the interests of justice.

5. The request to add Ambassador Ami R. Mpungwe, however, is justified. His expected testimony, concerning his eye-witness observations at the Arusha Accord negotiations in 1992 and 1993, is described in detail and appears to the Chamber to be of potential significance. The Prosecution has been on notice of his potential appearance for some time, considering that Ambassador Mpungwe has been the object of two decisions by the Chamber requiring his cooperation and appearance as a witness.[6] Finally, the record shows unequivocally that the Defence has acted with diligence to secure the witness's appearance before the end of its case, and that the witness is now prepared to appear during the present session, in compliance with the Chamber's order. For all of these reasons, the interests of justice are served by allowing his name to be added to the witness list.

6. The Defence also wishes to add Witness ZZ on the basis that he may have information concerning the negotiation of the Arusha Accords. Unlike Ambassador Mpungwe, however, this person has apparently not yet been met by the Defence, has not previously been the object of any judicial order, and no notice of his potential appearance or disclosure of his identity has previously

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Bagosora et al., Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, para. 15 ("these witnesses are being presented very early in the Prosecution case").

[3] *Bagosora et al.*, Decision on Bagosora Motion to Amend Its Witness List (TC), 11 September 2006, para. 6.

[4] *Bagosora et al.*, Decision on the Nsengiyumva Motion to Add Six Witnesses to Its Witness List (TC), 11 September 2006, para. 5.

[5] Motion, paras. 68 (G-08), 72 (O-03), 94 (AZ).

[6] *Bagosora et al.*, Decision on the Bagosora Defence Request for Subpoena of Ambassador Mpungwe and Cooperation of the United Republic of Tanzania (TC), 29 August 2006; *Bagosora et al.*, Decision on Request for Subpoena of Ami R. Mpungwe (TC), 19 October 2006.

been given to the Prosecution. For these reasons, the Chamber considers that it is not in the interests of justice for this witness to be added to the witness list.

(ii) Extension of Time to Present Evidence

(a) General Considerations

7. The paramount concern in determining the schedule of a trial is to ensure that an accused has adequate time to prepare and present his or her case.[7] Determining what is adequate in any particular trial involves an exercise of discretion, based on a myriad of factors.[8] Such discretionary decisions, as the Appeals Chamber has explained, are guided by

> "the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case, and requires a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly variable set of trial proceedings".[9]

The Chamber has throughout the trial adopted a flexible and incremental approach to scheduling, in order to guarantee that the Defence has an adequate opportunity to present its case.

8. The deadline of 13 October 2006 for the close of the presentation of evidence by the Bagosora Defence follows a long arc of pre-trial and trial events. The four Accused were arrested between 9 March 1996 and 18 July 1997, meaning that they have now been in custody for more than nine years.[10] Separate trials of the Accused were scheduled to commence in 1998, but were postponed as a result of an unsuccessful attempt to jointly indict them with twenty-five other defendants, and then the decision to hold a joint trial of these four Accused.[11] Opening statements were heard before Trial Chamber III on 2 April 2002, but the hearing of evidence did not start until 2 September 2002. After the non-re-election of one judge and the retirement of another, the parties agreed to continue the case before Trial Chamber I, as presently composed, on the basis of the existing trial record, which consisted of thirty-one days of testimony.[12] The remainder of the Prosecution case was heard between 14 June 2003 and 14 October 2004; over those sixteen months, in seven separate trial sessions, the Prosecution called eighty witnesses over 170 trial days.[13] On 26 October 2004, the Registrar removed Lead Counsel for the Kabiligi Defence from the legal aid program on the basis of evidence that he had committed fraud. In light of the impact of this decision on the Kabiligi Defence, the Chamber postponed the start of the Defence case until 30 March 2005.[14] On 1 March 2005, the Chamber further postponed the start of the Defence to 11 April 2005, with the start of the Kabiligi Defence to be determined at a later date.[15] The

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[7] Article 20 (4) (d): "the accused shall be entitled to … adequate time and facilities for the presentation of his or her defence …".

[8] *Milosevic*, Case N°IT-02-54-AR73.6, Decision on the Interlocutory Appeal By the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case (AC), 20 January 2004 para. 7 ("As the decisions of the Tribunal hold, and as the *amici* acknowledge, the Trial Chamber's order may be overturned only if the Chamber has erred in the exercise of its discretion in setting the time limits"); *Bagosora et al*., Decision (AC), 28 October 2003, p. 4 ("it is within the discretion of the Trial Chamber to determine the progress and schedule of the Trial proceedings").

[9] *Milosevic*, Case N°IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel (AC), 1 November 2004, para. 9.

[10] The length of time an accused has spent in detention can be used as a factor in determining a trial schedule, even when this factor weighs against a specific request of the Defence: *Milosevic*, Case N°IT-02-54-AR73.6, Decision on the Interlocutory Appeals by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case (AC), 20 January 2004, para. 8; *Martic*, IT-95-11-PT, Decision on Defence's Motion for Postponement of Commencement of Trial (TC), 6 December 2005 ("considering that the requested postponement of nine months is not appropriate, in particular in view of the length of the pre-trial detention of the Accused").

[11] *Bagosora et al*., Decision on the Prosecutor's Motion for Joinder (TC), 29 June 2000.

[12] *Bagosora et al*., Decision on Continuation or Commencement *De Novo* of Trial (TC), 11 June 2003. The transfer of the case followed the non-re-election of one judge and the retirement of another.

[13] *Bagosora et al*., Decision on Motions for Judgement of Acquittal (TC), 2 February 2005, para. 1.

[14] T. 21 December 2004 pp. 27, 41.

[15] T. 1 March 2005 pp. 9, 17.

Defence began presenting its evidence on that date, almost six months after the close of the Prosecution case. Over the next eighteen months, in six separate trial sessions, the three Defence teams called 131 witnesses over 173 trial days, before reaching the 13 October 2006 deadline.

9. The Kabiligi Defence filed its Pre-Defence Brief on 7 July 2006 and commenced the presentation of its evidence concurrent with the three other Defence teams during the sixth trial session. The seventh Defence trial session, currently underway, is scheduled to be devoted exclusively to presentation of the Kabiligi Defence evidence subject, however, to the Chamber's oral decision to hear the remainder of Bagosora witness Jean Kambanda's testimony, which had begun during the last session; and to hear one Ntabakuze witness who was the object of a pre-existing *subpoena*.[16]

10. The Chamber repeatedly reviewed the progress of the case as the Defence phase of the trial proceeded, calibrating targets and guidelines to suit the legitimate needs of the case, rather than imposing mechanistic deadlines based on a statistical comparison with the duration of the Prosecution case. In light of the pace of testimony and submissions from the Defence concerning the number of remaining witnesses, the bench observed at the end of the third trial session that the entire Defence case should end around October 2006.[17] At the end of the fourth trial session, the Chamber expressly indicated that it was considering 14 July 2006 as the deadline for the presentation of evidence by the three Defence teams, with the remaining time given to the Kabiligi Defence. The three Defence teams raised various specific issues of concern, but did not register any fundamental disagreement with that deadline. To accommodate the specific concerns, the Chamber decided that the following session should be longer than usual, commencing on 15 May 2006, in order to provide sufficient time to finish by 14 July 2006.[18]

11. On 3 May 2006, the Presiding Judge issued a memorandum indicating that the Defence had

> "informed the Chamber that they are not in a position to provide a sufficient number of witnesses from Monday 5 May 20 to Friday 26 May 2006",

and postponed the start of the fifth defence trial session to 29 May 2006. The memorandum then reiterated that "the three Defence teams are still expected to present all their witnesses by 14 July 2006".[19] During the fifth trial session, which commenced on 29 May 2006, the Defence failed to call any evidence on thirteen trial days, despite repeated admonitions from the Chamber to use trial time efficiently. A review of the Minutes of Proceedings shows that only 79 hours and twelve minutes of court time was utilized during that trial session, out of a minimum of 270 hours available. During that trial session, the Bagosora Defence called only four witnesses.

12. During a Status Conference near the end of the fifth trial session, the bench observed that "there are very few witnesses left from the three teams as we have seen the development during the present session".[20] Despite the three Defence teams' inability to use trial time effectively during that trial session, the Chamber authorized them to present additional evidence in the sixth trial session, concurrent with the Kabiligi Defence, from 4 September through 13 October 2006.[21] The Chamber unequivocally emphasized that this would be the last opportunity for the Bagosora, Nsengiyumva and

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[16] *Bagosora et al*., Decision on Commencement of Kabiligi Defence and Filing of Pre-Defence Brief (TC), 21 June 2006; T. 5 July 2006 p. 13; T. 13 October 2006 p. 6 (Status Conference).
[17] T. 30 November 2005 pp. 9-10 ("this case should close around October 2006 at the latest. That's what we should do, and it should be possible. And I think it could be done if everyone really now made an effort.").
[18] T. 7 April 2006 p. 15.
[19] *Interoffice Memorandum*, 3 May 2006, ICTR/JUD-11-6-1-06/010.
[20] T. 5 July 2006 p. 6.
[21] T. 5 July 2006 p. 13. Failure to provide a steady flow of witnesses has been taken as an indication that the Defence has had an adequate opportunity to present its case. See *Krajisnik*, Case N°IT-00-39-T, Decision on Defence's Rule 74 *bis* Motion; Amended Trial Schedule (TC), 27 February 2006, paras. 9, 15, 17.

Ntabakuze Defence teams to present their evidence.[22] Nevertheless, during that sixth trial session, proceedings were again frequently adjourned due to lack of witnesses.[23] The Chamber reiterated throughout the proceedings that the 13 October 2006 deadline remained firm, although the Chamber also emphasized that it would consider any applications to present individual witnesses beyond that date.

(b) Specific Requests

13. The requests to hear Witnesses J-07, B-06 and N-02 after the 13 October 2006 deadline are denied. The Chamber recently denied a Bagosora motion requesting the assistance of a State for the appearance of Witness J-07, on the ground that his testimony had not been shown to be necessary and appropriate for the conduct of the defence.[24] The interests of justice do not favour altering the trial schedule to accommodate a witness whose appearance is both unnecessary and unlikely. The timing of the appearance of Witness B-06 is also uncertain. The reason for his unavailability during the entire course of the Defence case prior to 13 October 2006 is unclear, and the Chamber is not persuaded that his testimony is of sufficient importance to justify his appearance at this stage. Witness N-02's expected testimony has not been described with particularity, nor has any convincing reason been given why steps could not have been taken for his appearance before 13 October 2006. The possibility that Witness N-02's testimony could have been replaced by documents, yet to be received from the Government of Rwanda, provides no justification for not having called him according to the trial schedule.

14. The Chamber will allow the Bagosora Defence to call Ambassador Mpungwe and General Gatsinzi during the last Defence trial session. Judicial orders for the cooperation and appearance of these witnesses have been outstanding since before the expiry of the 13 October 2006 deadline. The Chamber considers that the interest of justice favours hearing their evidence provided that they can appear prior to the end of the present trial session, which concludes on 13 December 2006.

15. The Chamber also authorizes the appearance of expert witnesses Bernard Lugan and Peter Caddick-Adams.[25] The Bagosora Defence's long-held and often-repeated position was that these witnesses should be permitted to testify near the end of the case so as to be able to comment on the totality of factual evidence presented by all the defendants. The Kabiligi Defence did not object to that request until recently. Under these particular circumstances, the Chamber grants leave to the Bagosora Defence to call these witnesses during the trial session which concludes on 13 December 2006. The appearance of these witnesses must be co-ordinated with the Kabiligi Defence, which must have first priority in the presentation of witnesses during the present trial session.

(iii) Documents

16. The deadlines prescribed by the Chamber for the hearing of evidence concerned testimonial evidence. The Chamber hereby declares that any Defence team may tender documentary evidence for admission through the end of the trial on 13 December 2006.

FOR THE ABOVE REASONS, THE CHAMBER

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[22] T. 5 July 2006 p. 17 ("To the extent that the three teams are not able to present their witnesses by the end of the first segment [ending on 13 October 2006], those witnesses will fall. That's the end.").
[23] E.g. 8, 11, 13, 15, 19, 20 September 2006.
[24] *Bagosora et al*., Decision on Bagosora Request for the Government of France to Authorize the Appearance of a Witness (TC), 20 October 2006; *Bagosora et al*., Decision on Bagosora Request for Certification to Appeal Decision on Request for Assistance Under Article 28 (TC), 6 November 2006.
[25] The Chamber has already announced orally that it would grant the request to hear the testimony of Dr. Lugan during the present session. T. 10 November 2006 p. 29.

GRANTS the request for the addition of Ami R. Mpungwe to the Bagosora Defence witness list;

DENIES the request for the addition of witnesses O-03, ZZ, and AZ to the Bagosora witness list;

GRANTS the request to present the testimony of witnesses Mpungwe, Gatsinzi, Lugan, and Caddick-Adams during the trial session ending 13 December 2006;

DENIES the request to present the testimony of witnesses J-07, B-06 and N-02;

DECLARES that any Defence team may tender documentary evidence for admission through the end of the present trial session on 13 December 2006.

Arusha, 17 November 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Ntabakuze Motion for Disclosure of Specific Exclupatory Evidence 20 November 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Aloys Ntabakuze – Disclosure obligation of the Prosecutor, Criterium of "actual knowledge" of the Prosecutor, Request too general – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 68 (A)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgement, 23 May 2005 (ICTR-98-44A) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses, 27 September 2005 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68, 6 October 2006 (ICTR-98-41)

I.C.T.Y : Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Judgement, 29 July 2004 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Radoslav Brđanin, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004 (IT-99-36) ; Appeals Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Judgement, 17 December 2004 (IT-95-14/2)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion for Disclosure of Exculpatory Evidence in the Possession of the Prosecutor Pursuant to Rule 68", filed by the Ntabakuze Defence on 11 October 2006;

CONSIDERING the Prosecution Response, filed on 31 October 2006; the Ntabakuze Reply, filed on 9 November 2006; and the Prosecution Response to the Reply, filed on 10 November 2006;

HEREBY DECIDES the motion.

Introduction

1. The Ntabakuze Defence seeks disclosure of evidence concerning alleged involvement by RPF soldiers in massacres at nine specific sites between April and June 1994 that have been attributed by Prosecution witnesses to soldiers under the Accused's command. The Defence claims that confidential sources have indicated that such information, in particular in the form of witness statements, is in the Prosecution's possession.[1] The Defence also requests disclosure of material concerning "any massacres at these sites that occurred during the period July – December 1994, which have been purported to have occurred during the period of April – June 1994". More broadly, the Defence asks for "any other exculpatory information in the hands of the Prosecutor".[2]

2. The Prosecution concedes that the material concerning the nine massacre sites, if it existed, would *prima facie* be potentially exculpatory.[3] However, in response to the motion, the Prosecution undertook a specific review of its files which revealed, "to the best of [it]'s knowledge", that it possesses no such material.[4] It is willing to conduct further queries should the Defence provide more specific information identifying the material.[5]

Deliberations

3. Rule 68 (A) requires the Prosecution to disclose

> "any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence".

The initial determination of what material is exculpatory, which is primarily a facts-based judgement, rests with the Prosecution.[6] The expression "actual knowledge" has been consistently interpreted as requiring that the material be in the Prosecution's possession.[7] Hence, if the Defence claims that the obligation to disclose exculpatory material has been violated it must: (i) define the material with reasonable specificity; (ii) establish that it is in the custody and control of the

[1] Motion, para. 1.
[2] *Id*., p. 4.
[3] Response, para. 9.
[4] *Id*., para. 5.
[5] *Id*., para. 6.
[6] *Karemera et al*., Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 16.
[7] *Kajelijeli*, Judgement (AC), 23 May 2005, para. 262 ("Defence must first establish that the evidence was in the possession of the Prosecution"); *Brđanin*, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials (AC), 7 December 2004 (application must "be accompanied by all *prima facie* proofs tending to show that it is likely that the evidence is exculpatory and is in the possession of the Prosecution").

Prosecution; and (iii) present a *prima facie* case that it is, in fact, exculpatory.[8] The Prosecution is generally presumed to discharge its obligations under Rule 68 in good faith.[9]

4. The Prosecution concedes that if the material concerning the nine massacre sites were in its possession, it would be exculpatory. However, it claims that it has conducted a review of its files and made inquiries amongst its investigators which indicate that it has no such information.[10] The Chamber has no basis to reject this assertion. The Defence reference to "confidential sources" is insufficient to contradict the Prosecution's express and unequivocal statement that it has no such material to disclose.

5. The request for "any exculpatory information in the hands of the Prosecutor" is too general; it does no more than re-state the obligation already prescribed by Rule 68. The request for material concerning massacres that occurred during the period from July-December 1994, but which were "purported to" have been committed from April-June 1994, is also vague. In light of the Prosecution assertion that it has no such information, the Chamber need not consider whether the request is too uncertain and variable to be the object of an order under Rule 68.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 20 November 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[8] *Blaskic*, Case N°IT-95-14-A, Judgement (AC), 29 July 2004, para. 268, *Karemera et al*., Decision on Joseph Nzizorera's Interlocutory Appeal (AC), 28 April 2006, para. 13; *Bagosora et al*., Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68 (TC), 6 October 2006, para. 2; *Bagosora et al*., Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses (TC), 27 September 2005, para. 3 ("a request for production of documents has to be sufficiently specific as to the nature of the evidence sought and its being in the possession of the addressee of the request").

[9] *Kordic and Cerkez*, Case N°IT-95-14/2-A, Judgement (AC), 17 December 2004, para. 183 ("the general practice of the International Tribunal is to respect the Prosecution's function in the administration of justice, and the Prosecution execution of that function in good faith"); *Karemera et al*., Decision on Joseph Nzizorera's Interlocutory Appeal (AC), 28 April 2006, para. 17 ("the Trial Chamber is entitled to assume that the Prosecution is acting in good faith").

[10] The Prosecution identifies seven documents which "do generally pertain to the times or places at question", but does not suggest that these documents are disclosed pursuant to Rule 68 as being exculpatory. Response, para. 7. The basis for making the materials available in the Electronic Disclosure System is not made clear.

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Decision on Kabiligi Motion for Inspection of Documents Under Rule 66 (B) 6 December 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Gratien Kabiligi – Inspection of Documents concerning its own witnesses, National immigration authorities documents, Categories of documents, Documents material to the preparation of the defence, Documents concerning the Accused's Alibi – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 66 (A) (ii) and 66 (B)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Kabiligi "Motion for Disclosure of Documents Intended to be Used by the Prosecution in the Cross-Examination of the Accused Kabiligi", filed on 4 October 2006;

CONSIDERING the Prosecution Response, filed on 10 October 2006 and the Defence reply, filed on the 13 October 2006;

HEREBY DECIDES the motion.

Introduction

1. The Kabiligi Defence requests four categories of documents from the Prosecution, which the Defence believes may be used during, or may be relevant to, the cross-examination of the Accused if he testifies: (i) documents or materials that "relate to the alibi" of the Accused, or his "alleged travel … around Rwanda during the period relevant to the Indictment"; (ii) "all personal agendas, diaries, passports, photographs, logs and travel documents, and correspondence to and from General Kabiligi" from the time-period covered by the Indictment up to the present; (iii) statements or documents given by the Accused to immigration authorities of various named countries; and (iv) documents seized from the Accused by ICTR investigators. These materials are sought under Rule 66 (B) of the Rules of Procedure and Evidence as interpreted, notably, by a recent decision of the Appeals Chamber in this case. The Accused is expected to start his testimony on 11 December 2006.

2. The Prosecution appears to accept that it must allow inspection of documents in the third and fourth categories, but contests that the obligation arises from Rule 66 (B) or that such disclosure must be made before the beginning of the witness's testimony.[1]

Deliberations

3. Rule 66 (B) provides that:

> At the request of the Defence, the Prosecutor shall … permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

The Appeals Chamber has interpreted this provision in the context of a Defence request to inspect documents concerning, and statements given by, its own witnesses that the Prosecution has obtained from national immigration authorities. The Appeals Chamber defined two categories of immigration documents: (i) those that the Prosecution "intends to use as exhibits", which are automatically subject to inspection; and (ii) those not intended for use as exhibits, but which are otherwise "material to the preparation of the Defence" and, therefore, subject to inspection. The precise scope of the second category was remitted to the Trial Chamber for further consideration in light of the following definition of materiality:

> In accord with the plain meaning of Rule 66 (B) of the Rules, the test for materiality … is the relevance of the documents to the preparation of the defence case. Preparation is a broad concept and does not necessarily require that the material itself counter the Prosecution evidence. Indeed, for the Appellants, the immigration documents are material to the preparation of their defence because these documents may improve their assessment of the potential credibility of their witnesses before making a final selection of whom to call in their defence. The Appeals Chamber cannot exclude that this is an appropriate basis for authorizing the inspection of documents if the requisite showing is made by the defence. There are few tasks more relevant to the preparation of the defence case than selecting witnesses. The Trial Chamber is the appropriate authority to make this case-specific assessment in the first instance under the appropriate standard.
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> …
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> The Appeals Chamber observes that this plain reading of Rule 66 (B) of the Rules does not create a broad affirmative obligation on the Prosecution to disclose any and all documents which may be relevant to its cross-examination, as suggested by the Trial Chamber. Rule 66 (B) is only triggered by a sufficiently specific request by the defence, which in turn engages reciprocal disclosure obligations on the defence's part under Rule 67 (C). In this case, as the Trial Chamber recognized, the defence sought a precise category of documents, namely immigration-related material, admittedly in the possession of the Prosecution.[2]

The Appeals Chamber also recognized the Trial Chamber's discretion to determine the timing of inspection:

> Finally, the Appeals Chamber notes that the Impugned Decision in fact provided for the disclosure of at least some of the requested material, the documents intended as exhibits, at the time of cross-examination. This framework may be appropriate in some circumstances for certain material. The Appeals Chamber affirms that the Trial Chamber is best placed to determine both the modalities for disclosure and also what time is sufficient for an accused to

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[1] Response, paras. 7, 48 ("The Prosecution submits that it is not obliged to disclose the defence witnesses' materials to the defence before the defence witness is sworn in").
[2] *Prosecutor v. Bagosora et al.*, Case N°ICTR-98-41-AR73, Decision on the Interlocutory Appeal Relating to Disclosure Under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence (AC), 25 September 2006, paras. 9-10.

prepare his defence based on the timing of such disclosure. It is evident, however, that disclosure at the time of cross-examination is insufficient to the extent, as in this case, that the requested materials are intended to assist the defence select its witnesses.[3]

4. In respect of the first category of documents defined by the Appeals Chamber, the Prosecution argues that it does not form any intention as to which documents to use as exhibits until after the examination-in-chief of a Defence witness. Hence, no documents can be subject to advance inspection on that basis. The Trial Chamber accepts that it may be difficult or impossible to know whether a document will be tendered as an exhibit until the witness's testimony-in-chief has been heard. As the Chamber is not in a position to meaningfully review which documents the Prosecution intends to use as exhibits, it accepts the Prosecution submission that none of the documents sought are responsive to that category.

5. The Chamber must also consider whether any of the documents requested are otherwise "material to the preparation of the defence". The Kabiligi request to inspect "documents or materials which relate to the alibi" of the Accused, or concerning his movements throughout Rwanda during the period relevant to the Indictment, potentially embraces a wide range of documents, of varying degrees of significance to the choice of whether the Accused will testify. The indefinite nature of the category risks creating just the "broad affirmative obligation" rejected by the Appeals Chamber in its decision. The request for personal agendas, diaries, travel documents and correspondence is, in the Chamber's view, also unduly broad and vague.

6. The request to inspect statements or documents given by the Accused himself to immigration authorities is a well-defined category of particular importance to the preparation of the Defence. The significance of a witness's own statements is reflected, in particular, in Rule 66 (A) (ii), which requires the Prosecution to disclose all prior statements of its own witnesses. The Defence has a similar obligation in respect of its witnesses.[4] In the present situation, the Chamber considers the Accused's prior statements to be material to the preparation of the Defence. Documents seized from the Accused by ICTR investigators may also be especially important and is a defined category of information. These documents are, accordingly, also subject to inspection under Rule 66 (B) as being material to the preparation of the Defence.

7. In order for the Defence to have a reasonable opportunity to review the documents and exercise its choice as to whether the Accused will testify, the inspection must be permitted immediately.

FOR THE ABOVE REASONS, THE CHAMBER

ORDERS the Prosecution to permit the Defence to immediately inspect any statements or documents given by the Accused to immigration authorities, or documents seized from the Accused by ICTR investigators;

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[3] *Id*., para. 12.

[4] The Chamber exercised its discretion under Rule 73 *ter* (B) to require the Defence to provide statements of its own witnesses: T. 21 December p. 41: ("MR. PRESIDENT: Tomorrow or the 3rd of January you will provide the pseudonyms of each witness, the summary of the facts on which each witness will testify; the points in the indictment as to which witness will testify; and the estimated length of the time required for each witness. On the 7th you will give the names and the identifying information of these witnesses, unredacted statements of declarations given previously by the witness. MR. TREMBLAY: Mr. President, I have problems understanding why and – why on the basis of what we have to disclose unredacted statements. I do not see any provision in the Rule that obligates us to disclose this to the Prosecutor; I don't see that. MR. PRESIDENT: 73 (B), last paragraph, yes. This – it's being done in all other cases."). T. 16 May 2005 p. 30: ("MR. PRESIDENT: And there is a summary there. So you did very helpfully, Mr. White, provide us with this page concerning relief in this motion, and this discussion was useful … 'Provide statements where available, and, if not, to provide comprehensive will-say statements.' Well, that leads to the – to the question of which statements are lacking, which we will come back to later, but the obligation is there.")

DENIES the motion in all other respects.

Arusha, 6 December 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Decision on Defence Motion for Admission of Statement of Witness LG-1/U-03 Under Rule 92 bis 11 December 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Admission of evidence, Statement of a person who is deceased, Satisfactory indicia of its reliability, testimony relatinf to proof of the acts and conduct of the accused – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rules 89 (C), 90 (A), 92 bis, 92 bis (A) (i), 92 bis (A) (i) (a), 92 bis (A) (i) (b), 92 bis (A) (i) (e), 92 bis (A) (ii) and 92 bis (C)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Jean de Dieu Kamuhanda, Decision on Kamuhanda's Motion to Admit into Evidence Two Statements by Witness GER in Accordance with Rules 89 (C) and 92 bis of the Rules of Procedure and Evidence, 20 May 2002 (ICTR-99-54) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Prosecutor's Motion to Remove from her Witness List Five Deceased Witnesses and to Admit into Evidence the Witness Statement of Four of Said Witnesses, 22 January 2003 (ICTR-98-42) ; *Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 *bis*, 9 March 2004 (ICTR-98-41) ; *Trial Chamber,* The Prosecutor v. Mikaeli Muhimana, Decision on the Prosecution Motion for Admission of Witness Statements (Rule 89 (C) and 92 *bis*), 20 May 2004 (ICTR-95-1B) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Admission of Statements of Deceased Witnesses, 19 January 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Aloys Simba, Decision on the Admission of a Written Statement, 25 January 2005 (ICTR-2001-76)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Stanislav Galić, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), 7 June 2002 (IT-98-29)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion Requesting the Trial Chamber to Admit a Statement by Deceased Witness LG-1/U-03", etc., filed jointly by the Nsengiyumva and Bagosora Defence on 16 October 2006;

CONSIDERING the Prosecution Response, filed on 26 October 2006;

HEREBY DECIDES the motion.

Introduction

1. The Nsengiyumva and Bagosora Defence jointly request that the Chamber admit into evidence, pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence, a statement given to the Nsengiyumva Defence team by Witness LG-1/U-03 shortly prior to his death.[1] The witness held an important post related to communications in the Rwandan Armed Forces in 1994. He came to the Tribunal in the summer of 2005 but was unable to appear due to scheduling difficulties. Before the witness could return to give his testimony, he became seriously ill. Two members of the Nsengiyumva Defence met with the witness several times in January 2006, resulting in a four-page statement signed by the witness. According to documents submitted by the Defence, the witness passed away on 10 February 2006.

2. The Prosecution opposes the admission of the statement on the basis that it goes to proof of the acts and conduct of the Accused, and that it lacks sufficient indicia of reliability to comply with the requirements of 92 *bis* (C).[2]

Deliberations

3. Rule 89 (C) provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value". This discretion is guided in respect of testimonial evidence by Rule 90 (A), which requires that "[w]itnesses shall, in principle, be heard directly by the Chambers". Rule 92 *bis* does, however, allow a statement of a witness to be admitted into evidence in lieu of oral testimony provided that it concerns "proof of a matter other than the acts and conduct of the accused as charged in the indictment". In addition to this requirement, the Chamber must exercise its discretion, in accordance with the criteria set out in Rule 92 *bis* (A) (i) and (ii), to determine whether the statement should be admitted.[3] Factors which favour admission include the fact that oral evidence has been heard on similar facts; provides an historical, political or military background; or relates to the character of the accused. Factors weighing against admission include whether there is an overriding public interest to hear the evidence orally; its nature and source render it unreliable, or its prejudicial effect outweighs its probative value. The general requirements of relevance and probative value, applicable to all types of evidence under Rule 89 (C), must also be satisfied.[4] When a statement has been given by a person who is deceased, Rule 92 *bis* (C) permits the admission of the statement provided that the Chamber finds from the circumstances in which the statement was made and recorded that there are satisfactory indicia of its reliability.[5]

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[1] Motion, para. 1.
[2] Response, paras. 6-9.
[3] *Bagosora et al*., Decision on Admission of Statements by Deceased Witnesses (TC), 19 January 2005, para. 15; *Muhimana*, Decision on the Prosecution Motion for Admission of Witness Statements (Rule 89 (C) and 92 *bis*) (TC), 20 May 2004, para. 26 ("Thus, the Chamber finds that although Rule 92 *bis* (C) provides for the specific situation where a witness has died or is untraceable, it remains part of Rule 92 *bis* as a whole, and the conditions laid down in Rule 92 *bis* (A) for admissibility remain valid as the umbrella section of the whole provision"); *Galic*, Case N°IT-98-29-A, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002, para. 24 ("*Galic* Decision") ("Rule 92 *bis* (C), however, does not provide a separate and self-contained method of producing evidence in written form in lieu of oral testimony").
[4] *Bagosora et al*., Decision on Admission of Statements by Deceased Witnesses (TC), 19 January 2005, para. 15; *Bagosora et al*., Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under 92 *bis* (TC), 9 March 2004, para. 12.
[5] *Bagosora et al*., Decision on Admission of Statements by Deceased Witnesses (TC), 19 January 2005, para. 15; *Galic* Decision, para. 24 ("Both in form and in substance, Rule 92 *bis* (C) merely excuses the necessary absence of the declaration required by Rule 92 *bis* (B) for written statements to become admissible under Rule 92 *bis* (A)); *Muhimana*, Decision on the Prosecution Motion for Admission of Witness Statements (Rule 89 (C) and 92 *bis*) (TC), 20 May 2004, para. 26;

(i) Indicia of reliability

4. The Prosecution asserts that the statement lacks satisfactory indicia of reliability, noting that the statement was taken in the absence of any independent and impartial person. Furthermore, the witness did not make any separate declaration that the contents of the statement are true and correct.

5. Based on the documents submitted by the Defence, the Chamber accepts that the witness is deceased and that, accordingly, Rule 92 *bis* (C) applies to the present situation.[6] The statement does, in the Chamber's view, possess sufficient indicia of reliability to be admissible. The witness's statement was transcribed into French by the Legal Assistant of the Nsengiyumva Defence team and read back to the witness. In the first paragraph, the witness indicates that he "freely declares as follows", and the statement is signed at the end by the witness, and witnessed by Co-Counsel for Nsengiyumva and the Legal Assistant. Co-Counsel has also signed an *affidavit* attesting that although the witness was in pain, he was lucid throughout the interview and gave his statement freely and willingly, and in Co-Counsel's opinion, was clearly aware of what he was doing. Moreover, the information contained in the statement is consistent with the witness's previous declarations and his will-say statement.[7]

6. While it would have been preferable for the statement to have been witnessed and interpreted by persons other than those forming part of the Defence team for the Accused, the Chamber is satisfied, in light of the circumstances described above, that the statement possesses satisfactory indicia of reliability under Rule 92 *bis* (C).

(ii) Acts and conduct of the accused

7. The witness's statement can be divided into several sections. The first portion is an account of the background of the witness, and a general description of the organization and operation of his workplace, including an account of how messages were received from and sent to different Army units. This information describes the military background in April 1994, which is expressly mentioned as appropriate for admission under Rule 92 *bis* (A) (i) (b), and does not relate to the acts and conduct of the Accused.[8] Furthermore, the testimony generally repeats testimony heard previously in the case, a factor which favours admission under Rule 92 *bis* (A) (i) (a).[9] This evidence is also relevant and probative, as required for admission under Rule 89 (C). Accordingly, the Chamber considers paragraphs 1 to 19 of the statement to be admissible.

8. The character of the Accused Nsengiyumva is also described in the statement. Rule 92 *bis* (A) (i) (e) specifically mentions that this type of information is appropriate for admission. The Prosecution argues that the discussion of the Accused's character lacks probative value as the declarant does not describe the basis for his knowledge of the Accused. Any such deficiencies may, in the Chamber's view, be appropriately evaluated in determining the weight to be given to the statement, and do not preclude admission. Accordingly, the Chamber admits paragraphs 24 and 25 of the witness's statement into evidence.

Nyiramasuhuko et al., Decision on the Prosecution's Motion to remove From Her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of the Said Witnesses (TC), 22 January 2003, para. 21.

[6] *Bagosora et al.*, Decision on Admission of Statements by Deceased Witnesses (TC), 19 January 2005, para. 15; *Galic* Decision, para. 24.

[7] The will-say for this witness was sent to all parties by M. Constant on 25 July 2005.

[8] A similarly general account describing the Rwandan Air Force as it existed in April 1994 was admitted on this basis in *Bagosora et al.*, Decision on Admission of Statements by Deceased Witnesses (TC), 19 January 2005, para. 25.

[9] *Bagosora et al.*, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under 92 *bis* (TC), 9 March 2004, para. 6.

9. Paragraphs 20 to 23 of the statement contain assertions by the witness that he did not see certain specific messages that are alleged by other witnesses to have been transmitted by the Accused in April 1994. These aspects of the witness's statement contradict testimony of Prosecution witnesses about the acts and conduct of the Accused Nsengiyumva, Bagosora and Kabiligi during this critical time-period. Statements tending to contradict evidence that the Accused carried out certain acts have been held to relate to "proof of the acts and conduct of the accused" for the purposes of 92 *bis* (A).[10] The Chamber therefore considers that the information provided by the witness in paragraphs 20 to 23 concerns the acts and conduct of the accused, and is, therefore, inadmissible.

FOR THE ABOVE REASONS, THE CHAMBER

DECLARES paragraphs 1 to 19 and 24 to 25 of the witness's statement be admitted as evidence;

REQUESTS the Registry to ensure that the admitted documents are marked and assigned exhibit numbers;

DENIES the Defence motion in all other respects.

Arusha, 11 December 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[10] *Kamuhanda*, Decision on Kamuhanda's Motion to Admit into Evidence Two Statements by Witness GER in Accordance with Rules 89(C) and 92 *bis* of the Rules of Procedure and Evidence, 20 May 2002, para. 29 ("The Chamber notes that the statements of GER contradict the allegations made against the Accused as outlined in the Indictment against him. The Chamber considers that because of that contradiction, the said statements may be said to relate to the criminal acts and conduct of the accused"); *Simba*, Decision on the Admission of a Written Statement (TC), 25 January 2005, para. 5 (The statement of a witness that an accused was not present at a massacre in which he was alleged to have participated was held to go to the acts and conduct of the accused. "The Defence seeks to use it to support the Accused alibi that he was not present at Kaduha parish. This goes directly to proof of the acts and conduct of the Accused by corroborating to some extent his alibi"); *Bagosora et al*., Decision on Prosecutor's Motion for Admission of Written Witness Statement (TC), 9 March 2004, para. 16 ("[The statement sought to be admitted must satisfy] Rule 92 *bis*, in that it goes to proof of a matter other than the acts and conduct of the Accused as charged in the Indictment, that is, that it does not contain evidence that tends to prove or disprove the Accused's acts or conduct as charged").

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Decision on Bagosora Motion for Site Visit 11 December 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora – Site visit, Instrumental in the discovery of the truth and determination of the matter before the Chamber, Visit marginal to the assessment of the evidence – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 4

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda, 29 September 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Jean Mpambara, Decision on the Prosecution Motion for A Site Visit, 10 February 2006 (ICTR-2001-65)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "*Requête … visant la visite du Camp de Butotori*", filed by the Bagosora Defence on 18 July 2006;

HEREBY DECIDES the motion.

Introduction

1. The Bagosora Defence requests that the Chamber conduct a site visit to the Butotori training area in Gisenyi, in order to test the credibility of Prosecution and Defence witnesses and, in particular, the possibility that the Accused Bagosora participated in a meeting attended by at least one hundred persons. The Defence submits that the site visit would take no longer than half a day.

Deliberations

2. Rule 4 of the Rules of Procedure and Evidence provides that

> "[a] Chamber or a Judge may exercise their functions away from the Seat of the Tribunal, if so authorized by the President in the interests of justice."

A site visit is justified where it would be "instrumental in the discovery of the truth and determination of the matter before the Chamber".[1]

[1] *Bagosora et al.,* Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda (TC), 29 September 2004, para. 4; *Mpambara*, Decision on the Prosecution Motion for A Site Visit (TC), 10 February 2006, para. 4.

3. The Chamber considers the likely value of a site visit to the Butotori training area to be marginal to the assessment of the evidence. The testimony of the witnesses concerned was extensive, and the Chamber has ample material on which to assess their credibility and make findings of fact. Those findings are not likely to be affected by any observations that the Chamber could make during a site visit, particularly in light of the Defence submission that changes may have been made to the location since 1994.[2]

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 11 December 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[2] Motion, para. 21.

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Decision on Request for Certification of Appeal on Disclosure and Investigations concerning the Assassination of President Habyarimana 12 December 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Certification of appeal, Material advance the proceedings, Proper evaluation of the significance of the information, Detailed understanding of the totality of evidence, Scope of the Prosecution case against the Accused,

International Instrument cited :

Rules of Procedure and Evidence, rule 73 (B)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 February 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Request for Certification of a Decision of 17 October 2006", filed by the Bagosora Defence on 25 October 2006;

CONSIDERING the Prosecutor's Response, filed on 26 October 2006; and the Bagosora Reply, filed on 30 October 2006;

HEREBY DECIDES the request.

Introduction

1. The Bagosora Defence requests leave to appeal the Chamber's Decision of 17 October 2006, declining to issue an order requiring the Prosecution to disclose evidence or information arising from any investigations into the assassination of President Habyarimana on 6 April, and declining to issue an order requiring the Prosecution to undertake such investigations.[1] The Defence argues that the Chamber abused its discretion by failing to recognize the relevance of information concerning the identity of those responsible for assassinating President Habyarimana on 6 April 1994.[2]

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[1] *Bagosora et al.*, Decision on Requests for Disclosure and Investigations Concerning the Assassination of President Habyarimana (TC), 17 October 2006.
[2] Reply, paras. 22-24.

Deliberations

2. Certification may be granted under Rule 73 (B) when a decision

> "involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

3. Whether an interlocutory appeal would materially advance the proceedings includes consideration of whether:

> a showing has been made that the appeal could succeed. That threshold would be met, for example, by showing some basis to believe that the Chamber committed an error as to the applicable law; that it made a patently incorrect conclusion of fact; or that it was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[3]

In respect of determinations of relevance, the Appeals Chamber has underlined that:

> It is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of the trial; it is not for the Appeals Chamber to assume this responsibility. As the Appeals Chamber has previously underscored, certification of an appeal has to be the absolute exception when deciding on the admissibility of evidence.[4]

4. A proper evaluation of the significance of the information requested involves a detailed understanding of the totality of evidence heard by the Chamber and, in particular, the scope of the Prosecution case against the Accused. Sufficient evidence concerning the shooting down of the Presidential airplane has been entered into evidence to provide the Chamber with the requisite context for events that followed. The Chamber has repeatedly stressed that there is no need for detailed evidence on matters of collateral and indirect relevance to the Indictments against the Accused. Certification of an interlocutory appeal on these matters would not materially advance the proceedings; on the contrary, it would draw the Appeals Chamber into an unwarranted and premature review of the evidence, which is best reserved for the appeal from the final judgement.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the request.

Arusha, 12 December 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[3] *Bagosora et al*., Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4.
[4] *Nyiramasuhuko et al*., Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5.

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Decision on Kabiligi request for Certification Concerning Inspection of Documents Pursuant to Rule 66 (B) 12 December 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Gratien Kabiligi – Certification to appeal, Importance for the trial of the choice of an Accused to give or decline testimony at his or her own trial – Categories of documents subject to the obligation of disclosure, Materiality of the documents requested – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 66 (B) and 73 (B)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Interlocutory Appeal Relating to Disclosure Under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Request for Certification of the 'Decision on Kabiligi Motion for Inspection of Documents Under Rule 66 (B)' of 6 December 2006", filed by the Kabiligi Defence on 11 December 2006;

CONSIDERING the oral submissions of the parties on 11 December 2006;

HEREBY DECIDES the request.

Introduction

1. The Kabiligi Defence requests leave to file an interlocutory appeal from a decision of this Chamber that granted in part, and denied in part, a Kabiligi request to inspect Prosecution documents under Rule 66 (B) of the Rules of Procedure and Evidence.[1] The Chamber granted the Defence request to inspect statements made by the Accused and other documents related to immigration applications to national authorities; and all documents seized from the Accused by ICTR investigators. However, the Chamber denied a request to inspect "documents or materials which relate to the alibi of the accused Kabiligi, and alleged travel of General Kabiligi around Rwanda during the period relevant to the

[1] *Bagosora et al*., Decision on Kabiligi Motion for Inspection of Documents Under Rule 66 (B) (TC), 6 December 2006 ("the Impugned Decision").

indictment", and of "all personal agendas, diaries, passports, photographs, logs and travel documents, and correspondence to and from General Kabiligi written during the period relevant to the Indictment, in the period up until his arrest, and since his detention in the UNDF".

Deliberations

2. Certification may be granted under Rule 73 (B) of the Rules when a decision

> "involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

3. The choice of an Accused to give, or to decline to give, testimony at his or her own trial is unquestionably very important to the conduct of a trial. The question in the present case, however, is whether the category of documents whose inspection has not been granted "would significantly affect the fair and expeditious conduct of proceedings or the conduct of the trial", and whether resolution of that issue now may materially advance the proceedings. In the Impugned Decision, the Chamber granted two of the requests for inspection on the basis that they were well-defined and of apparent importance to the preparation of the Defence. The other two categories, however, were found to be "unduly broad and vague" and "of varying degrees of significance to the choice of whether the Accused will testify".[2] The Chamber was guided by the Appeals Chamber's statement that

> "Rule 66 (B) of the Rules does not create a broad affirmative obligation on the Prosecution to disclose any and all documents which may be relevant to its cross-examination",

and that such requests must be "sufficiently specific".[3] Once a sufficiently specific category has been defined, the Defence must make the "requisite showing" that the documents are material to the preparation of the defence. The determination of what is "material", as distinct from the generality of "any and all documents which may be relevant" to the cross-examination, is a "case-specific assessment" to be made by the Trial Chamber.[4]

4. Certification of this issue – the impermissible vagueness of the categories – would not, in the Chamber's view, materially advance the proceedings. Whether a category has been defined with sufficient specificity is a "case-specific assessment" which falls within the core of the Trial Chamber's discretion. The first category articulated by the Defence could include any document which makes any reference to the whereabouts of the Accused in 1994, as "relat[ing] to the alibi of the accused and alleged travel of General Kabiligi". Many such documents, however, would have only tangential significance to the choice of whether the Accused should testify and, hence, would not be material to the preparation of the Defence. The second category is also vague to the extent that it covers some documents which could be material, but many other documents that likely would not be. Leave to appeal the Chamber's decision to deny inspection of these two broad categories on the basis that they are unduly vague and indefinite would not, in the Chamber's view, materially advance the proceedings.[5]

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[2] Impugned Decision, para. 5.
[3] *Bagosora et al*., Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence (AC), 25 September 2006, para. 10.
[4] *Id*., para. 9.
[5] Certification of interlocutory appeals may only be granted on the basis of arguments and propositions which were first raised before the Trial Chamber. Some of the oral arguments presented by the Defence go beyond the specific argumentation concerning the two categories defined by the Defence in its motion, and are based instead on a much broader proposition that "we have a right to know what's coming". T. 11 December 2006 p. 6 (draft). The grounds for the original motion are narrower, based on the materiality of the specific categories defined by the Defence. The Chamber restricts its consideration of whether to grant interlocutory appeal to the argumentation and issues raised in the original motion. *Bagosora et al*., Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries (TC), 21 July 2005 paras. 5-6 ("Permitting interlocutory appeals of decisions on the basis of arguments which were not advanced in relation to the original motion would encourage repetitive pleadings and could lead to resolution of issues by the Appeals Chamber without a prior

5. Some documents within the two categories may be significant to the preparation of the Defence, but this does not mean that the categories as a whole, without further specification, raise an issue that would "significantly affect the fair and expeditious conduct of the proceedings". Indeed, nothing prevents the Defence from interposing objections during the cross-examination of the Accused in respect of documents subject to disclosure under Rule 66 (B). On one previous occasion, the Chamber excluded questioning on a document that had not been disclosed in response to a proper request pursuant to Rule 66 (B).[6] Should that situation arise during the cross-examination of the Accused, the Defence can object and, if not satisfied by the Chamber's ruling, may request certification. Certification of those decisions, based on specific documents whose significance can be concretely assessed, may involve an issue that significantly affects the fair conduct of proceedings, and materially advances the proceedings. However, based on the general categories defined in the Impugned Decision, the Defence has not shown that either criterion is satisfied.

6. The potential materiality of the categories as a whole is further weakened by the Prosecution's assertion that at least some of the documents comprehended by the requests have already been disclosed. For example, the Prosecution asserts that all prior statements and photographs of the Accused have been disclosed.[7] Moreover, many of the documents in the second category – such as, diaries, passports, and personal agendas – would already be subject to disclosure to the extent that the Impugned Decision ordered inspection of "documents seized from the Accused". The failure to specifically define categories of documents that have not yet been disclosed, combined with the general nature of the requests, makes it impossible for the Chamber to make a reasoned assessment of the materiality of the categories without having some idea of at least the specific type of documents involved.

7. For these reasons, the Chamber finds that the Defence has not shown either that certification of appeal of the Impugned Decision would materially advance the proceedings, or that it involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the request.

Arusha, 12 December 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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decision on the merits by the Trial Chamber. Even though a Trial Chamber may at the certification stage revisit the substance of a decision, it does so only within the context of the criteria set out in Rule 73 (B). A certification motion is not an appropriate venue to advance new grounds of argument. A decision to grant certification on the basis of grounds which had not been previously argued could take the responding party by surprise, and circumvent the usual procedure for assessing motions on the merits").

[6] T. 28 September 2006 pp. 23-24 (Witness KVB-19).

[7] T. 11 December 2006 p. 15 (draft).

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Decision on Bagosora Motion to Vary its Witness List and Tender a Witness Statement Under Rule 92 bis
12 December 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora – Modification of the Witness List, Materiality of the prospective testimonies – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 92 bis, 92 bis (B) and 92 bis (C)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Request for Reconsideration, Motion to Vary the Witness List and Motion to Tender a Witness Statement", etc., and the Strictly Confidential and *Ex Parte* Annex thereto, filed by the Bagosora Defence on 4 December 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. The deadline for the presentation of evidence by the Bagosora Defence was 13 October 2006. On 17 November 2006, the Chamber granted leave to hear the testimony of four Bagosora witnesses after that date, but denied the request to hear seven others.[1] The Bagosora Defence now asks the Chamber to reconsider its decision in respect of one of the witnesses whom it declined to hear, Witness B-06. It also requests permission to present an additional witness, Witness G-10, or, in the alternative, to tender her statement under Rule 92 *bis*.[2]

Deliberations

(i) Witness B-06

2. The Chamber previously held in respect of Witness B-06 that

> "[t]he reason for his unavailability during the entire course of the Defence case prior to 13 October 2006 is unclear, and the Chamber is not persuaded that his testimony is of sufficient importance to justify his appearance at this stage".[3]

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[1] *Bagosora et al*., Decision on Bagosora Motion to Present Additional Witnesses and Vary Its Witness List (TC), 17 November 2006.
[2] The Chamber previously indicated orally that the present motion would be denied: T. 8 December 2006 p. 2.
[3] *Id*., para. 13.

The Chamber has again considered the prospective testimony of Witness B-06 and sees no basis to reconsider its previous decision. The fact that Witness B-06, a Tutsi who was not personally acquainted with Bagosora, may have been saved by the Accused in April 1994, is not a matter of such importance to the case as to justify his appearance at this late stage.[4] Although the Chamber appreciates the difficulties faced by the Defence in convincing this particular witness to testify, this reticence over a long period of time cannot dictate the trial schedule.

(ii) Witness G-10

3. Witness G-10 is ostensibly able to contradict the testimony of Prosecution Witness DAS concerning a roadblock where Tutsi civilians were allegedly killed in the presence of the Accused in Kigali in late June 1994. To be precise, Witness G-10 is said to be able to deny that her relative, who is identified by Witness DAS as having been present at the roadblock and speaking publicly to the *Interahamwe*, could have been present.[5] Witness G-10 was not an eyewitness to the event, but the Defence suggests that her testimony would generally undermine the credibility of Witness DAS's description of the event.

4. The Defence first met Witness G-10 in November 2006, after an effort to secure similar testimony from another relative. The motion indicates that the Defence has been aware of the need to find members of this family as early as April 2005.[6] No specific showing has been made that Witness G-10 could not have been discovered or contacted before November 2006. As the witness's testimony is not a direct observation of the event or of the Accused, and as the Chamber is not in a position to determine whether the witness could have been contacted earlier, the request for the appearance of the witness beyond the close of the Bagosora Defence case is not justified.

5. Witness G-10's written declaration does not satisfy the formalities prescribed by Rule 92 *bis* (B). The statement is not witnessed by a person "authorised to witness such a declaration in accordance with the law and procedure of a State", nor by any "Presiding Officer appointed by the Registrar of the Tribunal". In the absence of such formalities, the document is not admissible, unless a showing is made that the declarant has died or is otherwise unavailable, under Rule 92 *bis* (C). These formal obligations cannot be relieved by the efforts described in the motion to secure a duly authorized witness.[7]

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the request.

Arusha, 12 December 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[4] Confidential Annex, para. 7.
[5] Motion, para. 27.
[6] Motion, para. 13.
[7] Motion, paras. 31-33.

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Decision on Ntabakuze Motion for Reconsideration of Denial of Issuance of Subpoena to a United Nations Official 12 December 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Issuance of subpoena to United Nations Officials, Inherent jurisdiction of the Chamber to reverse or revise its decision, Failure to exhaust efforts to obtain voluntary cooperation, No grounds to suggest that new material circumstances will arise – Motion denied

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagasora et al., Decision on Motion to Harmonize and Amend Witness Protection Measures, 3 June 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana et al., Decision on Bizimungu's Motion in Opposition to the Admissibility of the Testimonies of Witnesses LMC, DX/ANM, BB, GS, CJ/ANL and GFO and for Reconsideration of the Chamber's Decision of 13 May 2005, 24 November 2005 (ICTR-99-50)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion for Reconsideration of the Trial Chamber's 'Decision on Request for *Subpoenas* of United Nations Officials' of 6 October 2006", filed by the Ntabakuze Defence on 6 December 2006;

CONSIDERING the Prosecution Response, filed on 7 December 2006;

HEREBY DECIDES the motion.

Introduction

1. The Ntabakuze Defence asks for reconsideration of the Trial Chamber's decision of 6 December 2006 ("the *Subpoena* Decision") to the extent that it denied the issuance of a *subpoena* to Mr. Iqbal Riza, a former official of the Department of Peacekeeping Operations ("DPKO") of the United Nations in New York in 1994.[1] The Defence submits that the United Nations Office of Legal Affairs has ceased its cooperation in procuring a written declaration from Mr. Riza, which is said to have been one of the grounds upon which the Chamber denied the issuance of a *subpoena*.

Deliberations

[1] *Bagosora et al*., Decision on Request for Subpoenas of United Nations Officials (TC), 6 October 2006 ("the Subpoena Decision").

2. A Chamber has inherent jurisdiction to reverse or revise a previous decision where new material circumstances have arisen that did not exist at the time of the decision, or when

> convinced that the decision was erroneous and has caused prejudice or injustice to a party.[2] The Defence does not contest the legal principles applied in the *Subpoena* Decision, where the Chamber articulated three requirements for the issuance of a *subpoena*: "(i) reasonable attempts have been made to obtain the voluntary cooperation of the witness; (ii) the prospective witness has information which can materially assist the applicant in respect of clearly identified issues relevant to the trial; and (iii) the witness's testimony must be necessary and appropriate for the conduct and fairness of the trial."[3]

3. The Chamber expressly relied upon the absence of the first requirement to deny the issuance of a *subpoena* to Mr. Riza:

> The perspective of the DPKO, as the central repository of UNAMIR documents, may have a distinct value in one respect. The Defence wishes the DPKO witnesses to confirm that they had no basis to believe that there was a conspiracy or plan to commit genocide leading up to April 1994. To a large extent, however, the documents already disclosed by the DPKO to the Defence, many of which have been entered as exhibits without any dispute as to authenticity, provide a more direct indication as to the information available to the DPKO over time. To the extent that any further confirmation is required from witnesses, the Office of Legal Affairs has offered to continue to cooperate with the Ntabakuze Defence in the preparation of a statement in lieu of oral testimony.[4] In light of this ongoing cooperation, and the nature of the information sought, the Chamber does not consider that the first condition for the issuance of a *subpoena* – the exhaustion of reasonable attempts to obtain the voluntary cooperation of the witness – is satisfied. Accordingly, there is no need to further consider whether the information is sufficiently important to satisfy the second and third conditions for a *subpoena*.
>
> Under these circumstances, the Chamber shall not order that a *subpoena* be issued to either Mr. Annan or Mr. Riza.[5]

Based on the Defence submissions, it now appears that the first requirement for the issuance of a *subpoena* is satisfied.

4. The Chamber based its reasoning not only on the failure to exhaust efforts to obtain voluntary cooperation, but also on the "nature of the information sought". Indeed, the *Subpoena* Decision discusses at length whether the information sought is sufficiently important to justify a *subpoena*:

> The directness of a witness's observation of events is an important criterion in determining whether a *subpoena* should be issued. Every witness to whom a *subpoena* has been issued in the present case was an eyewitness to the conduct of the Accused or their subordinates. Although the Defence attempts to characterize Mr. Annan and Mr. Riza as "eye-witnesses or participants in the events", their prospective testimony concerns information sent to them by UNAMIR officials in Rwanda, and possibly other sources. They are said to be "the only persons who can explain the circumstances described" in the various memos, faxes and code cables exchanged between UNAMIR and the DPKO in New York.
>
> The Chamber disagrees that Mr. Annan and Mr. Riza are eyewitnesses. The Defence has not shown that either of them can draw on any personal observation of events for their testimony. Although Mr. Riza did apparently visit Rwanda in May or June 1994, the Defence does not

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[2] *Bagosora et al*., Decision on Motion to Harmonize and Amend Witness Protection Measures (TC), 3 June 2005, para. 3; *Ndindiliyimana et al*., Decision on Bizimungu's Motion in Opposition to the Admissibility of the Testimonies of Witnesses LMC, DX/ANM, BB, GS, CJ/ANL and GFO and for Reconsideration of the Chamber's Decision of 13 May 2005 (TC), 24 November 2005.
[3] Subpoena Decision, para. 3.
[4] Submissions, p. 4.
[5] Subpoena Decision, paras. 7-8.

suggest that it wishes to question him about this visit.[6] By contrast, this Chamber has heard from numerous members of UNAMIR who were on the ground in Rwanda: Jacques Roger Booh-Booh, General Dallaire, Major Beardsley, Lt. Colonel Frank Claeys, Colonel Joseph Dewez, Major Donald MacNeil, Colonel Aouilli Tchemi Tchambi, Major Petrus Maggen, Major Robert Van Putten, and Lieutenant Colonel Babacar El Hadj Faye. Indeed, the code cables to United Nations Headquarters in New York City were based on the direct eyewitness observation of these individuals and other UNAMIR officials posted in Rwanda at the time. The impressions of the recipients of those reports in United Nations Headquarters would be of limited weight in comparison to this direct and primary testimony, and does not constitute information which is necessary and appropriate for the conduct and fairness of the trial.[7]

5. The Defence motion for reconsideration raises no grounds to suggest that new material circumstances have arisen in respect of these observations, or that the Chamber's conclusion is erroneous. Mr. Riza was not an eyewitness of events in Rwanda; his knowledge is limited to the receipt of communications by United Nations Headquarters from UNAMIR personnel, many of whom have personally testified before the Chamber; and the Defence has had an extensive opportunity to review, and seek admission of, United Nations documents in order to directly demonstrate the content of those communications. In the absence of any reason to believe that its previous conclusions are incorrect or were based on circumstances which have now changed, the Chamber reaffirms that the third requirement for the issuance of a *subpoena* – that the information sought be necessary and appropriate for the conduct and fairness of the trial – is not met.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 12 December 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[6] Motion, Annex 4, p. 9.
[7] Subpoena Decision, paras. 5-6.

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Decision on Kabiligi Motion for Testimony by Video-Conference and Modalities for Presentation of Witnesses
14 December 2006 (ICTR-98-41-T)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Gratien Kabiligi – Video-Conference testimony, Interests of Justice, Good reason for the inability or unwillingness of the witnesses to orally testify, French military officers, Refusal of the French Ministry of Defence to authorize the witnesses' travel to Arusha because of national security concerns – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 54 and 75

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on the Prosecutor's Application to Add Witness X to Its List of Witnesses and for Protective Measures, 14 September 2001 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 October 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Testimony of Witness Amadou Deme by Video-Link, 29 August 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Modalities for Presentation of a Witness, 20 September 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Video-Conference Testimony of Kabiligi Witnesses KX-38 and KVB-46, 5 October 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Video-Conference Testimony of Kabiligi Witnesses YUL39 and LAX-23 and to Hear Testimony in Closed Session, 19 October 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Video-Conference Testimony of Kabiligi Witness Delta and to Hear Testimony in Closed Session, 1 November 2006 (ICTR-98-41)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Tihomir Blaškić, Decision of Trial Chamber I on Protective Measures for General Philippe Morillon, Witness of the Trial Chamber, 12 May 1999 (IT-95-14)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion to Request the Testimony of Witnesses SX-1, VIP-1, and TT-02 to be Heard Via Video Conference", etc., filed by the Kabiligi Defence on 11 December 2006;

CONSIDERING the oral submissions of the parties on 12 December 2006;

HEREBY DECIDES the motion.

Introduction

1. The Kabiligi Defence requests that three of its witnesses, who are former French military officers, be permitted to testify by video-link on the basis that the French Ministry of Defence refuses to authorize their travel to Arusha because of security concerns. The French authorities have also requested that the testimony be heard according to the same special conditions as were applied to Witness DM-26, namely: (i) that the testimony be heard in closed session; (ii) non-disclosure of the witness's identity; (iii) limiting the scope of examination to mattets already covered during a previous interview of the witness, and the same limitation on cross-examination; (iv) the presence of a representative of the Government of France in the proceedings who is authorized to assert a national security privilege; and (v) non-disclosure of the witness's testimony to any party to another proceeding[1].

2. The requests are opposed by the Prosecution, which asserts that it has not yet received the statements taken during forma1 interviews of the witnesses and that, accordingly, it is not in a position to know whether video-testimony is justified, and whether it is able to agree to the modalities proposed for the witnesses' testimony[2]. The D efence responds that it has not yet received the statements in question from the French judicial authorities but that, in any event, previous interviews with two of the three witnesses have already been disclosed to the Prosecution, and that the questions during the formal interviews were the same as those asked earlier[3]. Further, the Defence indicates that statements from the formal interviews are expected shortly, and will be disclosed to the Prosecution immediately.

DELIBERATIONS

3. Testimony by video-conference may be ordered on the basis that it is "in the interests of justice", pursuant to Rule 54 of the Rules of Procedure and Evidence, or as a witness protection measure under Rule 75, where it is "necessary to safeguard the witness's security"[4]. Whether video-conference testimony is in the "interests of justice" under Rule 54 will depend on the importance of the testimony, the witness's inability or unwillingness to attend, and whether a good reason has been adduced for that inability or unwillingness[5]. Although it is not absolutely necessary that the reason for the refusal to attend be objectively justified, a showing must at least be made that the witness has a credible basis for the refusal, and that those grounds are genuinely held[6].

4. According to the Defence, the three witnesses are unable to come to Arusha because authorization to do so has been refused by their govemment. The Prosecution asserts that France has an obligation to cooperate with the Tribunal and that, accordingly, the Chamber ought to inquire more closely into the security concerns and determine whether they are wellfounded. The Chamber has no

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[1] Motion, para. 1 ; *Bagosora et al*., Modalities for Presentation of a Witness (TC), 20 September 2006, para. 3.
[2] T. 12 December 2006 pp. 3-5 (draft).
[3] *Id*. p. 5. (draft). The Defence does concede that no previous stalement of Witness TT-02 exists.
[4] *Bagosora et al*., Decision on Video-Conference Testimony of Kabiligi Witness Delta and to Hear Testimony in Closed session (TC), 1 November 2006, para 2; *Bagosora et al*., Decision on Video-Conference Testimony of Kabiligi Witnesses YUL39 and LAX-23 and to Hear Testimony in Closed Session (TC), 19 October 2006, para. 2; *Bagosora et al*., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004, paras. 5-8; *Nahimana el al.,* Decision on the Prosecutor's Application for Add Witness X to its List of Witnesses and for Protective Measures (TC), 14 September 2001.
[5] *Bagosora et al.,* Decision on Video-Conference Testimony of Kabiligi Witness Delta and to Hear Testimony in Closed Session (TC), 1 November 2006, para 2; *Bagosora et al.,* Decision on Video-Conference Testimony of Kabiligi Witnesses YUL-39 and LAX-23 and to Hear Testimony in Closed Session (TC), 19 October 2006, para. 2; *Bagosora el al.,* Decision on Video-Conference Testimony of Kabiligi Wiînesses KX-38 and KVB-46 (TC), 5 October 2006, para. 3.
[6] *Bagosora el al.,* Decision on Video-Conference Testimony of Kabiligi Wiîness Delta and to Hear Testimony in Closed Session (TC), 1 November 2006, para 2; *Bagosora et al.,* Decision on Video-Conference Testimony of Kabiligi Witnesses KX-38 and KVB-46 (TC), 5 October 2006, para. 3; *Bagosora el al.,* Decision on Testimony of Witness Amadou Deme by Video-Link (TC), 29 August 2006, para. 5.

reason to doubt the good faith basis for the views of the Government of France, as described by the Defence in its motion. Accordingly, the witnesses have a credible basis to assert that they are unable to testify in Arusha because of the position of their government. Allowing their testimony, which appears to concem matters on which no other Defence witnesses have been called, is in the interests of justice.

5. Despite the absence of statements from the formal interviews, a sufficient basis has been established by the Defence that these three witnesses are in generally the same situation as Witness DM-26. The modalities were previously requested in order to safeguard the security of the witnesses and to facilitate non-disclosure of matters that may touch upon national security concerns. The Defence has made a sufficient showing, based on the existing statements and the role and identity of the witnesses, that the modalities requested may facilitate these objectives to the same degree as was the case for Witness DM-26. For the reasons more fully expressed in that decision, the Chamber accepts that those modalities are compatible with the Rules and the statute[7]. These measures must, however, be understood as justified only by the exceptional circumstance that the Governrnent of France has invoked national security, and appears to have a credible basis for doing so. Furthemore, the final determination as to the proper scope of questioning, in accordance with the modalities prescribed by this decision, must rest with the chamber[8].

FOR THE ABOVE REASONS, THE CHAMBER

AUTHORIZES the taking of the testimony of Witnesses SX-1, VIP-1, and TT-02 by videoconference;

INSTRUSTS the Registry, in consultation with the parties, to make al1 necessary arrangements, in respect of the testimony of Witnesses SX-1, VIP-I, and TT-02 by videoconference and to videotape the testimony for possible future reference by the Chamber;

DECLARES that (i) the testimony be heard in closed session; (ii) the witness's identity will not be disclosed; (iii) examination and cross-examination shall be limited to matters already covered during previous interviews of the witness; (iv) a representative of the Government of France may be present during proceedings and may request that the witness be relieved from answering questions on the grounds of national security; and (v) the witness's testimony shall not be subject to disclosure to any party in another proceeding.

Arusha, 14 December 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[7] *Bagosora et al.,* Modalities for Presentation of a Witness (TC), 20 September 2006, para. 5.
[8] *Bagosora et al.,* Modalities for Presentation of a Witness (TC), 20 September 2006, para. 5; *The Prosecutor v. Blaskić,* Decision of Trial Chamber I on Protective Measures for General Philippe Morillon, Witness of the Trial Chamber (TC), 12 May 1999.

Le Procureur c. Théoneste BAGOSORA, Gratien KABILIGI, Aloys NTABAKUZE et Anatole NSENGIYUMVA

Affaire N° ICTR-98-41

Fiche technique : Théoneste Bagosora

• Nom: BAGOSORA

• Prénom: Théoneste

• Date de naissance: 16 août 1941

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: directeur de cabinet au ministère de la défense

• Date de confirmation de l'acte d'accusation: 10 août 1996

• Date des modifications subséquentes de l'acte d'accusation: 12 août 1999

• Date de jonction d'instance: 29 juin 2000 – Kabiligi, Ntabakuze et Nsengiyumva

• Chefs d'accusation: génocide, complicité de génocide, entente en vue de commette le génocide, incitation directe et publique à commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date et lieu de l'arrestation: 9 mars 1996, au Cameroun

• Date du transfert: 23 janvier 1997

• Date de la comparution initiale: 20 février 1997

• Précision sur le plaidoyer: non coupable

• Date du début du procès: 2 avril 2002

• Intervention de tiers: *Amicus curiae,* Belgique

• Date et contenu du prononcé du prononcé: 18 décembre 2008, condamné à l'emprisonnement à vie

• Affaire en appel

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Fiche technique : Gratien Kabiligi

• Nom: KABILIGI

• Prénom: Gratien

• Date de naissance: 18 décembre 1951

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: brigadier général dans les Forces armées rwandaises (FAR)

• Date de confirmation de l'acte d'accusation: 15 octobre 1997

• Date des modifications subséquentes de l'acte d'accusation: 8 octobre 1999

• Date de jonction d'instance: 29 juin 2000 – Bagosora, Nsengiyumva et Ntabakuze

• Chefs d'accusation: génocide, complicité dans le génocide, entente en vue de commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date et lieu de l'arrestation: 18 juillet 1997, au Kenya

• Date du transfert: 18 juillet 1997

• Date de la comparution initiale: 17 février 1998

• Précision sur le plaidoyer: non coupable

• Date du début du procès: 2 avril 2002

• Date et contenu du prononcé: 18 décembre 2008, acquitté

• Affaire en appel

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Fiche technique: Aloys Ntabakuze

• Nom: NTABAKUZE

• Prénom: Aloys

• Date de naissance: 1954

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: commandant de bataillon des FAR

• Date de confirmation de l'acte d'accusation: 15 octobre 1997

• Date de jonction d'instance: 29 juin 2000 – Bagosora, Kabiligi et Nsengiyumva

• Date et lieu de l'arrestation: 18 juillet 1997, au Kenya

• Chefs d'accusation: génocide, complicité dans le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date du transfert: 18 juillet 1997

• Date de la comparution initiale: 24 octobre 1997

• Précision sur le plaidoyer: non coupable

• Date du début du procès: 2 avril 2002

• Date et contenu du prononcé: 18 décembre 2008, condamné à l'emprisonnement à vie

• Affaire en appel

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Fiche technique: Anatole Nsengiyumva

• Nom: NSENGIYUMVA

• Prénom: Anatole

• Date de naissance: 4 septembre 1950

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: lieutenant-colonel

• Date de la confirmation de l'acte d'accusation: 12 juillet 1996

• Date de jonction d'instance: 29 juin 2000 – Bagosora, Kabiligi et Ntabakuze

• Date des modifications subséquentes de l'acte d'accusation: 12 août 1999

• Chefs d'accusation: incitation directe et publique à commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date et lieu de l'arrestation: 27 mars 1996, au Cameroun

• Date du transfert: 23 janvier 1997

• Date de la comparution initiale: 19 février 1997

• Précision sur le plaidoyer: non coupable

• Date du début du procès: 2 avril 2002

• Date et contenu du prononcé: 18 décembre 2008, condamné à l'emprisonnement à vie

• Affaire en appel

Décision relative à la requête intitulée Kabiligi Defence Request to Meet Witness LE-1
30 janvier 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Gratien Kabiligi – Rencontre avec un témoin protégé, Changement de Conseiller principal – Requête acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 73 (A)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative au report de la présentation des moyens de défense de l'accusé Kabiligi, 21 avril 2005 (ICTR-98-41)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIÉGEANT en la Chambre de première instance I, composée du juge Erik Møse désigné par la Chambre en application de l'article 73 (A) du Règlement de procédure et de preuve,

SAISI de la requête de la Défense de Kabiligi intitulée *Urgent Motion for Trial Chamber Authorization to Interview Witness LE-1,* déposée le 24 janvier 2006,

VU la réponse du Procureur déposée le 25 janvier 2006,

STATUE sur la requête.

1. La Défense de Kabiligi prie la Chambre de l'autoriser à s'entretenir avec le témoin LE-1 qui a déposé les 19, 20 et 21 octobre 2005 en tant que témoin à décharge, même si la Chambre avait recommandé à celui-ci de « ne discuter de [sa] déposition avec qui que ce soit »[1].

2. Comme suite à la nomination du nouveau conseil principal, la Défense de Kabiligi a été autorisée par la Chambre à présenter ses moyens après les autres équipes de la Défense[2]. Reconnaissant que les témoins qui déposent pour le compte des autres accusés pourraient par la suite le faire en faveur de l'accusé Kabiligi, la Chambre a souvent autorisé par le passé la Défense de Kabiligi à s'entretenir avec ces témoins, lorsqu'elle était saisie à cet effet[3]. Il n'y a pas de raison

[1] Compte rendu de l'audience du 21 octobre 2005, p. 59.
[2] *Bagosora et consorts,* Décision relative au report de la présentation des moyens de défense de l'accusé Kabiligi, 21 avril 2005
[3] Voir, par exemple, le compte rendu de l'audience du 4 mai 2005, p. 41 et 42 (« M. LE PRÉSIDENT : Monsieur le Témoin, nous sommes arrivés à la fin de votre déposition et je vous remercie d'avoir effectué ce long voyage pour venir déposer devant cette juridiction. Nous vous souhaitons un bon voyage retour, et veuillez ne pas discuter de votre déposition avec qui que ce soit ... Monsieur le Témoin, ce que j'ai dit c'est, en fait, la phrase rituelle que nous prononçons devant témoin, mais étant donné qu'il pourrait y avoir une situation précise qui impliquera que Maître Skolnik veuille vous interroger ... et, bien

qu'elle ne le fasse pas en l'espèce. Cette autorisation doit être interprétée comme s'appliquant à toute question pouvant se rapporter à l'actuel procès, y compris celles sur lesquelles le témoin a déjà déposé devant la Chambre.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT À LA REQUÊTE et autorise le témoin LE-1 à discuter de toute question pouvant se rapporter au présent procès, y compris celles sur lesquelles le témoin a déjà déposé devant la Chambre

Fait à Arusha, le 30 janvier 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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entendu, lui et son équipe seront libres de le faire. Donc, en fait, ma remarque très générale n'incluait pas les spécificités de l'équipe de Kabiligi ».)

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Décision relative à la requête de la défense intitulée Kabiligi Application for Certification for Appeal Pursuant to Rule 73 (B) of Part of the Trial Chambers Decision on Exclusion of Testimony Outside the Scope of the Indictment 10 février 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Autorisation d'interjeter appel, Effet sur l'issue du procès, Faits engageant gravement la responsabilité de l'accusé, Admissibilité d'éléments de preuve, Exceptionnalité de l'appel interlocutoire de décision d'admissibilité de preuves, Pas de démonstration que la Chambre de première instance a fait usage d'une norme juridique erronée – Requête rejetée

Instrument international cité :

Règlement de Procédure et de preuve, art. 73 (B) et 89 (C)

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Théoneste Bagosora et consorts, Decision (Appeal of the Trial Chamber I 'Decision on Motions By Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses' of 9 September 2003), 28 octobre 2003 (ICTR-98-41) ; Chambre d'appel, Le Procureur c. Pauline Nyiramasuhuko et consorts, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 septembre 2004 (ICTR-98-42) ; Chambre d'appel, Le Procureur c. Pauline Nyiramasuhuko et consorts, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 octobre 2004 (ICTR-98-42)

LE TRIBUNAL. PÉNAL INTERNATIONAL POUR LE RWANDA,

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov (la « Chambre »),

SAISI de la requête de la Défense intitulée « Kabiligi Application for Certification for Appeal Pursuant to Rule 73 (B) of Part of the Trial Chamber's "Decision on Exclusion of Testimony Outside the Scope of the Indictment" filed 27 september 2005 », déposée le 4 octobre 2005 (la « Requête »),

VU la Réponse du Procureur, déposée le 11 octobre 2005, la Réplique de la Défense, déposée le 14 octobre 2005, la Duplique du Procureur, déposée le 17 octobre 2005, et la Triplique de la Défense, déposée le 19 octobre 2005,

STATUE sur la Requête

Introduction

1. La Défense de Kabiligi demande l'autorisation d'interjeter appel de la Décision de la Chambre relative à l'inadmissibilité de dépositions qui sortent du cadre de l'acte d'accusation, déposée le 27

septembre 2005[1]. Dans cette décision, la Chambre jugeait inadmissibles certaines parties des dépositions de deux témoins au motif qu'elles n'avaient aucun rapport avec l'acte d'accusation, tout en rejetant toutes les autres demandes dans ce sens concernant les dépositions de huit témoins au total[2].

Délibération

2. En vertu de l'article 73 (B) du Règlement, l'appel d'une décision peut être certifié lorsque celle-ci

> « touche une question susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue, et que son règlement immédiat par la Chambre d'appel pourrait concrètement faire progresser la procédure ».

3. La première condition est indéniablement remplie. Il est question dans la Décision de plus d'une douzaine de faits, dont certains sont présentés comme engageant gravement la responsabilité de l'accusé. Les accusations portées contre l'accusé, et la nécessité pour la Défense de les réfuter, seraient grandement réduites si ces éléments de preuve devaient être exclus au stade actuel de la procédure.

4. La seconde condition à laquelle est subordonnée l'autorisation d'interjeter appel est que la Chambre de première instance doit être convaincue que le « règlement immédiat [de la question] par la Chambre d'appel pourrait concrètement faire progresser la procédure ». La question examinée dans la Décision est de savoir si plusieurs éléments des dépositions devraient être déclarés inadmissibles au motif qu'ils n'ont aucun rapport avec l'acte d'accusation. Pour y répondre, il faut répondre à une autre question, celle de savoir si les allégations générales portées dans l'acte d'accusation ont été précisées par une communication ultérieure, en particulier dans le Mémoire préalable au procès. La Décision expose très clairement le lien qui existe entre ces deux questions.

> L'article 89 (C) du Règlement dispose que « [la] Chambre peut recevoir tout élément de preuve pertinent dont elle estime qu'il a valeur probante ». Pour être admissible, l'«élément de preuve doit se rattacher, d'une manière ou d'une autre, a un élément constitutif d'un crime imputé a l'accusé » [traduction]. Dans la requête, la Défense se plaint du fait que les éléments de preuve n'ont aucun rapport avec les faits mentionnés dans l'acte d'accusation et affirme que les quelques paragraphes de l'acte d'accusation auxquels ils pourraient se rapporter sont trop vagues pour être pris en considération. Dans des arrêts récents, la Chambre d'appel a traité en profondeur de la précision avec laquelle un acte d'accusation doit être libellé et de l'importance à accorder aux autres formes de communication auxquelles peut recourir le Procureur. Même si, dans ces affaires, la question examinée était de savoir s'il fallait annuler une condamnation parce que le fait reproché n'était pas décrit avec suffisamment de précision dans l'accusation, l'analyse peut aussi s'appliquer en l'espèce, où la question est de savoir si le lien entre certains chefs d'accusation et les éléments de preuve présentés est suffisant pour que ceux-ci soient admissibles[3].

Bref, la Décision tranche la question de l'admissibilité d'éléments de preuve

5. La Chambre d'appel a jugé qu'il n'y avait pas lieu, en règle générale, de certifier un appel concernant l'admissibilité d'éléments de preuve, au motif que

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[1] *Bagosora et consorts,* Décision relative à l'inadmissibilité de dépositions qui sortent du cadre de l'acte d'accusation, Chambre de première instance, 27 septembre 2005 (la «Décision »).
[2] La déposition du témoin XAI concernant le meurtre de trois civils, qui aurait été commis sur les ordres de l'accusé, et la déposition du témoin DCH concernant les meurtres commis à l'école de Mburabuturo, et qui l'auraient été en présence de l'accusé, ont été jugées inadmissibles.
[3] Décision, par. 2 (références omises).

> « les questions portées en appel sont manifestement du ressort de la Chambre de première instance, laquelle, en tant que juge des faits, décide souverainement [...] »[4] [traduction].

De telles décisions ne sont certes pas à l'abri d'un appel interlocutoire, mais la Chambre d'appel estime que la certification doit être « l'exception absolue »[5]. Le requérant doit faire valoir, à l'appui de la demande de certification, un motif autre qu'une erreur que la Chambre avait commise dans l'appréciation d'un fait à propos duquel elle a exercé son pouvoir discrétionnaire[6].

6. La Défense admet que les faits essentiels allégués dans un acte d'accusation peuvent être complétés par une communication supplémentaire, mais elle soutient que la Chambre de première instance

> « a commis une erreur dans l'exercice du pouvoir discrétionnaire d'admettre ces faits essentiels, compte tenu des méthodes et du moment choisis en l'espèce par le Procureur pour faire cette communication afférente aux témoins susmentionnés »[7] [traduction].

La Défense affirme en outre que l'inclusion de l'élément de preuve, tel qu'il a été admis par la Chambre, « équivaut a une transformation radicale de l'acte d'accusation modifié et de la thèse du Procureur »[8] [traduction]. Or, la Chambre d'appel, de son côté, considère que pareille « transformation radicale » est inadmissible[9].

7. Les arguments ainsi cumulés par la Défense pour soutenir que la Décision est entachée d'une erreur de droit ne sont pas convaincants. La Défense n'a pas établi qu'une norme juridique erronée avait été appliquée, voire que la Chambre avait commis une erreur de fait dans l'application de cette norme juridique. En gros, la Défense marque son désaccord sur la manière, qu'elle estime erronée, dont la Chambre a exercé son pouvoir d'appréciation. C'est justement le genre de conclusion factuelle que la Chambre d'appel a jugé non indiqué pour une certification. Aucun élément de la présente demande en certification d'appel n'en fait une « exception absolue » au sens où l'entend la Chambre d'appel.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête.

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[4] *Nyiramasuhuko et consorts, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence*, Chambre d'appel, 4 octobre 2004, par. 5 (« Effectivement, les arguments concernant le sort et l'intégrité de l'élément de preuve depuis le moment où il a été obtenu jusqu'à celui où il a été produit en justice, la propriété de l'agenda et le point de savoir si des pages y manquent touchent tous à l'authenticité, à la fiabilité et à l'admissibilité de l'agenda, et leur appréciation relève du pouvoir discrétionnaire de la Chambre de première instance. C'est d'abord et avant tout à elle qu'il appartient, en tant que juge des faits, de décider de l'admissibilité des éléments de preuve durant le procès ; ce n'est pas à la Chambre d'appel d'assumer cette responsabilité ») [traduction] ; *Nyiramasuhuko et consorts, Decision on Pauline Nyiramasuhuko's Request for Reconsideration*, Chambre d'appel, 27 septembre 2004, par. 10 (« [E]n matière d'admissibilité des éléments de preuve la certification, d'appel doit être l'exception absolue »). Le calendrier des audiences, qui a souvent une incidence sur les droits reconnus à l'accusé par les articles 19 et 20 du Statut, a, lui aussi, été présenté comme étant une question relevant du pouvoir d'appréciation d'une Chambre de première instance, sous réserve d'une infirmation consécutive à un appel interlocutoire « dans un nombre de cas limité, par exemple lorsque la Chambre de première instance n'a pas exercé ce pouvoir d'appréciation ou n'a pas tenu compte d'un élément essentiel »[traduction]. Voir *Bagosora et consorts*, Decision *(Appeal of the Trial Chamber I 'Decision on Motions By Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses' of 9 September 2003),* Chambre d'appel, 22 septembre 2003, p. 4.

[5] *Nyiramasuhuko et consorts, Decision on Pauline Nyiramasuhuko's Request for Reconsideration,* Chambre d'appel, 27 septembre 2004, par. 10 (« [E]n matière d'admissibilité d'éléments de preuve, la certification d'appel doit être l'exception absolue ») [traduction] .

[6] Nyiramasuhuko et consorts, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (Chambre d'appel), 4 octobre 2004, par. 5.

[7] Requête, par. 5.

[8] *Ibid*., par. 13.

[9] *Ibid*., par. 14 et 15.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Ordonnance de transfert du témoin à décharge Jean Kambanda 27 février 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Jean Kambanda – Transfert de témoin détenu, Mali – Requête acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 90 bis (B)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Jean Kambanda, Jugement et sentence, 4 septembre 1998 (ICTR-97-23) ; Chambre d'appel, Le Procureur c. Jean Kambanda, Arrêt, 19 octobre 2000 (ICTR-97-23)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président de Chambre, Jai Ram Reddy et Sergei Alekseevich Egorov (la « Chambre »),

SAISI de la Requête en extrême urgence de la Défense de Théoneste Bagosora sollicitant une ordonnance de transfert d'un témoin détenu conformément à l'article 90 *bis* du Règlement de procédure et de preuve, déposée le 15 février 2006 (la « requête »),

STATUE comme suit sur la requête.

1. La Défense de Bagosora demande que soit ordonné le transfert provisoire de l'un de ses témoins, Jean Kambanda, au centre de détention du Tribunal à Arusha, aux fins de sa déposition devant la Chambre. M. Kambanda purge en République du Mali la peine d'emprisonnement à vie qui lui a été infligée par le Tribunal[1]. La Défense de Bagosora souhaite citer le témoin à partir du 13 mars 2006 et avant la fin de la présente session du procès, fixée au 7 avril 2006. Dans une lettre adressée au conseil principal, M. Kambanda a marqué sa volonté de témoigner pour Bagosora.

2. L'article 90 *bis* (B) pose deux conditions à la délivrance de l'ordonnance sollicitée. Il appartient à la Chambre de vérifier, premièrement, que

> « [l]a présence du témoin détenu n'est pas nécessaire dans une procédure pénale en cours sur le territoire de l'État requis pour la période durant laquelle elle est sollicitée par le Tribunal »,

et, deuxièmement, que

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[1] *Le Procureur c. Kambanda*, Jugement portant condamnation, 4 septembre 1998, p. 32 ; *Ibid*., Arrêt, 19 octobre 2000, p. 41.

« [s]on transfert n'est pas susceptible de prolonger la durée de sa détention telle que prévue par l'État requis ».

En outre, l'article 4.3 de l'accord conclu entre l'organisation des Nations Unies et la République du Mali prévoit expressément le transfert provisoire d'un détenu aux fins de sa comparution en qualité de témoin devant le Tribunal, pourvu que sa présence ne soit pas nécessaire dans une procédure pénale au Mali[2].

3. La Chambre a été informée par le Greffe que la présence de M. Kambanda n'était pas requise dans le cadre d'une procédure pénale au Mali pendant la période de son transfert envisagé à Arusha. La première condition est dès lors remplie. Comme M. Kambanda purge une peine d'emprisonnement à vie, la deuxième condition est sans objet. Vu la volonté de comparaître exprimée par M. Kambanda, l'ordonnance sollicitée est justifiée.

PAR CES MOTIFS, LA CHAMBRE,

ORDONNE, sous réserve de l'accord du Gouvernement malien et conformément à l'article 90 *bis* du Règlement, que Jean Kambanda soit temporairement transféré au centre de détention du Tribunal à Arusha le 10 mars 2006 ou vers cette date, et qu'il soit remis aux autorités maliennes au plus tard le 20 avril 2006 ;

PRIE le Gouvernement malien de faciliter le transfert du témoin en coopération avec le Greffier du Tribunal et le Gouvernement tanzanien ;

CHARGE le Greffier du Tribunal de :
transmettre la présente ordonnance aux Gouvernements malien et tanzanien ;
s'assurer du bon déroulement du transfert, y compris du suivi de la détention du témoin au centre de détention du Tribunal ;
s'informer de toutes modifications pouvant intervenir dans les modalités de la détention telles que prévues par l'État requis et pouvant affecter les dates de la détention temporaire, et d'en faire part à la Chambre dans les plus brefs délais.

Arusha, le 27 février 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[2] Accord entre le Gouvernement de la République du Mali et l'Organisation des Nations Unies concernant l'exécution des peines prononcées par le Tribunal pénal international pour le Rwanda, 12 février 1999, (enregistré le 4 octobre 2000 sous le n°36963), en ligne : <http://www.ictr.org/FRENCH/index.htm>.

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Décision relative à la demande tendant à obtenir l'assistance du Royaume de Belgique en vertu de l'article 28 du Statut 21 avril 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Coopération des Etats, Belgique, Rencontre avec 4 officiers de la MINUAR, Rencontre avec une personne présumée détenue en Belgique – Requête acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 28

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au général de division Yaache et la coopération de la République du Ghana, 23 juin 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la demande de coopération et d'assistance adressée au Royaume des Pays-Bas, 7 octobre 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Request to the Republic of Bangladesh Pursuant to Article 28 of the Statute, 31 otobre2005 (ICTR-98-41)

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président de Chambre, Jai Ram Reddy et Sergei Alekseevich Egorov (la « Chambre »),

SAISI d'une requête intitulée « *Urgent Motion Requesting an Order Directed at the Kingdom of Belgium…* » que la Défense de Nsengiyumva a déposée le 7 avril 2006,

VU les observations du Greffier intitulées « The Registrar's Submissions Regarding a Matter of Cooperation with the Kingdom of Belgium », déposées le 10 avril 2006,

STATUE sur ladite requête.

1. La Défense de Nsengiyumva prie la Chambre de demander au Royaume de Belgique, en vertu de l'article 28 du Statut du Tribunal, de faciliter la tenue d'entretiens qu'elle souhaite avoir avec quatre officiers de la MINUAR qui étaient en poste dans la préfecture de Gisenyi en 1994, à savoir le commandant Marc Biot, le capitaine Luc Geysels, le major Jacques De Koninck et l'adjudant Marc Beyens. D'après la Défense, ces quatre personnes possèdent des informations concernant le centre de formation de Butotori. En particulier, elles savent s'il avait été vraiment utilisé pour former des *Interahamwe* comme l'ont allégué des témoins à charge. La Défense de Nsengiyumva sollicite aussi l'autorisation de s'entretenir avec un certain Alphonse Higaniro qui, selon ses dires, est détenu par les

autorités belges et serait en mesure de contredire la déposition du témoin XBH selon laquelle l'accusé avait eu une entrevue avec le colonel Bagosora et d'autres personnes à Butare avant avril 1994 dans le but de planifier le génocide des Tutsis[1].

2. L'article 28 du Statut fait obligation aux Etats de

> « collabore[r] avec le Tribunal international pour le Rwanda à la recherche et au jugement des personnes accusées d'avoir commis des violations graves du droit international humanitaire ».

Toute partie qui demande à une Chambre de rendre une décision en vertu de l'article 28 du Statut doit indiquer dans sa requête la nature des informations recherchées, leur importance pour le procès et les efforts faits pour les obtenir. Le genre d'assistance demandé doit aussi être défini avec précision[2].

3. La requête indique dûment la nature des informations recherchées et leur importance pour la procédure engagée contre l'accusé. Les quatre officiers de la MINUAR ont probablement été témoins de faits survenus dans la préfecture de Gisenyi qui présentent un intérêt en l'espèce[3]. En ce qui concerne M. Higaniro, la Défense semble avoir des raisons de croire qu'il possède des informations précises qui contrediront la déposition incriminante du témoin à charge XBH. En conséquence, la Chambre est convaincue que les informations recherchées présentent un intérêt en l'espèce.

4. La Défense a établi qu'elle s'était convenablement employée à obtenir ces informations sans avoir recours à l'article 28 du Statut. Le Greffier dit que les autorités belges ne rejettent pas la demande de la Défense sur le fond ; seulement la législation belge n'autorise toute coopération que dans les cas ou une décision judiciaire a été rendue à cet effet[4]. Dans ces circonstances, la Chambre estime que la deuxième condition prévue à l'article 28 est remplie.

PAR CES MOTIFS, LA CHAMBRE

PRIE le Royaume de Belgique de lui apporter toute assistance nécessaire pour que la Défense de Nsengiyumva puisse avoir des entretiens avec le commandant Marc Biot, le capitaine Luc Geysels, le major Jacques De Koninck, l'adjudant Marc Beyens et M. Alphonse Higaniro ;

ORDONNE au Greffe de transmettre la présente décision aux autorités compétentes du Royaume de Belgique.

Arusha, le 21 avril 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[1] Requête, par. 19 et 20.

[2] Affaire *Bagosora et consorts*, Décision relative à la demande de coopération et d'assistance adressée au Royaume des Pays-Bas (Chambre de première instance), 7 février 2005, par. 5 ; Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au général de division Yaache et la coopération de la République du Ghana (Chambre de première instance), 23 juin 2004, par. 4.

[3] Plusieurs demandes d'autorisation d'interroger des officiers de la MINUAR ont déjà été formées en vertu de l'article 28 du Statut: affaire *Bagosora et consorts*, *Decision on Request to the Republic of Bangladesh for Assistance Pursuant to Article 28 of the Statute* (Chambre de première instance), 31 octobre 2005, Décision relative à la demande d'assistance adressée à la République togolaise en vertu de l'article 28 du Statut (Chambre de première instance) ; Décision relative à la demande de coopération et d'assistance adressée au Royaume des Pays-Bas (Chambre de première instance), 7 février 2005, par. 5 ; Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaitre au général de division Yaache et la coopération de la République du Ghana (Chambre de première instance), 23 juin 2004, par. 4.

[4] Observations du Greffier, par. 10.

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Décision relative à la demande de certification de l'appel interlocutoire concernant la communication de déclarations de témoins à décharge par le Procureur 22 mai 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Appel interlocutoire d'une décision, Equité et rapidité dans la conduite du procès, Pas d'obligation pour le Procureur de communiquer tous les documents qui peuvent être utiles pour le contre-interrogatoire des témoins à décharge, Progression concrète de la procédure, Utilisation par le Procureur des déclarations faites par les témoins à décharge devant les services d'immigration, Information affectant la crédibilité des preuves de la Défense – Requête partiellement acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 66 (B), 68 (A) et 73 (B)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Pauline Nyiramasuhuko et consorts, Décision relative aux requêtes de Ntahobali et de Nyiramasuhuko aux fins de certification d'appel de la Décision relative à la requête en urgence de la Défense tendant à voir déclarer irrecevables certaines parties de la déposition des témoins RV et QBZ, 18 mars 2004 (ICTR-98-42) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 juillet 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Certification Of Appeal Concerning Access To Protected Defence Witness Information, 29 juillet 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal, 16 février 2006 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A), 8 March 2006 (ICTR-98-41)

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance I (la « Chambre ») composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI de la requête intitulée Request to Certify for Appeal "Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses", déposée le 4 octobre 2005 par la Défense de Kabiligi, ainsi que de la requête intitulée Motion to Request for Certification to Appeal the Trial Chamber's Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses, déposée le 11 octobre 2005 par la Défense de Nsengiyumva,

PRENANT EN CONSIDÉRATION la réponse du Procureur à la requête de Kabiligi, déposée le 11 octobre 2005, la réplique de Kabiligi, déposée le 14 octobre 2005, la duplique du Procureur, déposée le 17 octobre 2005, ainsi que la réponse à celle-ci, déposée le 19 octobre 2005,

STATUE À PRÉSENT sur les requêtes.

Introduction

1. Le 27 septembre 2005, la Chambre a rejeté une demande présentée par la Défense de Nsengiyumva la priant d'enjoindre au Procureur de communiquer tous documents ou autres pièces en sa possession concernant la situation de certains témoins à décharge vis-à-vis des services d'immigration[1]. Le Procureur avait auparavant reconnu avoir obtenu des déclarations faites par lesdits témoins auprès des autorités nationales ou intergouvernementales d'immigration et il leur avait posé des questions en se servant de ces déclarations. La Chambre a rejeté l'argument de la Défense selon lequel la communication desdites déclarations était obligatoire en application soit de l'article 66 (B), soit de l'article 68 du Règlement de procédure et de preuve (le « Règlement »). La Défense demande l'autorisation de faire appel de la Décision.

Délibération

2. L'appel interlocutoire d'une décision peut être autorisé en vertu de l'article 73 (B) du Règlement lorsque ladite décision touche une question susceptible de compromettre sensiblement « l'équité et la rapidité du procès, ou son issue », et que «son règlement immédiat [. . .] pourrait concrètement faire progresser la procédure ».

(i) Équité et rapidité du procès

3. La Défense fait valoir que le Procureur doit communiquer les déclarations des témoins à décharge se trouvant en sa possession, en application de l'article 66 (B) du Règlement qui prévoit qu'il doit lui permettre d'examiner tous documents « qui sont nécessaires à la défense de l'accusé ». De l'avis de la Chambre, cette disposition exige que le Procureur communique tout document nécessaire à la présentation de ses moyens. La Défense estime, elle, que cette exigence doit s'appliquer à tout document que le Procureur pourrait utiliser pour mettre en doute la crédibilité de témoins à décharge[2]. Elle soutient en outre qu'elle n'a pas été en mesure d'évaluer correctement la crédibilité de ses propres témoins, du fait que le Procureur n'a pas été tenu de communiquer toutes les déclarations antérieures des témoins à décharge bien avant le contre-interrogatoire de ceux-ci[3]. La communication de ces documents aurait permis à la Défense de retirer ces témoins ou tout au moins de les préparer de manière plus adéquate en vue de clarifier et d'expliquer toute contradiction éventuelle avec des déclarations antérieures[4]. Le droit de l'accusé à un procès équitable est compromis lorsque le Procureur est autorisé à poser des questions concernant des déclarations qui ne sont communiquées qu'au début du contre-interrogatoire.

4. Le genre de documents visés par la Décision est bien plus vaste que les déclarations de témoins. La requête initiale demandait en effet la communication non seulement des déclarations des témoins à décharge, mais également

[1] Affaire Bagosora et consorts, Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses (Chambre de première instance), 27 septembre 2005 (la « Décision »).
[2] Affaire *Bagosora et consorts, Anatole Nsengiyumva's Reply,* etc., 1er juin 2005, par. 27 (« Il a aussi été établi que le Procureur a l'obligation de communiquer tous les éléments qui sont en sa possession et qu'il entend utiliser ou a utilisés au procès. Les éléments devant servir à attaquer ou à tester la crédibilité de témoins doivent aussi être communiqués conformément à la jurisprudence découlant de l'affaire *Delalić*).
[3] Requête de Kabiligi, par. 22 et 23.
[4] *Ibid*, par. 15.

« des pièces, documents, éléments de correspondance et écrits que le Procureur aurait en sa possession ou sous son contrôle et qui auraient trait à la situation desdits témoins vis-à-vis des services d'immigration »[5].

La Chambre a rejeté cette demande au motif que

« l'article 66 (B) du Règlement ne saurait être interprété comme imposant l'obligation générale au Procureur de communiquer les documents utilisés pour le contre-interrogatoire des témoins à décharge » [traduction].

5. La Chambre estime que dans la mesure où la Décision concerne un large éventail de documents susceptibles de relever de l'article 66 (B) du Règlement, « l'équité et la rapidité du procès » pourraient en effet être compromis. La certification de l'appel peut se justifier en particulier lorsqu'une décision vise « de grandes catégories d'éléments de preuve »[6] [traduction]. L'obligation invoquée par la Défense pourrait en principe contraindre le Procureur à communiquer tous les documents qui peuvent être utiles pour le contre-interrogatoire des témoins à décharge. Une telle obligation, si tant est qu'elle existe, accroîtrait de manière considérable l'obligation faite au Procureur de communiquer les documents en sa possession, ce qui en soi pourrait avoir des incidences sur l'équité et la rapidité du procès. La non-communication d'un document que le Procureur entend utiliser lors du contre-interrogatoire pourrait à n'en pas douter, provoquer le report des débats. S'en trouverait de plus changée la façon d'interroger les témoins, notamment la pratique qui consiste à autoriser la partie qui procède au contre-interrogatoire à attendre jusqu'au début de celui-ci pour communiquer les documents en sa possession. Compte tenu de la vaste gamme de documents en jeu et des conséquences sur la conduite du procès, la Chambre est d'avis que la première condition exigée pour autoriser la certification de l'appel est remplie.

(ii) Concrètement faire progresser la procédure

6. L'interprétation de l'article 66 (B) du Règlement soulève un point de droit qui pourrait avoir des incidences importantes sur le plan pratique. La Défense a exposé les raisons pour lesquelles elle conteste le bien-fondé de la Décision et la Chambre ne peut affirmer à priori que l'appel n'a aucune chance de prospérer[7]. Jusqu'à présent, l'utilisation par le Procureur des déclarations faites par les témoins à décharge devant les services d'immigration n'a manifestement pas eu d'effets importants sur la manière dont celui-ci procède aux contre-interrogatoires. Toutefois, compte tenu des implications éventuelles de sa décision, la Chambre est d'avis qu'un règlement immédiat de la question de l'interprétation de l'article 66 (B) du Règlement

« permettra d'éviter les conséquences graves qui pourraient découler de la poursuite de la présentation des moyens à décharge sur une base juridique erronée »[8] [traduction].

7. Autoriser l'appel au regard de l'article 68 (A) du Règlement ne serait par contre pas de nature à faire progresser concrètement la procédure. La décision applique le principe bien établi qui veut que la Défense démontre qu'il existe à priori des raisons de croire que les pièces demandées sont de nature à disculper l'accusé[9]. Sur la base des conclusions qui lui ont été présentées, la Chambre a estimé qu'en l'espèce, cette démonstration n'avait pas été faite. Dans sa demande de certification, la Défense de

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[5] Affaire Bagosora et consorts, Anatole Nsengiyumva's Extremely Urgent Motion Requesting Disclosure, etc., 16 mai 2005, par. 22.

[6] Affaire Bagosora et consorts, Certification of Appeal Concerning Access to Protected Defence Witness Information (Chambre de première instance), 29 juillet 2005, par. 2.

[7] Affaire Bagosora et consorts, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (Chambre de première instance), 16 février 2006, par. 4.

[8] Affaire *Bagosora et consorts*, *Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses,* 21 juillet 2005, par. 11. L'autorisation d'appel accordée concernait une décision où il était question de savoir si l'interprétation faite par la Chambre de première instance des mesures de protection de témoins était correcte ou non.

[9] Affaire Bagosora et consorts, Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A), (Chambre de première instance), 8 mars 2006, par. 3.

Kabiligi avance un nouvel argument où elle soutient que toute pièce que le Procureur pourrait utiliser en vue de discréditer des témoins à décharge doit être considérée comme susceptible de disculper l'accusé. Ce nouvel argument est irrecevable aux fins de certification, du fait qu'il n'a pas été soulevé dans la requête initiale[10]. En tout état de cause, la Chambre estime que cet argument n'emporte pas la conviction. En effet, l'article 68 (A) du Règlement vise « tous les éléments » qui

> « sont de nature à disculper en tout ou en partie l'accusé ou à porter atteinte à la crédibilité [des] éléments de preuve à charge ».

Des éléments qui portent atteinte à la crédibilité des éléments à décharge ne sont pas en eux-mêmes de nature à disculper en tout ou en partie l'accusé.

8. La Chambre considère qu'il ne se justifie pas de suspendre l'instance en attendant que la question soit tranchée en appel[11]. La seule catégorie de documents que sollicite la Défense dans sa requête concerne les déclarations faites antérieurement par les témoins auprès des services nationaux d'immigration. Comme il a été indiqué plus haut, le fait que ces documents n'ont pas été communiqués à l'avance n'a pas eu de conséquences notables. Par ailleurs, la Défense peut toujours demander le rappel d'un témoin si cela se justifie, au vu des circonstances de l'espèce.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la requête en partie ;

CERTIFIE l'appel interlocutoire, dans la Décision relative à la communication des déclarations faites aux services d'immigration par les témoins à décharge, pour la partie ayant trait à l'obligation faite au Procureur de communiquer des éléments en vertu de l'article 66 (B) du Règlement ;

REJETTE la demande de suspension de l'instance.

Fait à Arusha le 22 mai 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[10] Affaire *Nyiramasuhuko et consorts,* Décision relative aux requêtes de Ntahobali et de Nyiramasuhuko aux fins de certification d'appel de la Décision relative à la requête en urgence de la Défense tendant à voir déclarer irrecevables certaines parties de la déposition des témoins RV et QBZ (Chambre de première instance), 18 mars 2004, par. 21.

[11] Requête de Nsengiyumva, p. 7. Il était demandé eu substance que l'utilisation de tout document relatif aux déclarations faites auprès des services d'immigration soit suspendue jusqu'à ce que la question soit réglée en appel.

Décision relative à la requête aux fins d'admission en preuve de documents émanant de l'Organisation des Nations Unies en vertu de l'article 89 (C) 25 mai 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Admission d'éléments de preuve, Démonstration par le demandeur que prima facie le document est pertinent et a une valeur probatoire, Aucun critère technique pour établir l'authenticité d'un document, Balance des probabilités en faveur de la détection de preuve probatoire pour tout document produit de façon contemporaine aux faits – Requête partiellement acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 89 (C)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Thénoneste Bagosora et consorts, Décision relative à l'admissibilité de la déposition du témoin DBQ, 18 novembre 2003 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole, 13 septembre 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la requête du Procureur intitulée : « Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89 (C) », 14 otobre 2004 (ICTR-98-41)

T.P.I.Y.: Chambre d'appel, Le Procureur c. Zejnil Delalić et Hazim Delić, http://www.icty.org/x/cases/mucic/acdec/fr/80304AL3.htm*Arrêt Relatif à la Requête de l'Accusé Zejnil Delalic aux Fins d'Autorisation d'Interjeter Appel de la Décision de la Chambre de Première Instance en Date du 19 janvier 1998 Concernant la Recevabilité d'éléments de Preuve*, 4 mars 1998 (IT-96-1) ; Chambre de première instance, Le Procureur c. Tihomir Blaškić, Jugement, 3 mars 2000 (IT-95-14); Chambre d'appel, Le Procureur c. Mario Kordić et Dario Čerkez, Décision relative à l'appel concernant la déclaration d'un témoin décédé, 21 juillet 2000 (IT-95-14/2) ; Chambre de première instance, Le Procureur c. Miroslav Kvočka et consorts, Decision on Exhibits, 19 juillet 2001 (IT-*98-30/1)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIEGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI de la requête de Ntabakuze intitulée « Motion to Deposit Certain United Nations Documents into Evidence for the Truth of Their Contents », déposée le 7 décembre 2005,

VU la réponse du Procureur, déposée le 12 décembre 2005, la réplique de la Défense, déposée le 3 janvier 2006, et la duplique du Procureur, déposée le 4 janvier 2006,

STATUANT sur la requête

Introduction

1. La Défense de Ntabakuze demande que 23 jeux de documents soient admis en preuve. Le conseil principal de Ntabakuze a expliqué qu'il s'est personnellement procuré ces documents auprès de l'organisation des Nations unies[1]. Ceux-ci constituent des correspondances officielles des Nations Unies provenant de la mission de maintien de la paix au Rwanda en 1994, la MINUAR. Chaque document est rédigé par l'un des trois hauts fonctionnaires suivants : Jacques-Roger Booh-Booh, ancien Représentant spécial du Secrétaire général au Rwanda ; Kofi Annan, ancien Secrétaire général adjoint chargé des opérations de maintien de la paix, et le général de corps d'armée Roméo Dallaire, ancien commandant de la MINUAR. À une exception près, tous ces documents sont datés de janvier à avril 1994.

Délibérations

2. Aux termes de l'article 89 (C) du Règlement de preuve et de procédure (le Règlement), une Chambre « peut recevoir tout élément de preuve pertinent dont elle estime qu'il a valeur probante ». Lorsqu'elle demande à verser un document en preuve, la partie requérante doit avancer des arguments justifiant que le document est à la fois pertinent et revêt une valeur probante[2].

3. La Défense a avancé des arguments démontrant la pertinence des documents, lesquels reflètent le point de vue de fonctionnaires des Nations Unies sur le contexte politique et militaire au Rwanda en 1994. Ce contexte est pertinent au regard des chefs d'accusation retenus contre l'accusé et il a donné lieu à des dépositions détaillées des témoins cités tant par la Défense que par le Procureur.

4. Il n'est pas nécessaire que des documents soient identifiés par un témoin pour avoir une valeur probante[3]. En revanche, il faut indiquer d'une manière ou d'une autre que le document est bel et bien ce que la partie requérante prétend, et que son contenu est fiable[4]. Le Règlement n'impose aucun critère technique pour établir l'authenticité d'un document, mais un certain nombre de facteurs ont été jugés pertinents :

- dans quelle mesure le contenu du document est corroboré par d'autres éléments de preuve[5].

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[1] Compte rendu de l'audience du 22 novembre 2005 p. 58.

[2] Affaire *Bagosora et consorts,* Décision relative à la requête du Procureur intitulée : « *Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89 (C) »* (Chambre de première instance), 14 octobre 2004, par. 22 ; affaire *Bagosora et consorts, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole* (Chambre de première instance), 13 septembre 2004, par. 7 ; *Delalić* et *Delić,* Décision relative à la requête intitulée : *Decision on Application of Defendant Zejnil Delalić for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence* (Chambre de première instance), 4 mars 1998, par. 17 (« En ce qui concerne la recevabilité des preuves, l'exigence implicite de crédibilité signifie tout simplement qu'elles doivent contenir suffisamment d'indices de fiabilité pour que des poursuites soient engagées ».).

[3] Affaire *Kvočka et consorts,* Décision relative aux pièces à conviction, 19 juillet 2001 (« il n'est pas d'usage dans cette affaire s'insister sur la présentation des pièces à conviction lors de l'interrogatoire des témoins »); *Blaskic,* Jugement (Chambre de première instance), 3 mars 2000, par. 35 (concluant qu'un collège de juges professionnels était capable de vérifier des preuves documentaires et de leur accorder le poids qu'elles méritent).

[4] Affaire *Bagosora et al*., Décision relative à l'admissibilité du témoin DBQ (Chambre de première instance), 18 novembre 2003, par. 24 (« [Un] élément de preuve dont la fiabilité ne peut pas être vérifiée comme il convient ... ne peut pas avoir force probante. » ; affaire *Musema,* jugement et sentence (Chambre de première instance), 27 janvier 2000, par. 59 à 72 (discussion relative à l'évaluation de la crédibilité en relation avec la question de savoir si la preuve a une valeur probante) ; affaire *Kordić et consorts,* arrêt concernant la déclaration d'un témoin décédé (Chambre d'appel), 21 juillet 2000, par. 24 («Un élément de preuve peut présenter tant de lacunes en terme d'indice de fiabilité qu'il n'est pas probant et, par conséquent, inadmissible »).

[5] Affaire *Bagosora et consorts,* Décision relative à l'admission de l'intercalaire 19 du classeur produit en lien avec la comparution du témoin Maxwell Nkole (Chambre de première instance), 13 septembre 2004, par. 7 ; Affaire *Musema,* jugement et sentence (Chambre de première instance), 27 janvier 2000, par. 75. Voir aussi affaire *Delalić et Delić, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence* (Chambre de première instance), 4 mars 1998, par. 18b) (confirmant la recevabilité des éléments de preuve qui correspondaient à la première déposition du témoin et aux autres preuves documentaires).

- le lieu où il a été obtenu[6]
- s'il s'agit d'un original ou d'une copie[7].
- si c'est une copie, a-t-elle été enregistrée ou déposée auprès d'une autorité institutionnelle[8].
- est-elle signée, placée sous scellés, cachetée ou certifiée d'une manière ou d'une autre[9].

Au stade de l'admissibilité, la Chambre n'a pas à se prononcer définitivement sur le point de savoir si le document est ce que la partie requérante dit qu'il est, encore moins sur le caractère véridique ou exact de son contenu[10].

6.* En l'espèce, selon l'hypothèse la plus probable il convient de constater la valeur probante de tous les documents qui ont été produits à l'époque des événements survenus au Rwanda en 1994. Lesdits documents proviennent des archives conservées au Siège de l'organisation des Nations Unies, ce qui confirme qu'ils semblent bien être des documents des Nations Unies. En outre, ils ont été produits lors des événements en question, au cours d'échanges de correspondance habituels entre de hauts fonctionnaires de la MINUAR, ou sont en rapport direct avec ces échanges de correspondance. Ces caractéristiques confèrent aux documents une fiabilité suffisante pour les rendre admissibles.

8. L'assertion du Procureur selon laquelle quelques-uns de ces documents ont déjà été admis est fondée[11], et il n'est donc pas nécessaire de les produire une seconde fois.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la requête de la Défense aux fins d'admettre en preuve les annexes A, C, F, H, I, K, L, N, P, Q, R, S, T, U, V et W.

REJETTE la requête de la Défense aux fins d'admettre en preuve les annexes B, D, E, G, J, M et O.

Fait à Arusha, le 25 mai 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[6] Affaire *Bagosora et consorts,* Décision relative à l'intercalaire 19 du classeur produit en lien avec la comparution du témoin Maxwell Nkole (Chambre de première instance), 13 septembre 2004, par. 8. Voir aussi affaire *Delalić and Delić, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence* (Chambre d'appel), 4 mars 1998, par. 18 a) (confirmant la recevabilité des éléments preuve saisis dans les locaux d'une entreprise liée à l'accusé).

[7] Affaire *Musema,* jugement et sentence (Chambre de première instance, 27 janvier 2000, par. 67.

[8] Id.

[9] Affaire *Bagosora et consorts,* Décision relative à l'admission de l'intercalaire 19 du classeur produit en lien avec la comparution du témoin Maxwell Nkole (Chambre de première instance), 13 septembre 2004, par. 8; affaire *Musema,* jugement et sentence (Chambre de première instance), 27 janvier 2000, par. 67.

[10] Affaire *Musema,* jugement et sentence (Chambre de première instance), 27 janvier 2000, par. 56.

* La mauvaise numérotation est le fait du Tribunal.

[11] Les annexes B, D, E, G, J, M et O ont été précédemment admises en preuve.

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Ordonnance de Transfert du témoin à décharge Jean Kambanda 15 juin 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Jean Kambanda – Transfert de témoin détenu, Mali

Instrument international cité :

Règlement de Procédure et de preuve, art. 90 bis (B)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Jean Kambanda, Jugement et sentence, 4 septembre 1998 (ICTR-97-23) ; Chambre d'appel, Le Procureur c. Jean Kambanda, Arrêt, 19 octobre 2000 (ICTR-97-23) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Ordonnance de transfert du témoin à décharge Jean Kambanda, 27 février 2006 (ICTR-98-41)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIEGEANT en la Chambre de première instance I composée des juges Erik Møse, Président de Chambre, Jai Ram Reddy et Sergei Alekscevich Egorov,

SAISI de la requête intitulée Requête en extrême Urgence de la Défense de Théoneste Bagosora sollicitant une ordonnance de transfert d'un témoin détenu conformément à l'article 90 *bis* du Règlement de procédure et de preuve (le « Règlement »), déposée le 7 juin 2006,

VU la réponse intitulée Ntabakuze Response to Bagosora Request to Transfer Witness Jean Kambanda, and Ancilliary request for Exclusion of Evidence, déposée le 13 juin 2006, et le rectificatif dudit document déposé 14 juin2006.

STATUE sur la requête,

1. La Défense de Bagosora demande que soit ordonné le transfert provisoire de l'un de ses témoins, Jean Kambanda, au centre de détention du Tribunal à Arusha, aux fins de sa déposition devant la Chambre. M. Kambanda purge en République du Mali la peine d'emprisonnement à vie qui lui a été infligée par le Tribunal[1]. La Défense de Bagosora souhaite citer le témoin avant la fin de la présente session du procès, fixée au 14 juillet 2006. M. Kambanda avait auparavant marqué sa volonté de témoigner pour Bagosora[2].

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[1] *Kambanda,* Jugement, 4 septembre 1998, p. 28 *(sic); Kambanda,* arrêt, 19 octobre 2000, p. 39 [de la version anglaise].

[2] *Bagosora et consorts,* Ordonnance de transfert du témoin à décharge Jean Kambanda, 27 février 2006, par. 1 et 3. Auparavant, le témoin avait été transféré au centre de détention du Tribunal dans la perspective de sa déposition durant la dernière session du Procès. Toutefois, avant sa déposition, la Chambre a été saisie d'une requête en disjonction d'instances formée par Kabiligi, Nsengiyumva et Ntabakuze, qui se sont élevés contre sa comparution et ont demandé un sursis de la procédure. Le 27 mars 2006, la Chambre a exposé par écrit les motifs du rejet de la disjonction d'instances. Le 3 avril 2006, la Défense a déposé une demande de certification d'appel de ladite décision, et a encore requis le sursis à la comparution de

2. L'article 90 *bis* (B) du Règlement pose deux conditions à la délivrance de l'ordonnance sollicitée. Il appartient à la Chambre de vérifier, premièrement, que

> « [l]a présence du témoin détenu n'est pas nécessaire dans une procédure pénale en cours sur le territoire de l'Etat requis pour la période durant laquelle elle est sollicitée par le Tribunal »,

et deuxièmement, que

> « [s]on transfert n'est pas susceptible de prolonger la durée de sa détention telle que prévue par l'Etat requis ».

En outre, l'article 4 de l'accord conclu entre l'Organisation des Nations Unies et la République du Mali prévoit expressément le transfert provisoire d'un détenu aux fins de sa comparution en qualité de témoin devant le Tribunal, pourvu que sa présence ne soit pas nécessaire dans une procédure pénale au Mali[3].

3. La Chambre a été informée par le Greffe que la présence de M. Kambanda n'était pas requise dans le cadre d'une procédure pénale au Mali pendant la période de son transfert envisagé. La première condition est dès lors remplie. Comme M. Kambanda purge une peine d'emprisonnement à vie, la deuxième condition est sans objet.

4. Les arguments invoqués par la Défense de Ntabakuze ne sont pas pertinents au regard de l'article 90 *bis* du Règlement qui définit les conditions pour ordonner le transfert du témoin en personne. Au fond, il ressort des arguments avancés par Ntabakuze que la déposition du témoin serait préjudiciable et qu'en conséquence elle doit être exclue comme étant contre lui, ou Kambanda ne doit pas du tout être autorisé à déposer. Ces questions ne relèvent pas vraiment de l'article 90 *bis* du Règlement et doivent être abordées dans une décision distincte.

PAR CES MOTIFS, LA CHAMBRE

ORDONNE, sous réserve de l'accord du Gouvernement malien et conformément à l'article 90 *bis* du Règlement, que Jean Kambanda soit temporairement transféré au centre de détention du Tribunal à Arusha le 15 juin 2006 ou vers cette date, et qu'il soit remis aux autorités maliennes au plus tard le 30 juillet 2006 ;

PRIE le Gouvernement malien de faciliter le transfert du témoin en coopération avec le Greffier du Tribunal et le Gouvernement tanzanien :

CHARGE le Greffier de :
(A) transmettre la présente ordonnance aux Gouvernements malien et tanzanien ;
(B) s'assurer du bon déroulement du transfert, y compris du suivi de la détention du témoin au centre de détention du Tribunal ;
(C) s'informer de toutes modifications pouvant intervenir dans les modalités de la détention telles que prévues par l'Etat requis et pouvant affecter la durée de détention temporaire du témoin, et d'en faire part à la Chambre dans les plus brefs délais.

Arusha, le 15 juin 2006.

Kambanda en attendant la résolution de cette question. Lorsque la session du procès s'est terminée le 7 avril 2006, la requête était toujours en examen.

[3] Accord entre le Gouvernement de la République du *Mali* et l'Organisation des Nations Unies concernant l'exécution des peines prononcées par le Tribunal pénal international pour le Rwanda, 12 février 1999, enregistré le 4 octobre 2000 sous le numéro 36963, < http://www.ictr.org/ENGLISH/agreements/mali.pdf>

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Décision relative à la requête de Nsengiyumva intitulée Request to Direct Registry to Comply with Order Concerning Witness Protection 3 juillet 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Mesures de protection de témoin, Pas de renonciation volontaire du statut de témoin protégé, Seule la Chambre est compétente pour modifier le statut de témoin protégé – Requête rejetée

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la requête de Ntabakuze aux fins de protection de témoins, 15 mars 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la requête du Procureur en uniformisation et modification de mesures de protection de témoins, 1er juin 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision Amending Defence Witness Protection Orders, 2 décembre 2005 (ICTR-98-41)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIEGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI de la requête de Nsengiyumva intitulée *Motion Seeking a Directive to the Registry, etc.*, déposée le 1er juin 2006,

VU les observations du Greffier déposées le 9 juin 2006, et la réponse de la Défense du 15 juin 2006,

STATUE sur la requête.

Introduction

1. Avant le début de la déposition du témoin BRA-1 les 5 et 6 avril 2006, la Chambre a entendu les arguments avancés au sujet de la requête par laquelle la Défense de Nsengiyumva demandait à la Chambre d'autoriser le témoin à résider dans un lieu de son choix, et non dans la maison sécurisée prévue par le Tribunal pour le logement des témoins protégés. La Chambre a jugé qu'un témoin protégé pouvait faire ce choix sans pour autant compromettre son statut. Toutefois, il devait être avisé que de ce fait, le Tribunal ne serait plus en mesure de lui garantir le même niveau de sécurité que dans une maison sécurisée[1]. Le témoin BRA-1 a ensuite été introduit dans la salle d'audience. Le Président lui a exposé la situation telle qu'elle se présentait en droit et en fait. Le témoin a déclaré, de manière

[1] Compte rendu de l'audience du 5 avril 2006, p. 57 à 59.

non équivoque, qu'il souhaitait demeurer un témoin protégé, même s'il choisissait de résider ailleurs[2]. Le 29 mai 2006, passé le terme de l'ajournement de l'instance, le témoin BRA-1 a terminé sa déposition.

2. La Défense fait valoir qu'à l'issue de la déposition, le Greffe a enfreint ladite ordonnance en exigeant du témoin qu'il signe un formulaire (joint à la requête en annexe 3) par lequel il renonçait à son statut de témoin protégé. Elle prie la Chambre d'enjoindre au Greffe de cesser d'utiliser ce formulaire et d'avoir à verser au témoin la totalité de l'indemnité de subsistance, mais elle n'en précise pas le montant.

3. Le Greffe explique que le témoin BRA-1 a demandé, avant la fin de son séjour à Arusha, que lui soit versé le montant de l'indemnité prévue pour les témoins non protégés, montant qui est beaucoup plus élevé que celui versé aux témoins protégés. Le Greffe lui a dit qu'il ne saurait prétendre à une telle somme s'il ne signait pas un formulaire par lequel il renonçait au statut de témoin protégé, ce que le témoin a refusé de faire. Le 2 juin 2006, le montant auquel il avait droit en tant que témoin protégé lui a été remis mais les dépenses engagées ne lui ont pas été remboursées. Le témoin a refusé ce montant, en faisant valoir que sa requête en versement de la totalité de l'indemnité de subsistance était pendante devant la Chambre. Le 6 juin 2006, un représentant du Greffe s'est rendu à la résidence du témoin pour lui verser cette indemnité au taux fixé pour les témoins protégés, plus le remboursement des dépenses engagées, conformément à la réglementation en vigueur à l'organisation des Nations Unies, mais le témoin ne s'y trouvait pas.

Délibération

4. Les ordonnances prescrivant des mesures de protection des témoins à décharge ne prévoient pas que l'on puisse renoncer volontairement au statut de témoin protégé[3]. Au départ, ce statut avait été invoqué par la Défense de Nsengiyumva lorsqu'elle avait cité le témoin BRA-1 en tant que témoin protégé, conformément au paragraphe 1 de l'ordonnance prescrivant des mesures de protection du témoin ; il a été ensuite réaffirmé par le témoin lui-même avant le début de sa déposition. Seule la Chambre est compétente pour modifier le statut d'un témoin protégé ; or elle a clairement indiqué dans sa décision orale du 5 avril 2006 que le statut du témoin, qui était celui de témoin protégé, demeurait inchangé. Pas plus le Greffe que le témoin ne peuvent modifier ce statut juridique. Le témoin BRA-1 demeure un témoin protégé et doit être traité comme tel. Ceci dit, le risque découlant de la décision du témoin de ne pas habiter la maison sécurisée mise à sa disposition ne peut être imputé au Greffe. Celui-ci a précisé qu'il ne pouvait pas garantir aux témoins résidant hors des maisons sécurisées le même niveau de sécurité et qu'il prévenait tout témoin qui prenait une telle décision du risque accru qu'il encourait[4].

5. Il appartient essentiellement au Greffe d'arrêter le montant exact auquel ont droit les témoins, conformément à la réglementation en vigueur à l'Organisation des Nations Unies. La Défense n'a pas établi que cette réglementation telle qu'elle est actuellement appliquée ne permettait pas un procès équitable. Faute de quoi, la Chambre ne saurait remettre en question l'interprétation faite par le Greffe.

PAR CES MOTIFS, LA CHAMBRE

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[2] *Ibid*., p. 60 et 61.

[3] Le 1er juin 2005, la Chambre a jugé que les mesures de protection prises en faveur du témoin de Ntabakuze devaient s'appliquer à tous les témoins de Nsengiyumva. *Bagosora et consorts,* Décision relative à la requête du Procureur en uniformisation et modification de mesures de protection de témoins, Chambre de première instance, 1er juin 2005 ; *Bagosora et consorts,* Décision relative à la requête de Ntabakuze aux fins de protection de témoins, 15 mars 2004. Ces mesures ont été de nouveau modifiées, sans avoir pour autant la moindre incidence sur la présente requête, par la décision rendue dans l'affaire *Bagosora et consorts,* intitulée *Decision Amending Defence Witness Protection Orders,* 2 décembre 2005

[4] Compte rendu de l'audience du 5 avril 2006, p. 57 à 59.

DÉCLARE que le témoin BRA-1 demeure un témoin protégé ;

REJETTE tous les autres points de la requête.

Fait à Arusha, le 3 juillet 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Décision relative à la demande de certification de celle portant sur la question de l'exclusion de certains éléments de preuve 14 juillet 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Autorisation d'interjeter appel, Importance crucial de l'information quant aux faits matériels, Toute déclaration de culpabilité fondée sur les moyens de preuve admis à tort pourrait conduire à un nouveau procès, Clarification des principes d'exclusion des preuves comme progression concrète de la procédure – Requête partiellement acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 73 (B)

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Eliezer Niyitegeka, Jugement, 9 juillet 2004 (ICTR-96-14) ; Chambre d'appel, Le Procureur c. Pauline Nyiramasuhuko et consorts, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 septembre 2004 (ICTR-98-42) ; Chambre d'appel, Le Procureur c. Pauline Nyiramasuhuko et consorts, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 octobre 2004 (ICTR-98-42) ; Chambre d'appel, Le Procureur c. Gérard et Elizaphan Ntakirutimana, Jugement, 13 décembre 2004 (ICTR-96-10 et ICTR-96-17) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Certification Of Appeal Concerning Access To Protected Defence Witness Information, 29 juillet 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Certification of lnterlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements, 22 mai 2006 (ICTR-98-41) ; Chambre d'appel, Le Procureur. Edouard Karemera et consorts, Décision faisant suite a l'appel interlocutoire interjeté par le Procureur de la décision relative au constat judiciaire, 16 juin 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Ntabakuze Motion for Exclusion of Evidence, 29 juin 2006 (ICTR-98-41)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIEGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président de Chambre, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI d'une requête de Ntabakuze intitulée Ntabakuze Motion for Certification of the "Decision on Ntabakuze Motion for Exclusion of Evidence" of 29 June 2006, Pursuant to Rule 73 (B), déposée le 6 juillet 2006,

STATUE sur ladite requête.

Introduction

1. Le 29 juin 2006, la Chambre a accueilli en partie une requête de la Défense de Ntabakuze tendant à faire exclure 17 catégories d'éléments de preuve[1]. Elle a exclu en partie trois des catégories d'éléments de preuve contestées et rejeté la requête pour les 14 autres[2]. Ntabakuze sollicite à présent l'autorisation de former un recours interlocutoire contre la décision du 29 juin.

Délibération

2. Aux termes de l'article 73 (B) du Règlement, la Chambre peut accorder l'autorisation de faire appel d'une décision en cours de procès lorsque celle-ci

> « touche une question susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue, et que son règlement immédiat par la Chambre d'appel pourrait concrètement faire progresser la procédure ».

(i) Equité et rapidité du procès

3. La Défense fait valoir que l'équité du procès a été compromise, la Chambre ayant autorisé le Procureur

> « *a posteriori* à modifier implicitement l'acte d'accusation au fur et à mesure qu'il présentait les moyens à charge »[3] [traduction].

Elle reconnait dans sa demande de certification qu'« il aurait été possible de « purger » l'acte d'accusation de son vice » [traduction] dans une certaine mesure, mais reproche à la Chambre d'avoir indûment permis que cela se fasse pour « l'immense majorité des allégations précises portées contre l'accusé »[4] [traduction]. Comme l'acte d'accusation n'indique pas clairement l'objectif pour lequel le Procureur y a énoncé tel ou tel fait essentiel, l'accusé n'est pas sûr de la nature des accusations portées contre lui. Cette incertitude oblige l'accusé à « s'appuyer plus sur son intuition et des conjectures que sur le raisonnement juridique » [traduction] pour présenter ses moyens de défense et donne lieu à un procès inéquitable et peu circonscrit[5]. Selon la Défense, il s'agit là d'une atteinte à l'équité et à la rapidité du procès.

4. La Chambre dément que sa décision ait autorisé *a posteriori* la modification de l'acte d'accusation. Toutefois, l'obligation d'informer dûment l'accusé des faits essentiels est une question qui revêt une importance capitale pour l'équité du procès. Vu l'importance des principes sur lesquels sa décision est fondée et l'ampleur des éléments de preuve dont l'exclusion a été sollicitée[6], la

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[1] Affaire Bagosora et consorts, Chambre de première instance, Decision on Ntabakuze Motion for Exclusion of Evidence, 29 juin 2006.
[2] La Chambre a aussi relevé que le Procureur avait accepté qu'une quatrième catégorie soit exclue en partie. Voir la décision du 29 juin 2006, par. 25.
[3] Requête, par. 6.
[4] *Ibid*., par. 7.
[5] *Ibid*., par. 10 à 13 et 18.
[6] La certification peut se justifier si, en particulier, «de grandes catégories d'éléments de preuve » sont touchées par une décision. Voir l'affaire *Bagosora et consorts,* Chambre de première instance, *Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements,* 22 mai 2006, et *Certification of Appea1 Concerning Access ta Protected Defence Witness Information,* 29 juillet 2005, par. 2.

Chambre est convaincue que cette décision touche une question susceptible de compromettre sensiblement l'équité ou la rapidité du procès.

(ii) Faire concrètement avancer la procédure

5. La Défense soutient qu'à cause de la décision de la Chambre, elle ne connaît clairement ni la thèse du Procureur ni l'objectif qu'il visait par l'exposé de certains faits essentiels. Cette situation lui serait préjudiciable et risque de l'obliger à ne pas circonscrire la présentation des moyens de preuve à décharge. Le préjudice invoqué se manifeste immédiatement, à savoir durant les débats, et ne peut être réparé par la suite. Des requêtes semblables à la sienne qui ont été formées par d'autres équipes de défense sont pendantes devant la Chambre et le règlement immédiat de la question par la Chambre d'appel serait aussi utile à ce propos. Toute déclaration de culpabilité fondée sur les moyens de preuve admis à tort pourrait conduire à un nouveau procès. Or, un appel interlocutoire peut permettre d'éviter ce risque[7]. Au demeurant, la Défense dit avoir de sérieux doutes sur l'exactitude des principes juridiques appliqués par la Chambre et souligne que le règlement de cette question permettrait au procès de se poursuivre suivant les normes[8].

6. Certains des moyens de preuve que la Chambre a refusé d'exclure pourraient suffire pour tirer des conclusions factuelles précises et distinctes susceptibles d'être annulées lorsque le jugement serait attaqué devant la Chambre d'appel si celle-ci estime que c'est à tort qu'ils ont été pris en considération[9]. D'autres pourraient être rapprochés de tel ou tel élément de preuve additionnel dont l'admission n'a pas été contestée pour dégager des conclusions factuelles plus étendues. La Chambre reconnaît que si elle s'appuie en partie sur des éléments de preuve qui seraient jugés inadmissibles par la Chambre d'appel et en partie sur d'autres qui sont admissibles pour prononcer une déclaration de culpabilité, la Chambre d'appel aura considérablement du mal à trouver une réparation appropriée. En outre, compte tenu de la complexité et de l'importance des questions soulevées, l'obtention d'éclaircissements sur les principes applicables à la catégorie de requêtes considérée ferait concrètement avancer la procédure.

(iii) Eventail précis des questions certifiées

7. Compte tenu des questions de fait détaillées qui devaient être tranchées lors de l'appréciation de chacune des 17 catégories d'éléments de preuve en cause, la Chambre refuse de certifier la décision dans son intégralité. Comme l'a déclaré la Chambre d'appel, les questions relatives à l'admissibilité des éléments de preuve relèvent principalement de la compétence du juge des faits et ne doivent pas faire l'objet d'une certification tendant à autoriser un appel interlocutoire[10]. En revanche, les principes juridiques dont la Chambre de première instance s'est inspirée sont des questions qu'il convient de soumettre à l'appréciation de la Chambre d'appel. En conséquence, la Chambre accorde l'autorisation d'interjeter appel des énonciations juridiques figurant au paragraphe 10 de sa décision qui est libellé comme suit :

> La ligne de conduite que la Chambre de première instance adoptera dans les sections suivantes peut être résumée ainsi qu'il suit. Tout fait essentiel qui ne peut raisonnablement être rattaché à

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[7] Requête, par. 16.
[8] *Ibid*., par. 17 à 24.
[9] Arrêt *Niyitegeka,* par. 235,247 et 248 ; jugement *Ntakirutimana,* par. 71,79, 81, 85, 88, 91,99, 112 et 115.
[10] Affaire *Nyiramasuhuko et consorts,* Chambre d'appel, *Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence,* 4 octobre 2004, par. 5 (« Il appartient avant tout aux Chambres de première instance, en leur qualité de juges des faits, de déterminer les éléments de preuve qu'il y a lieu d'admettre lors du procès. Cette responsabilité n'incombe pas à la Chambre d'appel. Ainsi que la Chambre d'appel l'a déjà souligné, l'autorisation d'interjeter appel doit absolument être une exception en matière d'admission des éléments de preuve produits. En conséquence, comme il revenait clairement à la Chambre de première instance, en sa qualité de juge des faits, d'user de son pouvoir souverain d'appréciation pour trancher les questions soulevées dans le recours en l'espèce, la Chambre d'appel estime que ces questions ne justifient aucune exception et n'auraient pas dû être certifiées ») [traduction]) (la note de bas de page n'a pas été reproduite).

l'acte d'accusation sera exclu. Si un fait essentiel ne se rapporte qu'a une allégation vague ou générale portée dans l'acte d'accusation, la Chambre recherchera si le Procureur a informé l'accusé de ce fait essentiel dans son mémoire préalable au procès ou dans sa déclaration liminaire pour remédier à l'imprécision de l'acte d'accusation. Les faits essentiels qui concernent les actes accomplis par l'accusé sont examinés plus minutieusement que les allégations générales faisant état de telle ou telle conduite criminelle. Les autres types de pièces communiquées, telles que les déclarations de témoin ou les pièces à conviction potentielles, ne suffisent généralement pas pour informer dument la Défense des faits essentiels retenus. La Chambre reconnaît deux exceptions à ce principe : premièrement, lorsque la Chambre a fait droit à une requête en adjonction de témoin formée par le Procureur qui indique les faits essentiels dont parlera le témoin en question à la barre (témoin AAA) ; deuxièmement, lorsque la Chambre a ordonné une longue suspension des débats pour permettre explicitement à la Défense de faire face à des faits essentiels nouvellement découverts (témoin DBQ)[11]. [Traduction.]

Il convient d'inclure dans le champ de l'autorisation d'interjeter appel la règle à suivre pour déterminer si l'exception visée au paragraphe 7 de la décision contestée a été soulevée. La Chambre d'appel jugera peut-être nécessaire d'apprécier ces énonciations juridiques à la lumière d'autres passages de la décision, mais ce sont celles-ci qui font l'objet de l'autorisation d'interjeter appel accordée en application de l'article 73 (B) du Règlement.

8. La Défense reproche à la Chambre de n'avoir pas tenu compte de la réplique qu'elle a déposée le 29 mai 2006 à la suite de l'annexe jointe par le Procureur sa réponse (la « réplique »). Ce n'est pas vrai. En effet, la Chambre a bel et bien tenu compte de cette réplique, comme le prouve clairement le fait qu'elle a longuement examiné la question de savoir s'il était loisible a une Chambre de première instance de considérer qu'un acte d'accusation a été « purgé » de ses vices par d'autres pièces ou si cela ne relevait que de la compétence de la Chambre d'appel[12]. La Défense n'avait invoqué l'incompétence de la Chambre de première instance en la matière que dans sa réplique ; la requête initiale n'en fait pas état[13]. C'est donc tout simplement par inadvertance que la réplique n'a pas été mentionnée dans le préambule de la décision. En tout cas, comme l'examen des réponses est tout à fait discrétionnaire, le fait de ne pas analyser des écritures de cette nature ne constitue pas une erreur de droit ni une erreur de fait.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la requête en partie ;

CERTIFIE aux fins d'un appel interlocutoire les énonciations juridiques articulées aux paragraphes 7 et 10 de sa décision intitulée *Decision on Ntabakuze Motion for Exclusion of Evidence,* rendue le 29 juin 2006.

Fait à Arusha, le 14 juillet 2006

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[11] Affaire *Bagosora et consorts,* Chambre de première instance, *Decision on Ntabakuze Motion for Exclusion of Evidence,* 29 juin 2006, par. 10. L'article 73 (B) du Règlement donne toute latitude à la Chambre pour ne certifier qu'une partie d'une décision en vue d'un appel interlocutoire. Voir l'affaire *Nyiramasuhuko et consorts,* Chambre d'appel, *Decision on Pauline Nyiramasuhuko's Request for Reconsideration,* 27 septembre 2004, par. 7, et l'affaire *Karemera et consorts,* Chambre d'appel, Décision faisant suite à l'appel interlocutoire interjeté par le Procureur de la décision relative au constat judiciaire, 16 juin 2006, par. 13.

[12] Affaire Bagosora et consorts, Chambre de première instance, Decision on Ntabakuze Motion for Exclusion of Evidence, 29 juin 2006, par. 3.

[13] Réplique, par. 16. De fait, la requête initiale reconnait implicitement qu'une Chambre de première instance est dans une certaine mesure bel et bien habilitée à considérer qu'un acte d'accusation a été purgé de ses vices par d'autres pièces. Voir la requête initiale intitulée *Ntabakuze Defence Motion for the Exclusion of Evidence of Allegations Falling Outside the Scope of the Indictment,* déposée le 28 mars 2006, par. 23 à 29.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Décision relative à la requête de la défense intitulée Urgent Motion to the Chamber to Correct Material Errors in Decision on Request for a Subpoena for Major Biot 29 août 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Requête au Royaume de Belgique, Erreur sur la fonction et le nom de la personne requise, Citation à comparaître correcte précédemment émise – Requête sans objet

Instrument international cité :

Statut, art. 28

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la demande tendant à obtenir l'assistance du Royaume de Belgique en vertu de l'article 28 du Statut, 21 avril 2006 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la requête de la Défense demandant que soit délivrée une citation à comparaître comme témoin à adresser au major Jacques Biot, 14 juillet 2006 (ICTR-98-41)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI d'une requête de la Défense de Nsengiyumva intitulée *Urgent* Memorandum *to the Chamber to Correct Material Errors in Decision on Request for a* Subpoena *for Major Biot,* déposée le 20 juillet 2006,

STATUE sur ladite requête.

1. Le 7 avril 2006, la Défense de Nsengiyumva a déposé une requête priant la Chambre de demander l'assistance du Royaume de Belgique en vertu de l'article 28 du Statut pour faciliter la tenue d'un entretien avec un national belge, le « major Marc Biot ». La Chambre a fait droit à cette requête le 21 avril 2006[1]. Parallèlement, le 7 juillet 2006, la Défense a déposé une requête demandant à la Chambre de délivrer une citation à comparaître comme témoin à adresser au « major Jacques Biot ».

[1] Affaire *Bagosora et consorts,* Décision relative à la requête tendant à obtenir l'assistance du Royaume de Belgique en vertu de l'article 28 du Statut, Chambre de première instance, 21 avril 2006.

La Chambre a fait droit à ladite requête le 14 juillet 2006 et enjoint au Greffier d'adresser une citation à comparaître au major Jacques Biot[2].

2. La Défense a déposé par la suite un « *mémorandum* » [une requête] demandant à la Chambre de rectifier sa décision de manière à faire adresser la citation à comparaître au « major Marc Biot ». Elle y allègue aussi que ladite décision ne résume pas fidèlement les points du témoignage attendu du major Biot et que celui-ci n'était pas membre de la MINUAR, mais appartenait aux services de la coopération militaire belge[3]. Le 25 juillet 2006, la Défense a informé la Chambre, par l'intermédiaire du Greffe, que le nom correct du témoin potentiel était « Willy Biot ».

3. Le 20 juillet 2006, le Greffe a délivré à l'intention du « major Willy Biot », une citation à comparaître qui a été transmise aux autorités belges le 21 juillet 2006. Cette citation ayant à présent été adressée à son destinataire correctement identifié, la requête [« *mémorandum* »] en modification de la décision de la Chambre est donc sans objet. En outre, aucune des erreurs que la Défense dit avoir relevées n'a pu être établie à ce jour.

PAR CES MOTIFS, LA CHAMBRE

DECLARE la requête sans objet.

Fait à Arusha, le 29 août 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[2] Affaire *Bagosora et consorts,* Décision relative à la requête de la Défense demandant que soit délivrée une citation à comparaître comme témoin à adresser au major Jacques Biot, Chambre de première instance, 14 juillet 2006.
[3] « *Mémorandum* » [Requête] p. 4.

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Décision relative à la requête de Nsengiyumva tendant à faire déposer le témoin Higaniro par voie de vidéoconférence 29 août 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Témoignage par Vidéo-conférence, Témoin détenu à l'étranger, Intérêts de la justice, Belgique – Requête acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 54 et 90 (A)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 octobre 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Testimony by Video-Confèrence, 20 décembre 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Aloys Simba, Décision autorisant les dépositions des témoins MG, ISG et BJK1 par vidéoconférence, 4 février 2005 (ICTR-2001-76) ; Chambre de première instance, Le Procureur c. Aloys Simba, Décision relative à la requête de la Défense tendant à faire recueillir la déposition du témoin FMPI, 9 février 2005 (ICTR-2001-76) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la requête de Ntabakuze demandant qu'il soit permis au témoin DK 52 de déposer par voie de vidéoconférence, 22 février 2006 (ICTR-98-41)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIEGEANT en la Chambre de première instance I composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov (la « Chambre »),

SAISI d'une requête intitulée « Anatole Nsengiyumva's Extremely Urgent Motion for the Testimony of Mr. Alphonse Higaniro to be Taken by Video-Conference », déposée par la Défense de Nsengiyumva le 3 juillet 2006,

STATUE sur ladite requête

Introduction

1. La Défense de Nsengiyumva demande que la déposition d'Alphonse Higaniro, témoin à décharge présentement détenu en Belgique, soit entendue par vidéoconférence. M. Higaniro a dit qu'il était disposé à comparaitre, mais les autorités belges ont fait savoir que le droit belge interdisait de le transférer physiquement à Arusha pour qu'il dépose.

Délibération

2. En vertu de l'article 54 du Règlement de procédure et de preuve (le « Règlement »), une Chambre peut autoriser un témoin à déposer par vidéoconférence au lieu de comparaitre en personne

lorsque « l'intérêt de la justice » le commande[1]. Pour accorder cette autorisation, la Chambre doit tenir compte de l'importance de la déposition, de l'incapacité ou de la réticence du témoin à comparaitre au prétoire et de la solidité des raisons fournies pour justifier son incapacité ou sa réticence[2].

3. D'après la Défense, la déposition de M. Higaniro viendra contredire celle du témoin XBH qui a attesté que l'accusé s'était entretenu à Butare avec le colonel Bagosora et d'autres personnes pour discuter de l'organisation du génocide des Tutsis, notamment en élaborant des listes de personnalités à tuer. Le témoin XBH a dit que M. Higaniro lui-même avait assisté à une réunion Butare avec l'accusé, réunion au cours de laquelle une opération visant à tuer des Tutsis avait été débattue[3]. En conséquence, la Chambre est convaincue que la déposition serait importante. De plus, il ressort de la lettre des autorités belges annexée à la requête que le témoin étant détenu en Belgique, son transfert à Arusha n'est pas possible. Dans ces circonstances, la Chambre estime que l'intérêt de la justice commande d'autoriser M. Higaniro à déposer par voie de vidéoconférence.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la requête ;

ORDONNE au Greffe de prendre, en consultation avec la Défense, toutes les dispositions nécessaires pour que la déposition du témoin Alphonse Higaniro soit entendue par voie de vidéoconférence et d'enregistrer la déposition sur vidéocassette pour permettre a la Chambre de la consulter plus tard s'il y a lieu.

Arusha, le 29 août 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[1] Affaire *Bagosora et consorts, Decision on Prosecution Request for Testimony of Wirness BT Via Video-Link* (Chambre de première instance), 8 octobre 2004, par. 5 à 8. Une déposition par vidéoconférence peut également être autorisée pour assurer la protection du témoin, mais la Défense n'a pas sollicité la protection du témoin vise dans sa requête.

[2] Affaire *Bagosora et consorts,* Décision relative à la requête de Ntabakuze demandant qu'il soit permis au témoin DK 52 de déposer par voie de vidéoconférence, 22 février 2005 ; affaire *Simba,* Décision relative à la requête de la Défense tendant à faire recueillir la déposition du témoin FMPI, 9 février 2005 ; affaire *Simba,* Décision autorisant les dépositions des témoins IMG, ISG et BJKl par vidéoconférence. 4 février 2005, par. 4 ; affaire *Bagosora et consorts, Decision on Testimony by Video-Conference* (Chambre de première instance); 20 décembre 2004 ; affaire *Bagosora et consorts, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link* (Chambre de première instance), 8 octobre 2004.

[3] Compte rendu de l'audience du 3 juillet 2003, p. 28 et 29.

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Décision relative à la requête de Théoneste Bagosora intitulée Bagosora Defence Amended Strictly confidential and Ex Parte Request for Subpoena of Ambassador Mpungwe and Cooperation of the United Republic of Tanzania 29 août 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Citation un comparaître d'un ambassadeur, Coopération des Etats, Tanzanie – Requête partiellement acceptée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 71 (A) ; Statut, art. 28

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la demande d'assistance adressée à la République togolaise en vertu de l'article 28 du Statut, 31 octobre 2005 (ICTR-98-41)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI des requêtes intitulées Bagosora Defence Amended Strictly Confidential and Ex Parte Request for Subpoena of Ambassador Mpungwe and Cooperation of the United Republic of Tanzania [la requête] et Bagosora Defence Further Request for Timely Decision on Bagosora Defence Amended Motion Filed 7 July 2006 [la requête complémentaire], déposées respectivement le 7 juillet et le 24 août 2006,

STATUE sur la requête.

1. La Défense de Bagosora souhaite avoir un entretien avec l'Ambassadeur Ami R. Mpungwe, ancien haut fonctionnaire tanzanien qui aurait servi de facilitateur lors des négociations ayant débouché sur les Accords d'Arusha. Elle affirme avoir des motifs raisonnables de croire que M. Mpungwe dispose peut-être d'informations relatives à l'attitude du colonel Bagosora aux pourparlers de paix d'Arusha, attitude décrite par des témoins à charge dans des dépositions tendant à incriminer l'accusé. Dans la requête, la Défense rend compte des efforts considérables qu'elle a déployés, tout comme le Greffe, à partir du 28 avril 2005 pour rencontrer M. Mpungwe[1]. Elle prie donc la Chambre de demander au Gouvernement tanzanien de faciliter un entretien avec l'Ambassadeur Mpungwe et, « le cas échéant » [traduction], de citer celui-ci à la barre. Aux dernières nouvelles reçues par la Chambre, l'Ambassadeur se dit prêt à rencontrer la Défense de Bagosora à condition que les autorités gouvernementales l'y autorisent[2].

[1] Requête, par. 13 à 43 et Requête complémentaire, par. 4.
[2] Requête complémentaire, par. 4.

2. Aux termes de l'article 28 du Statut, les États sont tenus de

> « collabore[r] avec le Tribunal international pour le Rwanda à la recherche et au jugement des personnes accusées d'avoir commis des violations graves du droit international humanitaire ».

Cette obligation vise tant le Procureur dans sa quête de preuves à charge que la Défense dans sa quête de preuves à décharge. Toute requête présentée à une Chambre pour qu'elle formule une demande en vertu de l'article 28 du Statut doit indiquer la nature des renseignements demandés, la pertinence de ces renseignements pour le procès et les efforts qui ont été faits pour les obtenir. Elle doit également préciser la nature de l'assistance souhaitée[3].

3. Les conditions sont remplies pour prier la Chambre de présenter une demande en vertu de l'article 28 du Statut. La Défense et le Greffe ont fourni des efforts considérables pour organiser la rencontre sollicitée. La Défense a invoqué des motifs valables donnant à penser que M. Mpungwe pourrait disposer d'informations concernant l'attitude du colonel Bagosora aux pourparlers de paix d'Arusha, attitude au sujet de laquelle la Chambre a recueilli des témoignages directs qui sont susceptibles d'incriminer l'accusé. En outre, ces éléments de preuve ont trait à des allégations précises, portées au paragraphe 5.10 de l'acte d'accusation, selon lesquelles l'accusé

> « [. ..] a manifesté ostensiblement son opposition aux concessions faites par le représentant du Gouvernement [. . .] au point de quitter la table des négociations. Le colonel Théoneste Bagosora a quitté Arusha en déclarant qu'il rentrait au Rwanda « pour préparer l'apocalypse ».

La Défense a des raisons sérieuses de croire que l'Ambassadeur Mpungwe dispose peut-être d'informations qui pourraient se rapporter directement à ces allégations.

4. À ce stade de la procédure, la Chambre ne juge pas nécessaire d'adresser une citation à comparaître à M. Mpungwe. Celui-ci semble disposé à s'entretenir de son plein gré avec la Défense de Bagosora, à condition que le Gouvernement tanzanien l'y autorise. La Chambre relève néanmoins que cet entretien devrait avoir lieu le plus tôt possible. Le procès en est à sa phase finale, et la Défense doit avoir une possibilité raisonnable d'évaluer la nature des éléments d'information dont dispose M. Mpungwe pour pouvoir, le cas échéant, le citer à la barre.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la requête en partie ;

PRIE la République-Unie de Tanzanie d'autoriser l'Ambassadeur Mpungwe à s'entretenir avec la Défense de Bagosora et de fournir toute autre assistance pertinente qui pourra être raisonnablement demandée en vue de faciliter le déroulement de cette rencontre le plus tôt possible ;

CHARGE le Greffe de transmettre la présente décision aux autorités concernées de la République-Unie de Tanzanie.

Arusha, le 29 août 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[3] *Le Procureur c. Bagosora et consorts,* paragraphe 2 de la Décision relative à la demande d'assistance adressée à la République togolaise en vertu de l'article 28 du Statut, Chambre de première instance, 31 octobre 2005, par. 2.

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Décision relative à la déposition par vidéoconférence du témoin Amadou Deme 29 août 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Témoignage par video-conférence, Intérêts de la justice, Refus du témoin de voyager conseiller par ses avocats, Motifs valables de l'accusé qui pense avoir de bonnes raisons de ne pas voyager – Requête acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 54 et 90 (A)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 octobre 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Testimony by Video-Confèrence, 20 décembre 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Aloys Simba, Décision autorisant les dépositions des témoins MG, ISG et BJK1 par vidéoconférence, 4 février 2005 (ICTR-2001-76)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov (la « Chambre »),

SAISI de la requête de la Défense de Ntabakuze intitulée « *Request to Allow Witness Amadou Dema to Give testimony via Video-Link* », déposée le 12 juillet 2006,

VU la Réponse du Procureur, déposée le 20 juillet 2006, et la Réplique de la Défense, déposée le 3 1 juillet 2006,

STATUE CI-APRÈS sur ladite requête

Introduction

1. La Défense de Ntabakuze prie la Chambre d'autoriser le témoin Amadou Deme à déposer par vidéoconférence. Elle fait valoir que le témoin, un ancien fonctionnaire de l'information de la MINUAR, craint avant tout de se voir refuser le droit de rentrer dans son pays de résidence et que son avocat lui a conseillé de ne pas voyager à l'étranger[1]. Elle soutient que la déposition du témoin est importante, car elle portera, entre autres, sur l'existence d'une prétendue entente en vue de commettre le génocide et sur la question de savoir si des civils ont été niés à proximité de l'aéroport de Kigali où des para-commandos étaient stationnés[2].

[1] Requête, par. 7 à 9 ; Réplique de Ntabakuze, par. 4.
[2] Requête, par. 10.

2. Le Procureur s'oppose à la requête au motif que la situation du témoin ne remplit pas les conditions requises pour autoriser une déposition par vidéoconférence.

Délibération

3. L'article 90 (A) du Règlement de procédure et de preuve est ainsi libellé en partie : « [E]n principe, les Chambres entendent les témoins en personne ». Cependant, une Chambre peut décider, en application de l'article 54, de recueillir la déposition par vidéoconférence, si l'intérêt de la justice le commande[3]. A cet effet, la Chambre évaluera l'importance de la déposition, l'impossibilité pour le témoin de se présenter à l'audience ou sa réticence à le faire, et verra si des motifs valables ont été présentés pour justifier cette impossibilité pour le témoin de comparaître ou le fait pour lui d'être peu disposé à le faire[4].

4. Selon la Défense, M. Deme dira à la barre qu'il n'y a, à sa connaissance, aucun élément de preuve crédible établissant qu'en janvier 1994 il existait une entente en vue de commettre le génocide contre les Tutsis au Rwanda, que l'informateur selon lequel il existait une telle entente n'est pas crédible, et que lui-même n'a reçu aucune relation faisant état de massacres de civils près de l'aéroport de Kigali, alors pourtant qu'il y avait des observateurs de la MINUAR dans la zone. Cette déposition, si elle est jugée crédible, va à l'encontre des éléments de preuve tendant à incriminer l'accusé.

5. La Défense a établi que M. Deme refuse réellement de se rendre à l'étranger et que ce refus est fondé, au moins en partie, sur les conseils que son avocat lui donne en ce sens. La Défense n'a pas explicité en quoi un tel déplacement pourrait remettre en question le statut de résident du témoin, mais la Chambre admet que la Défense a établi suffisamment que le témoin estimait sincèrement avoir des raisons valables de ne pas se rendre à l'étranger et que ces raisons se fondent objectivement, en particulier, sur les conseils de son avocat.

6. Ayant examiné l'ensemble des circonstances, la Chambre estime que l'intérêt de la justice commande d'autoriser le témoin à déposer par vidéoconférence.

PAR CES MOTIFS, LA CHAMBRE

AUTORISE le témoin Amadou Deme à déposer par vidéoconférence à partir de son pays de résidence ;

INVITE le Greffe à prendre, en concertation avec les parties, toutes les dispositions nécessaires pour permettre la déposition du témoin Deme par vidéoconférence durant la prochaine session prévue du 4 septembre au 13 octobre 2006, et à enregistrer ladite déposition sur support vidéo pour permettre à la Chambre de s'y référer éventuellement.

Fait à Arusha, le 29 août 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[3] Affaire *Bagosora et consorts*, décision intitulée *Decision on Prosecution Request for Testimony of Witness BT Via Video-Link*, rendue par la Chambre de première instance le 8 octobre 2004.
[4] *Ibid*., par. 6, *Le Procureur c. Aloys Simba*, Décision autorisant les dépositions des témoins MG, ISG et BJK1 par vidéoconférence, rendue par la Chambre de première instance le 4 février 2004, par. 4 ; affaire *Bagosora et consorts*, décision intitulée *Decision on Testimony by Video-Conference* rendue par la Chambre de première instance le 20 décembre 2004, par. 4.

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Décision relative à la communication à la Défense des dépositions à Huis Clos des témoins BDR-1 et de LK-2
29 août 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Casimir Bizimungu – Communication de déposition à huis clos, Mesures de protection de témoins : interdiction de divulguer au public tout renseignement permettant d'identifier le témoin, Révélation de leur statut par les témoins eux-mêmes Requête acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 75 (G) ; Statut, art. 21

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la requête de Ntabakuze aux fins de protection de témoins, 15 mars 2004 (ICTR-98-41) ; Chambre d'appel, Le Procureur c. Théoneste Bagosora et consorts, Decision on Interlocutory Appeals of Decisions on Witness protection Orders, 6 octobre 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision Amending Defence Witness Protection Orders, 2 décembre 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. André Rwamakuba, Decision on Bagosora Motion for Disclosure of Closed Session Testimony of Defence Witness 3/13, 24 février 2006 (ICTR-98-44C) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Zigiranyirazo Motion for Disclosure of Closed Session Testimony of DM-190, 16 mai 2006 (ICTR-98-41) ; Chambre d'appel, Le Procureur c. Théoneste Bagosora et consorts, Decision on Nzirorera Request for Access to Protected Material, 19 mai 2006 (ICTR-98-41) ;Chambre d'appel, Le Procureur c. Théoneste Bagosora et consorts, Decision on Disclosure of Sealed Exhibits of Witness DM-12, 25 mai 2006 (ICTR-98-41)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI d'une requête intitulée « Requête de la Défense du Dr. Casimir Bizimungu en communication des audiences à huis clos et des exhibits des témoins protégés de la défense BDR-1 et LK2 », déposée le 10 juillet 2006,

STATUE sur ladite requête.

Introduction

1. La Défense de Casimir Bizimungu, dont le procès est en cours devant la Chambre de première instance II, demande que lui soient communiqués les comptes rendus des audiences à huis clos et les pièces à conviction mises sous scellés portant sur les dépositions des témoins BDR-1 et LK-2. Ceux-ci ont été entendus respectivement les 14 et 15 avril 2005 et les 19, 20 et 21 avril 2005 comme témoins à

décharge de Nsengiyumva dans l'affaire *Bagosora et consorts*[1]. La requête se fonde sur l'article 75 (G) du Règlement de procédure et de preuve [le « Règlement »].

2. La Défense de Bizimungu soutient que les deux témoins lui ont révélé avoir déposé devant ladite Chambre dans l'affaire *Bagosora et consorts*, et avoir consenti à la communication de tout document confidentiel y afférent[2]. Elle fait valoir que ces informations confidentielles doivent lui permettre de se prononcer sur la nécessité de citer ces témoins et, le cas échéant, de préparer et de présenter leurs dépositions[3]. Elle consent à se conformer aux mesures de protection de témoins à décharge applicables prises dans l'affaire Bagosora et consorts[4].

Arguments

3. Dans l'affaire *Bagosora et consorts*, la Chambre a, en application des articles 21 du Statut et 75 du Règlement, décide des mesures de protection de témoins qui interdisent de divulguer au public tout renseignement permettant d'identifier ceux-ci[5]. Certaines parties des dépositions des témoins BDR-1 et LK-2 ont été considérées comme entrant dans cette catégorie et ont, pour ces motifs, été entendues à huis clos[6]. L'article 75 (G) permet à toute partie à une deuxième affaire qui souhaite la modification de mesures ordonnées dans une première affaire de soumettre sa demande à la Chambre « saisie de la première affaire ».

4. Les témoins BDR-1 et LK-2 ont révélé à la Défense de Bizimungu leur statut de témoins protégés dans la présente affaire, et ils auraient par ailleurs consenti à la divulgation de ces informations confidentielles. Dans ces conditions, on ne voit pas en quoi on protégerait les témoins en refusant à la Défense l'accès à leurs dépositions confidentielles. En effet, tout membre du Bureau du Procureur ayant accès aux informations confidentielles dans toutes les affaires pendantes devant le Tribunal, la communication sollicitée est de nature à renforcer l'équité du procès[7]. Ce même accès ne saurait être refusé à la Défense lorsque des témoins lui ont dévoilé leur statut[8].

5. Les mesures de protection de témoins prises en faveur des témoins de Nsengiyumva s'appliquent *mutatis mutandis* à la Défense de Bizimungu et à l'accusé lui-même en ce qui concerne les témoins BDR-1 et LK-2[9].

PAR CES MOTIFS, LE TRIBUNAL

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[1] Requête, par. 7.
[2] *Ibid*., par. 13 et 14.
[3] *Ibid*., par 15 et 16.
[4] *Ibid*., par. 19.
[5] Affaire *Bagosora et consorts,* Décision relative à la requête de Ntabakuze aux fins de protection de témoins rendue par la Chambre de première instance le 15 mars 2004, par. 1 à 9. Dans cette même affaire, le paragraphe 22 de la Décision relative à la requête du Procureur en uniformisation et modification des mesures de protection de témoins, rendue par la Chambre de première instance le 1er juin 2005 a annulé la Décision Nsengiyumva du 15 mars 2004 relative à la protection de témoins et l'a remplacée, *mutatis mutandis,* par la Décision Ntabakuze susvisée. Voir aussi dans l'affaire *Bagosora et consorts,* la décision intitulée « *Decision Amending Defence Witness Protection Orders* » rendue par la Chambre de première instance le 2 décembre 2005 (modifiant toutes les ordonnances de protection des témoins antérieures dans l'affaire *Bagosora et consorts, pour* tenir compte du pouvoir discrétionnaire du Procureur de prendre connaissance d'informations confidentielles).
[6] S'agissant du témoin BDR-1 : comptes rendus des audiences du 14 avril 2005, p. 62 à 81 ; du 15 avril 2005, p. 31 à 40. En ce qui concerne le témoin LK-2 : compte rendu de l'audience du 19 avril 2006, p. 1 à 8.
[7] Affaire Bagosora et consorts, Decision on Interlocutory Appeals of Decisions on Witness protection Orders (Chambre d'appel), 6 octobre 2005, par. 44 à 46.
[8] Affaire Bagosora et consorts, Decision on Disclosure of Sealed Exhibits of Witness DM-12 (Chambre d'appel), 25 mai 2006, par. 9, et Decision on Nzirorera Request for Access to Protected Material, 19 mai 2006, par. 3. Voir également, toujours dans cette même affaire, Decision on Zigiranyirazo Motion for Disclosure of Closed Session Testimony of DM-190 (Chambre de première instance), 16 mai 2006, par.5 ; affaire Rwamakuba, Decision on Bagosora Motion for Disclosure of Closed Session Testimony of Defence Witness 3/13 (Chambre de première instance), 24 février 2006, par. 5.
[9] Ci-dessus, note (en bas de page) 5.

FAIT DROIT à la requête ;

INVITE le Procureur à communiquer à la Défense de Bizimungu les comptes rendus des audiences à huis clos et les pièces à conviction mises sous scellés portant sur les dépositions des témoins BDR-1 et LK-2 ;

DÉCIDE que les mesures de protection de témoins prises en faveur des témoins de Nsengiyumva doivent s'appliquer *mutatis mutandis* à la Défense de Bizimungu et à l'accusé lui-même en ce qui concerne les témoins BDR-1 et LK-2.

Fait à Arusha, le 29 août 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Décision relative à la requête de la défense de Bagosora visant la modification de sa liste de témoins
11 septembre 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora – Modification de la liste de témoins, Retrait de témoins, Ajout de témoins, Intérêts de la justice, Action diligente de la défense de Bagosora, Nombre limité de témoins concernés – Requête acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 73 ter (E)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E), 26 juin 2003 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Defence Motions to Amend the Defence Witness List, 17 février 2006 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Nsengiyumva Motion for Leave to Amend Its Witness List, 6 juin 2006 (ICTR-98-41)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov (la « Chambre »),

SAISI de la Requête de la Défense de Bagosora visant la modification de sa liste de témoins, déposée le 31 août 2006,

VU la réponse du Procureur, déposée le 1er septembre 2006,

STATUE sur la requête.

Introduction

1. La Défense de Bagosora demande à la Chambre de l'autoriser à ajouter deux témoins à sa liste et à en radier 15 autres. Elle prétend n'avoir appris l'existence de ces deux témoins que récemment. Leur déposition devrait réfuter des éléments de preuve à charge précis et la durée de l'interrogatoire principal des deux témoins est évaluée à trois heures et demie seulement[1].

Délibération

2. Le Procureur ne s'oppose pas à la requête, déclarant « ne pas prendre position » quant au sort qui devrait lui être réservé. Il fait toutefois valoir que la Défense n'est pas tenue de demander l'autorisation de retirer des témoins de sa liste et qu'en réalité, ceux-ci en avaient déjà été radiés en vertu d'une lettre adressée par le conseil principal à la Chambre le 12 avril 2006.

(i) Norme applicable

3. L'article *73 ter* (E) du Règlement de procédure et de preuve est ainsi libellé :

> Après le début de la présentation des moyens à décharge, la défense peut, si elle estime que l'intérêt de la justice le commande, saisir la Chambre de première instance d'une requête aux fins d'être autorisée à revenir à sa liste de témoins initiale ou à revoir la composition de sa liste.

La Chambre a déjà eu à appliquer cette disposition en l'espèce :

> Interprétant les dispositions analogues applicables aux témoins à charge, la Chambre de première instance a déclaré que la modification d'une liste de témoins devait reposer sur des « motifs valables » et servir l'« intérêt de la justice ». Des principes similaires ont été appliqués lors de l'examen des requêtes de la Défense tendant à modifier une liste de témoins. Au moment de décider d'autoriser on non une telle modification, il importe d'évaluer minutieusement, entre autres, pour chaque témoin, la suffisance des éléments de preuve présentés et le moment où ils ont été communiqués, la pertinence et la valeur probante des dépositions proposées par rapport aux témoignages existants et aux allégations portées dans l'acte d'accusation, la capacité effective de l'autre partie à contre-interroger le témoin et les raisons avancées par la partie requérante pour justifier l'ajout du témoin[2] [traduction] .

La Chambre doit s'assurer, à la lumière des obligations de communication imposées à la partie requérante, que l'ajout d'un témoin à la liste n'entraînera ni « surprise injuste ni préjudice » pour la partie adverse[3].

(ii) Retrait de témoins

4. Le Procureur ne s'oppose pas à la demande de retrait de témoins, celle-ci permettra en effet d'économiser les ressources du Tribunal et répond de toute évidence aux besoins d'une présentation efficace des moyens à décharge. D'où son accueil par la chambre[4].

(iii) Ajout de témoins

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[1] Requête, par. 27 et 36.
[2] Le Procureur c. Bagosora et consorts, Decision on Nsengiyumva Motion for Leave to Amend Its Witness List, Chambre de première instance, 6 juin 2006, par. 3.
[3] Le Procureur c. Bagosora et consorts, Decision on Prosecution Motion for addition of Witnesses Pursuant to Rule 73 bis (E), Chambre de première instance, 26 juin 2003, par. 16.
[4] Sont retirés de la liste les témoins B-04, E-01, F-05, G-09, H-01, H-06, L-01, M-09, N-05, N-08, 0-05, Q-01, T-07, X-02 et Z-08.

5. À la lumière des facteurs susmentionnés, la Chambre estime qu'il est dans l'intérêt de la justice d'autoriser la Défense à ajouter les témoins X-06 et X-07 à sa liste. La déposition de ces témoins semble avoir été définie de façon restrictive et orientée vers la réfutation d'éléments de preuve à charge précis.

6. La présente requête n'est que la deuxième du genre déposée par la Défense de Bagosora, ce qui montre que celle-ci a agi avec diligence pour modifier le moins possible sa liste de témoins et minimiser les effets perturbateurs qui en résulteraient pour la préparation du procès. Il semble que la Défense n'ait découvert que fin juillet le témoignage que les deux personnes en question pourraient apporter, ce qui laisse penser qu'elle a formé la présente requête aussitôt que possible. De plus, vu le peu de temps nécessaire à l'audition de ces deux témoins, la comparution des témoins dans les délais impartis avant la fin de la présentation des moyens à charge devrait se dérouler sans entrave, d'autant qu'un certain nombre d'autres témoins ont été retirés de la liste. Rien n'indique dans la présente requête qu'il faudrait modifier le calendrier du procès, lequel demande à la Défense de Bagosora d'appeler tous ses témoins des faits d'ici à la fin de la présente session, fixée au 13 octobre 2006.

7. La Défense avait initialement pour obligation, en matière de communication, de déposer sa liste de témoins, accompagnée du résumé des dépositions attendues au plus tard le 3 janvier 2005[5]. En raison des modifications apportées ultérieurement à la liste des témoins à décharge, la Chambre a exigé que ces informations soient communiquées « trente cinq jours avant la comparution du témoin »[6] [traduction]. Les renseignements concernant les deux témoins ont été communiqués au Procureur les 24 et 28 août 2006. Au regard du nombre limité de témoins visés, la Chambre retient la seconde date comme étant celle où la communication a été effectuée. En conséquence, et a moins .que Procureur ne renonce au délai, les témoins X-06 et X-07 ne pourront pas déposer avant le 2 octobre 2006.

PAR CES MOTIFS, LE TRIBUNAL

FAIT DROIT à la requête de la Défense de Bagosora visant à ajouter les témoins X-06 et X-07 à sa liste,

ENJOINT, au cas où cela n'aurait pas encore été fait, que soient communiquées au Procureur toutes les informations permettant d'identifier les témoins visés, ainsi que le résumé de leur témoignage,

DÉCLARE, à moins que Procureur ne renonce au délai, que les témoins ne pourront pas déposer avant le 2 octobre 2006.

Fait à Arusha, le 11 septembre 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[5] Compte rendu de l'audience du 21 décembre 2004 p. 31. Aux termes de l'article 73 *ter* (B) (iii) (b) du Règlement de procédure et de preuve, la Chambre ... peut inviter la défense à déposer ... une liste des témoins qu'[elle] entend citer, où [est] consigné ... un résumé des faits au sujet desquels chaque témoin déposera[.] ».

[6] Voir par exemple Le Procureur c. Bagosora et consorts, Decision on Defence Motions to Amend the Defence Witness List, Chambre de première instance, 17 février 2006, p. 6.

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Décision relative à la requête formée par Ntabakuze en vertu de l'article 28 du Statut et à la déposition du Colonel Saint-Quentin par voie de vidéoconférence en application de l'article 54 du Règlement
11 septembre 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Aloys Ntabakuze – Témoignage par vidéoconférence, Déposition ordonnée qu'« à la demande de l'une des parties » selon l'article 71 du RPP, Pouvoir d'ordonner qu'un témoin dépose par voie de vidéoconférence en vertu de l'article 54 du RPP, Intérêt de la justice – Coopération des Etats, France, Préoccupations légitimes des Etats, Brièveté de l'échéance de comparution risque de perturber le bon fonctionnement de l'unité militaire dont le témoin assure le commandement – Requête acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 54, 71, 71 (A) et 71 (D); Statut, art. 28

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au général de division Yaache et la coopération de la République du Ghana, 23 juin 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 octobre 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Testimony by Video-Conference, 20 décembre 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la demande de coopération et d'assistance adressée au Royaume des Pays-Bas, 7 février 2005 (ICTR-98-41)

T.P.I.Y. : Chambre de première instance, Le Procureur c. Duško Tadić, Décision relative aux requêtes de la défense aux fins de citer à comparaître et de protéger des témoins à décharge et de présenter des témoignages par vidéoconférence, 25 juin 1996 (IT-94-1)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIÉGEANT en la Chambre de première instance I composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI DE la requête de Ntabakuze intitulée *Motion for Request of Cooperation from the Government of France Pursuant to Article 28 of the Statute*, ainsi que l'additif et des modifications y afférents, déposés respectivement le 8 mars et le 28 août 2006,

STATUE À PRÉSENT sur la requête

Introduction

1. Le 8 mars 2006, la Défense de Ntabakuze a déposé une requête dans laquelle elle priait la Chambre de solliciter la coopération du Gouvernement français, notamment, pour

« faciliter la tenue d'une rencontre et d'un entretien avec le colonel Grégoire de Saint-Quentin qu'elle entend citer en qualité de témoin »[1] [traduction].

Par la suite, la Défense et le Greffe ont informé la Chambre que des dispositions avaient été prises pour organiser cet entretien. Le 5 mai et le 27 juin 2006, un membre de la Défense de Ntabakuze s'est entretenu avec le colonel de Saint-Quentin selon la procédure fixée par le Gouvernement français. Dans l'additif et les modifications apportés à sa requête, la Défense a prié la Chambre de rendre une

« ordonnance demandant à la France d'apporter toute la coopération et l'assistance nécessaires en vue de faciliter la mise à disposition du colonel Grégoire de Saint-Quentin du Tribunal de céans et sa comparution en qualité de témoin »[2] [traduction.].

2. Aux termes de l'article 28 du Statut, les États sont tenus de

« collabore[r] avec le Tribunal pénal international pour le Rwanda à la recherche et au jugement des personnes accusées d'avoir commis des violations graves du droit international humanitaire ».

Les demandes présentées à une Chambre en vertu de l'article 28 du Statut en vue de la délivrance d'une ordonnance doivent indiquer la nature des éléments d'information demandés, leur pertinence pour le procès et les efforts qui ont été faits pour les obtenir. Elles doivent aussi préciser la nature de l'aide souhaitée[3].

3. Le Gouvernement français a indiqué qu'il était disposé à autoriser le colonel de Saint-Quentin à déposer par voie de vidéoconférence conformément à l'article 71 (D) du Règlement de procédure et de preuve au lieu qu'il se rende à Arusha pour le faire de vive voix comme le demande la Défense[4]. Il précise qu'il est difficile de mettre le colonel de Saint-Quentin à la disposition du Tribunal à si brève échéance vu qu'il est un officier en activité à la tête d'une unité militaire[5]. La Défense prend acte de la position de la France, mais elle s'oppose à la demande en vue d'une déposition par voie de vidéoconférence au motif que l'article 71 (A) du Règlement exige qu'il y ait des « circonstances exceptionnelles ». N'ayant pas connaissance de l'existence de telles circonstances, la Défense estime qu'une telle demande ne saurait prospérer. De plus, l'article 71 (A) du Règlement indique qu'une Chambre peut ordonner qu'une déposition soit recueillie « à la demande de l'une des parties » ; la Défense estime qu'en l'absence d'une telle demande, la Chambre ne peut rendre une telle ordonnance[6].

Délibérations

4. Dans la mesure du possible, quand elle examine les requêtes fondées sur l'article 28 du Statut, la Chambre de première instance tient compte des préoccupations légitimes des Etats. Le Gouvernement français affirme que le colonel de Saint-Quentin est un officier en activité, commandant d'une unité militaire et que son absence perturberait le bon fonctionnement de ladite unité. Par ailleurs, le calendrier du procès prescrit à la Défense de Ntabakuze d'achever la présentation de ses moyens avant le 13 octobre 2006.

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[1] Requête, p. 5.
[2] Additif, p. 4.
[3] *Bagosora et consorts,* Décision relative à la demande de coopération et d'assistance adressée au Royaume des Pays-Bas (Chambre de première instance), 7 février 2005, par. 5 ; *Bagosora et al*., Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au Général Yaache et la coopération de la République du Ghana (Chambre de première instance), 23 juin 2004, par. 4.
[4] Additif, annexe 2 (Note verbale en date du 7 juillet 2006 l'Ambassadeur de la République française en Tanzanie au Greffier du TPIR).
[5] Additif, annexe 1 (Note verbale du 7 juillet 2006 de l'Ambassadeur de la République française en Tanzanie au Greffier du TPIR).
[6] Additif, par. 7.

5. La Défense fait observer à juste titre que, conformément à l'article 71 du Règlement, une déposition ne peut être ordonnée qu'« à la demande de l'une des parties ». Aucune des parties n'ayant fait une telle demande, la Chambre ne peut rendre une telle ordonnance.

6. Cependant, en vertu de l'article 54 du Règlement, la Chambre est investie du pouvoir d'ordonner qu'un témoin dépose par voie de vidéoconférence quand « l'intérêt de la justice » le commande. Ce pouvoir et le critère « intérêt de la justice » ont été pour la première fois reconnus devant le TPIY dans l'affaire *Tadić,* et cette jurisprudence est suivie par le Tribunal de céans[7]. Au nombre des critères permettant de déterminer si la déposition par voie de vidéoconférence est dans « l'intérêt de la justice », on citera : l'importance de la déposition, l'incapacité ou le refus du témoin de se présenter à l'audience ; et la preuve de l'existence de raisons valables justifiant cette incapacité ou cette réticence[8]. L'article 54 du Règlement prévoit expressément que la Chambre peut rendre une ordonnance de sa propre initiative[9].

7. Le Gouvernement français affirme que la comparution du colonel de Saint-Quentin à Arusha à une si brève échéance perturberait le bon fonctionnement de l'unité militaire dont il assure le commandement. Cette préoccupation constitue une raison valable justifiant son incapacité à comparaître. Dans ces circonstances, et en raison du fait que la Défense insiste sur l'importance de son témoignage, c'est dans l'intérêt de la justice que le témoin soit entendu par voie de vidéoconférence. Même si la Défense n'a fait aucune demande dans ce sens, la Chambre estime que ce mécanisme permet de prendre en compte les préoccupations légitimes du Gouvernement français tout en s'assurant que la déposition se fasse dans le respect du calendrier établi pour le procès. En conséquence, la Chambre décide, de sa propre initiative, de rendre l'ordonnance.

PAR CES MOTIFS, LA CHAMBRE

PRIE le Gouvernement français de bien vouloir autoriser le colonel de Saint-Quentin à déposer dans la présente affaire par voie de vidéoconférence ;

ENJOINT au Greffe de transmettre la présente décision aux autorités compétentes du Gouvernement français et, en consultation avec les parties et le Gouvernement français, de prendre les dispositions en vue de recueillir la déposition par voie de vidéoconférence conformément à la présente décision.

Fait à Arusha, le 11 septembre 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[7] *Tadić,* Décision relative aux requêtes de la Défense aux fins de citer comparaitre et de protéger les témoins à décharge et de présenter des témoignages par vidéoconference (Chambre de première instance), 25 juin 1996, par. 19 ; *Bagosora et consorts,* décision intitulée *Decision on Prosecution Request for Testimony of Witness BT Via Video-Link* (Chambre de première instance), 8 octobre 2004 ; *Bagosora et consorts,* décision intitulée *Decision on Testimony By Video-Conference* (Chambre de première instance), 20 décembre 2004, par. 4.

[8] Bagosora et consorts, décision intitulée Decision on Prosecution request for Testimony of Witness BT via Video-Link (Chambre de première instance), 8 octobre 2004, par. 6.

[9] L'article 54 du Règlement est ainsi libellé : « A la demande d'une des parties ou de sa propre initiative, un juge ou une Chambre de première instance peut délivrer les ordonnances, citations à comparaître, assignations, injonctions, mandats et ordres de transfert nécessaires aux fins de l'enquête, de la préparation ou de la conduite du procès ».

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Ordonnance de transfert du témoin à décharge Jean Kambanda 19 septembre 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Jean Kambanda – Transfert de témoin détenu, Mali – Transfert ordonné

Instrument international cité :

Règlement de Procédure et de preuve, art. 90 bis (B)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Jean Kambanda, Jugement et sentence, 4 septembre 1998 (ICTR-97-23) ; Chambre d'appel, Le Procureur c. Jean Kambanda, Arrêt, 19 octobre 2000 (ICTR-97-23) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et al., Decision on Severance or Exclusion of Evidence Based on Prejudice Arising From Testimony of Jean Kambanda, 11 septembre 2006 (ICTR-98-41)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIEGEANT en la Chambre de première instance I composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI de la Requête de la Défense de Bagosora sollicitant une ordonnance de transfert (article 90 *bis* du R.p.p.), déposée le 14 septembre 2006,

VU la réponse du Procureur, déposée le 15 septembre 2006,

STATUE sur la requête.

1. La Défense de Bagosora demande à la Chambre d'ordonner le transfert temporaire du témoin à décharge Jean Kambanda au centre de détention du Tribunal sis à Arusha pour qu'il dépose devant la Chambre. M. Kambanda purge actuellement au Mali[1] une peine d'emprisonnement à vie prononcée par le Tribunal. I1 a déposé devant la Chambre les 11, 12 et 13 juillet 2006. Sa déposition a été interrompue et la suite renvoyée à une date ultérieure en attendant que la Chambre statue sur une requête tendant à faire exclure certaines parties de cette déposition ou disjoindre les procès des accusés[2]. La Défense de Bagosora demande que ce témoin soit à Arusha dès le 2 octobre 2006 pour compléter sa déposition qui doit s'achever avant la fin de la présente session d'audiences prévue pour le 13 octobre 2006. Le Procureur ne s'oppose pas à la requête, mais demande que le témoin soit entendu le plus tôt possible et que l'ordonnance reste en vigueur jusqu'a la fin de sa déposition, quel qu'en soit le moment.

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[1] Affaire *Kambanda,* jugement, 4 septembre 1998, p. 20 ; arrêt, 19 octobre 2000, p. 41.
[2] Affaire Bagosora et consorts, Chambre de premiere instance, Decision on Severance or Exclusion of Evidence Bared on Prejudice Arising from Testimony of Jean Kambanda, 11 septembre 2006.

2. Aux termes de l'article 90 *bis* (B) du Règlement de Procédure et de preuve, de telles ordonnances ne peuvent être rendues que si deux conditions sont remplies : premièrement

> « la présence du témoin détenu [n'est] pas nécessaire dans une procédure pénale en cours sur le territoire de l'Etat requis pour la période durant laquelle elle est sollicitée par le Tribunal » ;

deuxièmement,

> « son transfert [n'est] pas susceptible de prolonger la durée de sa détention telle que prévue par l'Etat requis ».

De plus, l'article 4 de l'accord conclu entre l'Organisation des Nations Unies et la République du Mali prévoit expressément la possibilité de transférer temporairement un détenu pour qu'il fasse une déposition, à condition que sa présence ne soit pas requise dans une procédure pénale en cours au Mali[3].

3. La Chambre a été informée par le Greffe que la présence de M. Kambanda ne serait requise dans aucune procédure pénale au Mali pendant la période proposée pour son séjour, ce qui satisfait la première condition. Comme M. Kambanda purge une peine d'emprisonnement à vie, la seconde condition est inapplicable. La date précise de la déposition du témoin est une tout autre question. La Chambre tiendra toutefois compte de l'avis de la Défense de Bagosora selon lequel le témoin ne devrait pas reprendre sa déposition avant le retour du conseil principal à Arusha qui aura lieu le 2 octobre 2006 ou vers cette date.

PAR CES MOTIFS, LA CHAMBRE

ORDONNE, sous réserve de l'accord du Gouvernement du Mali, que Jean Kambanda soit temporairement transféré au centre de détention du Tribunal dans les meilleurs délais et renvoyé au Mali au plus tard le 30 octobre 2006, en application de l'article 90 *bis* du Règlement ;

DEMANDE au Gouvernement du Mali de faciliter son transfert en collaboration avec le Greffier et le Gouvernement de la Tanzanie.

CHARGE le Greffier :
(A) De transmettre la présente ordonnance aux Gouvernements du Mali et de la Tanzanie,
(B) De veiller au bon déroulement du transfert, y compris le suivi de la détention du témoin au centre de détention du Tribunal.
(C) De s'informer de toutes modifications pouvant intervenir dam les modalités de la détention telles que prévues par 1'Etat requis et influer sur la période de détention temporaire du témoin et d'en faire part à la Chambre dans les plus brefs délais.

Arusha, le 19 septembre 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[3] Accord entre le Gouvernement de la République du Mali et l'Organisation des Nations Unies concernant l'exécution des peines prononcées par le Tribunal Pénal international pour le Rwanda, 12 février 1999, enregistré le 4 octobre 2000 (sous le numéro 36963) <http://www.ictr.org/FRENCH/agreements/mali.pdf>

Décision relative à la demande tendant à obtenir l'assistance du Royaume de Belgique en vertu de l'article 28 du Statut
21 septembre 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Coopération des Etats, Belgique, Entrevue avec une personne en détention en Belgique – Requête acceptée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 54 ; Statut, art. 28

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au général de division Yaache et la coopération de la République du Ghana, 23 juin 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la demande de coopération et d'assistance adressée au Royaume des Pays-Bas, 7 février 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la demande tendant à obtenir l'assistance du Royaume de Belgique en vertu de l'article 28 du Statut, 21 avril 2006 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la requête de Nsengiyumva tendant à faire déposer le témoin Higaniro par voie de vidéoconférence, 29 août 2006 (ICTR-98-41)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIEGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov (la « Chambre »),

SAISI de la Requête en extrême urgence de la Défense de Bagosora visant la coopération du Royaume de Belgique (article 54 du RPP et article 28 du Statut), déposée le 20 septembre 2006,

STATUE sur ladite requête.

1. La Défense de Bagosora prie la Chambre de demander que le Gouvernement belge l'autorise à s'entretenir avec Alphonse Higaniro, témoin actuellement détenu en Belgique qui doit en principe déposer en faveur de la Défense de Nsengiyumva au début du mois d'octobre. Elle précise qu'elle sollicite cet entretien pour déterminer si elle a besoin de contre-interroger le témoin.

2. L'article 28 du Statut fait obligation aux États de

> « collabore[r] avec le Tribunal international pour le Rwanda à la recherche et au jugement des personnes accusées d'avoir commis des violations graves du droit international humanitaire ».

Toute personne qui demande à une Chambre de rendre une ordonnance en vertu de l'article 28 du Statut doit indiquer la nature des informations recherchées, l'intérêt que celles-ci présentent pour le

procès et les efforts qui ont été faits pour les obtenir. Elle doit aussi préciser la nature de l'assistance souhaitée[1].

3. Dans une décision antérieure, la Chambre a conclu que M. Higaniro pourrait avoir des informations présentant un intérêt pour le procès en l'espèce[2]. Le colonel Bagosora aurait été présent lorsque l'un des faits dont M. Higaniro serait en mesure de parler s'est produit[3]. En outre, il ressort de la correspondance annexée à la requête que la Défense a essayé d'obtenir l'entretien sollicité sans recourir à la Chambre, mais le droit belge n'autorise les entrevues de cette nature que si une décision a été rendue à cet effet en vertu de l'article 28 du Statut. La Chambre estime donc que les conditions nécessaires pour présenter une demande en vertu de l'article 28 sont réunies.

PAR CES MOTIFS, LA CHAMBRE

PRIE le Royaume de Belgique de lui apporter toute assistance nécessaire pour que la Défense de Bagosora puisse s'entretenir avec Alphonse Kiganiro ;

ORDONNE au Greffe de transmettre la présente décision aux autorités compétentes du Royaume de Belgique.

Arusha, le 21 septembre 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[1] Affaire *Le Procureur c. Bagosora et consorts*, Décision relative à la demande de coopération et d'assistance adressée au Royaume des Pays-Bas (Chambre de première instance), 7 février 2005, par. 5 ; Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au général de division Yaache et la coopération de la République du Ghana (Chambre de première instance), 23 juin 2004, par. 4.

[2] Affaire *Le Procureur c. Bagosora et consorts*, Décision relative à la demande tendant à obtenir l'assistance du Royaume de Belgique en vertu de l'article 28 du Statut (Chambre de première instance), 21 avril 2006, par. 3 ; Décision relative à la requête de Nsengiyumva tendant à faire déposer le témoin Higaniro par voie de vidéoconférence (Chambre de première instance), 29 août 2006.

[3] Affaire *Le Procureur c. Bagosora et consorts,* Décision relative à la requête de Nsengiyumva tendant à faire déposer le témoin Higaniro par voie de vidéoconférence (Chambre de première instance), 29 août 2006, par. 3

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Décision relative à la requête de la Défense de Kabiligi intitulée « Motion to Request the Testimony of Witnesses KX-38 and KVB-46 Via Video-Link » 5 octobre 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Gratien Kabiligi – Témoignage par Vidéoconférence, Intérêts de la justice, Démonstration que l'accusé à une raison valable pour refuser de venir témoigner oralement, Témoin : chef de file de l'opposition à l'actuel Gouvernement du Rwanda, Témoin : ancien haut responsable rwandais devenu par la suite chef d'un groupe de l'opposition – Requête acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 54 et 75

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Ferdinand Nahimana et consorts, Décision sur la requête du Procureur aux fins d'ajouter le témoin X à sa liste de témoins et de se voir accorder des mesures de protection, 14 septembre 2001 (ICTR-99-52) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 octobre 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Testimony by Video-Conference, 20 décembre 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Disclosure of Closed Session Testimony of BDR-1 and LK-2, 29 août 2006 (ICTR-98-41)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov (la « Chambre »),

SAISI de la requête de la Défense de Kabiligi intitulée « *Motion to Request the Testimony of Witnesses KX-38 and KYB-46 via Video-Link* », déposée le 20 septembre 2006,

STATUE sur ladite requête.

Introduction

1. La Défense de Kabiligi prie la Chambre d'entendre deux de ses témoins par voie de vidéoconférence. Ceux-ci sont disposés à témoigner, mais refusent de se rendre à Arusha, car en tant que chefs de file de l'opposition à l'actuel Gouvernement du Rwanda, ils craignent pour leur sécurité.

Délibération

2. La déposition par vidéoconférence peut être ordonnée soit en vertu de l'article 54 du Règlement de procédure et de preuve, parce que l'intérêt de la justice le commande, soit comme une mesure de protection du témoin prise en vertu de l'article 75 du Règlement qui exige que ce moyen soit

nécessaire pour protéger la sécurité du témoin[1]. La Défense de Kabiligi invoque les deux articles à l'appui de sa présente requête.

3. Pour déterminer si le recueil de la déposition par vidéoconférence est dans l'intérêt de la justice conformément à l'article 54 du Règlement, il faut prendre en compte trois facteurs : l'importance de la déposition, l'incapacité pour le témoin de comparaître ou son refus de le faire, et la raison qui aura été avancée pour justifier cette incapacité ou ce refus[2]. Il n'est pas absolument nécessaire de justifier le refus de manière objective, mais il faut à tout le moins établir que le refus du témoin se fonde sur des motifs crédibles et que ceux-ci sont sincères[3].

4. Le témoin KX-38 refuse de se rendre à Arusha au motif qu'il est un des chefs de file de l'opposition à l'actuel Gouvernement du Rwanda. Il s'est exilé en 1994. Selon la requête, ce qui fonde les craintes du témoin, c'est le décès inopiné et inexpliqué d'autres membres de l'opposition et le fait qu'il serait l'objet d'un harcèlement constant. Il passe pour connaître l'accusé de longue date et est en mesure de témoigner que celui-ci n'avait pas de préjugés raciaux et n'était pas extrémiste. Le témoin a manifesté son refus de se rendre à Arusha dans un courriel qu'il a adressé au conseil de la Défense et qui est joint en annexe confidentielle et unilatérale de la requête[4].

5. Le témoin KVB-46 est un ancien haut responsable rwandais devenu par la suite chef d'un groupe de l'opposition. D'après la requête, il a eu la primeur de l'information selon laquelle l'accusé était favorable aux Accords d'Arusha. Dans son courriel, il dit au conseil de Kabiligi que son refus de venir déposer à Arusha est « une question de vie ou de mort »[5].

6. La Défense a établi que si les deux témoins refusent de se rendre à Arusha, c'est qu'ils éprouvent des craintes sincères. La Chambre n'est pas en mesure de déterminer la justification objective de ces craintes, mais la Défense a établi qu'il s'agit de personnalités très en vue qui peuvent avoir des raisons de craindre tout particulièrement pour leur sécurité. Ils semblent être en mesure de faire, sur des questions bien définies, des dépositions susceptibles de disculper l'accusé. La Chambre conclut donc qu'il est dans l'intérêt de la justice de leur permettre de déposer par voie de vidéoconférence.

PAR CES MOTIFS, LA CHAMBRE

AUTORISE le recueil de la déposition des témoins KX-38 et KVB-46 par voie de vidéoconférence ;

CHARGE le Greffe de prendre, en concertation avec les parties, toutes les dispositions nécessaires pour le recueil de cette déposition et d'enregistrer celle-ci sur bande vidéo pour consultation éventuelle par la Chambre.

Fait à Arusha, le 5 octobre 2006.

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[1] Affaire *Bagosora et consorts,* Chambre de première instance, *Decision on Prosecution Request for Testimony of Witness BT via Video-Link,* 8 octobre 2004, par. 5 à 8 ; affaire *Nahimana et consorts,* Chambre de première instance, Décision sur la requête du Procureur aux fins d'ajouter le témoin X à sa liste de témoins et de se voir accorder des mesures de protection, 14 septembre 2001.

[2] Affaire Bagosora et consorts, Chambre de première instance, Decision on Prosecution Request for Testimony of Witness BT via Video-Link, 8 octobre 2004, par. 6 ; affaire Bagosora et consorts, Decision on Testimony by Video-Conference, 20 décembre 2004, par. 4.

[3] Affaire Bagosora et consorts, Chambre de première instance, Decision on Testimony of Witness Amadou Deme by Video-Link, 29 août 2006, par. 5 ; affaire Bagosora et consorts, Chambre de première instance, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 octobre 2004, par. 6 et 13

[4] Requête, annexe B.

[5] Requête, annexe D.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Décision relative à la requête de la Défense intitulée «Ntabakuze Motion for an Order Compelling the Prosecutor to Disclose Various Exculpatory Documents Pursuant to Rule 68 » 6 octobre 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Aloys Ntabakuze – Obligation de communication du Procureur, Charge du Procureur de déterminer sur la base des faits quels sont les éléments qui pourraient disculper l'accusé, Obligation du Procureur d'examiner, d'identifier et de communiquer tout document susceptible de disculper l'accusé – Requête rejetée

Instrument international cité :

Règlement de Procédure et de preuve, art. 68 (A)

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Juvénal Kajelijeli, Arrêt, 23 mai 2005 (ICTR-98-44A) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses, 27 septembre 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A), 8 mars 2006 (ICTR-98-41) ; Chambre d'appel, Le Procureur c. Edouard Karemera et al., Decision Décision relative à la requête interlocutoire de Joseph Nzirorera, 28 avril 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Ntabakuze Motion for Information from the UNHCR and a Meeting With One of Its Officials, 6 octobre 2006 (ICTR-98-41)

T.P.I.Y. : Chambre d'appel, Le Procureur c. Dario Kordić and Mario Čerkez, Décision relative à la requête de Dario Kordic aux fins de consulter les passages supprimés de l'audition du témoin AT tenue en octobre 2002, 23 mai 2003 (IT-95-14/2) ; Chambre d'appel, Le Procureur c. Tihomir Blaškić, Jugement, 29 juillet 2004 (IT-95-14) ; Chambre de première instance, Le Procureur c. Radoslav Brđanin, Décision relative aux requêtes par lesquelles l'appelant demande que l'accusation s'acquitte de ses obligations de communication en application de l'article 68 du Règlement et qu'une ordonnance impose au Greffier de communiquer certains documents, 7 décembre 2004 (IT-99-36)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov (la « Chambre »),

SAISI de la Requête de la Défense intitulée « Ntabakuze Motion for an Order Compelling the Prosecutor to Disclose Various Exculpatory Documents Pursuant to Rule 68 », déposée le 2 juin 2006,

VU la Réponse du Procureur, déposée le 7 juin 2006, et la Réplique de Ntabakuze, déposée le 27 juin 2006,

STATUE sur ladite requête,

Introduction

1. La Défense de Ntabakuze demande à la Chambre d'enjoindre au Procureur de lui communiquer huit catégories de documents, au motif qu'ils pourraient constituer des éléments de preuve à décharge au sens de l'article 68 (A) du Règlement. Il s'agit de rapports d'institutions des Nations Unies ou du Bureau du Procureur lui-même concernant des événements qui se sont déroulés au Rwanda en 1994. Une de ces catégories de documents, à savoir des rapports élaborés par le Haut Commissaire des Nations Unies pour les réfugiés, fait l'objet d'une requête déposée séparément par la Défense, qui sollicite en substance la même mesure pour les mêmes motifs, sur laquelle la Chambre rendra une décision ce jour-même[1].

Délibération

2. Aux termes de l'article 68 (A) du Règlement, le Procureur a l'obligation de communiquer

> « tous les éléments dont il sait effectivement qu'ils sont de nature à disculper en tout ou en partie l'accusé ou à porter atteinte à la crédibilité de ses éléments de preuve à charge».

La Chambre d'appel a toujours interprété l'expression « dont il sait effectivement » comme signifiant que l'information en question doit être en la possession du Procureur[2]. En conséquence,

> « [c]'est au Procureur qu'il revient de déterminer initialement si des éléments doivent être communiqués en application de l'article 68 du Règlement. »[3] […]
>
> « C'est au Procureur qu'il revient de déterminer, sur la base des faits, quels sont les éléments qui pourraient disculper l'accusé »,

et le Procureur est censé s'acquitter de cette obligation de bonne foi[4]. Si la Défense estime que celui-ci ne s'est pas acquitté de cette obligation, elle doit : (i) indiquer avec un degré de précision raisonnable les éléments de nature à disculper l'accusé ; (ii) établir que ces éléments sont en la

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[1] Le Procureur c. Bagosora et consorts, affaire n°ICTR-98-41-T, Decision on Ntabakuze Motion for Information from the UNHCR and a Meeting With One of Its Officials, Chambre de première instance, 6 octobre 2006.

[2] *Le Procureur c. Kajelijeli*, affaire n°ICTR-98-44A-A, Arrêt, 23 mai 2005, par. 262 (« La Défense doit d'abord établir que ces pièces à convictions étaient entre les mains du Procureur » [traduction]) ; *Le Procureur c. Radoslav Brđanin*, affaire n°IT-99-36-A, Décision relative aux requêtes par lesquelles l'appelant demande que l'Accusation s'acquitte de ses obligations de communication en application de l'article 68 du Règlement et qu'une ordonnance impose au Greffier de communiquer certains documents, Chambre d'appel, 7 décembre 2004 (« il […] appartient [à l'Appelant] de soumettre à la Chambre tout commencement de preuve de nature à rendre vraisemblable le caractère disculpatoire des éléments de preuve en question ainsi que leur détention par l'Accusation. », [p. 3]) ; *Le Procureur c. Tihomir Blaskić*, affaire n°IT-95-14-A, Arrêt, 29 juillet 2004, par. 268 (la Défense doit établir que les éléments de preuve « pourraient disculper l'accusé et qu'ils sont en la possession de l'Accusation ») ; *Le Procureur c. Bagosora et consorts*, affaire n°ICTR-98-41-T, *Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses*, Chambre de première instance, 27 septembre 2005, par. 3 « une demande relative à la production de documents doit dûment préciser la nature des éléments de preuve recherchés et le fait qu'ils sont en la possession de la partie à laquelle la demande est adressée » [traduction]).

[3] *Le Procureur c. Dario Kordić et Mario Cerkez*, affaire n°IT-95-14/2-A, Décision relative à la requête de Dario Kordić aux fins de consulter les passages supprimés de l'audition du témoin AT tenue en octobre 2002, Chambre d'appel, 23 mai 2003, par. 24.

[4] Le Procureur c. Tihomir Blaskić, affaire n°IT-95-14-A, Arrêt, 29 juillet 2004, par. 264 ; Le Procureur c. Bagosora et consorts, affaire n°ICTR-98-41-T, Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses, Chambre de première instance, 27 septembre 2005, par. 3 (« une requête de production de documents doit être suffisamment précise quant à la nature des éléments de preuve recherchés et à la preuve qu'ils sont en la possession de la partie faisant l'objet de la requête » [traduction]).

possession et sous le contrôle du Procureur ; (iii) présenter un commencement de preuve accréditant l'idée que les éléments recherchés sont susceptibles de disculper l'accusé[5].

3. Le Procureur déclare qu'il n'est en possession d'aucun document appartenant à quatre des huit catégories demandées par la Défense, à savoir : les dossiers constitués sur la base de l'enquête menée par Michael Hourigan sur l'assassinat du Président Habyarimana le 6 avril 1994 ; un rapport qui aurait été présenté par M. Hourigan à Louise Arbour concernant l'assassinat du Président Habyarimana le 6 avril 1994 ; des rapports établis par des observateurs des droits de l'homme sur l'évolution démographique au Rwanda, et des documents provenant du Bureau d'urgence de l'ONU pour le Rwanda »[6]. La Défense ne le conteste pas. En l'absence de toute indication en sens contraire, la Chambre accepte cette affirmation et ne peut délivrer aucune ordonnance concernant ces quatre catégories de documents.

4. Il reste à examiner trois catégories de documents, à savoir : « les rapports établis par le Bureau des Nations Unies pour les droits de l'homme au Rwanda sur certains massacres et charniers, ainsi que des résumés et des rapports sur les événements qui se sont déroulés au Rwanda en 1994 » ; « les rapports de l'Unité spéciale d'enquête du Bureau du Procureur sur certains massacres et charniers, ainsi que les résumés et les rapports relatifs aux événements qui se sont déroulés au Rwanda en 1994 », et « les rapports hebdomadaires succincts adressés par les observateurs militaires de la MINUAR au siège à Kigali tout au long de l'année 1994 et pendant les six premiers mois de 1995 » [traduction][7]. La Défense fait valoir que ces documents viendront étayer « sa thèse, telle qu'elle est exposée dans son mémoire préalable à la présentation des moyens à décharge » [traduction] et explique en quoi les catégories décrites ci-dessus peuvent contenir des documents de nature à disculper l'accusé. Le Procureur ne nie pas avoir en sa possession des documents appartenant à ces catégories, mais il soutient que ces documents ont été examinés et que toute information éventuellement à décharge a déjà été communiquée[8].

5. La Chambre doit accepter que le Procureur a examiné de bonne foi tous les documents en sa possession et qu'il s'est acquitté de ses obligations en matière de communication. Ces catégories de documents ne sont pas spécifiques au point de rendre obligatoire la communication de toute pièce y afférente. C'est pourquoi le Procureur est obligé d'examiner, d'identifier et de communiquer tout document susceptible de disculper l'accusé. En l'absence de toute preuve en sens contraire, aucune ordonnance en vertu de l'article 68 du Règlement ne pourrait se justifier.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête.

Fait à Arusha, le 6 octobre 2006.

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[5] *Le Procureur c. Tihomir Blaskić*, affaire n°IT-95-14-A, Arrêt, 29 juillet 2004, par. 268 ; *Le Procureur c. Karemera et consorts*, affaire n°ICTR-98-44-AR73.6, Décision relative à la requête interlocutoire de Joseph Nzirorera, Chambre d'appel, 28 avril 2006, par. 13 (« Pour établir une violation de l'obligation de communication en vertu de l'article 68, la Défense doit : (i) établir qu'il existe d'autres éléments que ceux qui lui ont été communiqués et qu'ils sont en la possession du Procureur ; (ii) présenter un commencement de preuve accréditant l'idée que les éléments recherchés seraient susceptibles de disculper l'accusé »).

[6] Le Procureur c. Bagosora et consorts, affaire n°ICTR-98-41-T, Prosecutor's Response to Ntabakuze Motion for an Order Compelling the Prosecutor to Disclose Various Exculpatory Documents Pursuant to Rule 68, Chambre de première instance, 7 juin 2006, par. 3 (d), 3 (e), 3 (f) et 3 (h).

[7] Le Procureur c. Bagosora et consorts, affaire n°ICTR-98-41-T, Ntabakuze Motion for an Order Compelling the Prosecutor to Disclose Various Exculpatory Documents Pursuant to Rule 68, Chambre de première instance, par. 1.

[8] Le Procureur c. Bagosora et consorts, affaire n°ICTR-98-41-T, Prosecutor's Response to Ntabakuze Motion for an Order Compelling the Prosecutor to Disclose Various Exculpatory Documents Pursuant to Rule 68, Chambre de première instance, 7 juin 2006, par. 3 (b), 3 (c) et 3 (g).

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Décision relative à la requête tendant à faire délivrer des citations à comparaître à des fonctionnaires de l'Organisation des Nations Unies 6 octobre 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Citation à comparaître à l'encontre d'officiels de l'ONU, Responsables du Département des opérations de maintien de la paix en 1994, Ancien enquêteur du Bureau du Procureur, Précision avec laquelle le témoignage éventuel a été identifié, Observation directe des faits par le témoin : critère important dans la détermination à citer à comparaître, Informations justifiant la délivrance d'une citation à comparaître, Connaissance contemporaine aux événements d'un plan visant à commettre le génocide, Pertinence de la norme régissant l'admission d'éléments de preuve, Identité des assassins du Président Habyarimana comme élément de contexte des évènements – Nature du chef d'accusation d'entente en vue de commettre le génocide – Requête rejetée

Instrument international cité :

Règlement de Procédure et de preuve, art. 89 (C)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Gratien Kabiligi, Decision on the Defence motion Seeking Supplementary Investigations, 1er juin 2000 (ICTR-98-41) ; Chambre d'appel, Le Procureur c. Clément Kayishema, Arrêt (deuxième requête de C. Kayishema aux fins de présentation à la Chambre d'appel de nouveaux moyens de preuve à partir du mémorandum rédigé par M. Hourigan), 28 septembre 2000 (ICTR-95-1) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à l'admissibilité de la déposition envisagée du témoin DBY, 18 septembre 2003 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision sur la requête de la Défense en communication des moyens de preuve à décharge, 7 octobre 2003 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au général de division Yaache et la coopération de la République du Ghana, 23 juin 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Prosecutor's Request for a Subpoena Regarding Witness BT, 25 août 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Bagosora Defence's Request for a Subpoena Regarding Mamadou Kane, 22 octobre 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Motions for Judgement of Acquittal, 2 février 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative a la Requête de Joseph Nzirorera aux fins d'obtenir la coopération du Gouvernement français, 23 février 2005 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Motion Requesting Subpoenas to Compel the Attendance of Defence Witnesses DK 32, DK 39, DK 51, DK 52, DK 31 1 and DM 24, 26 avril 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Decision on Defence Motion for Issuance of Subpoena to Witness T, 8 février 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Casimir Bizimungu et

consorts, Reconsideration of Oral Ruling of 1 June 2005 on Evidence Relating to the Crash of the Plane Cariying President Habyarinmna, 23 février 2006 (ICTR-99-50) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A), 8 mars 2006 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Edouard Karemera et al., Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3, 12 juillet 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Request for a Subpoena for Major Jacques Biot, 14 juillet 2006 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts,Decision on Request for a Subpoena Compelling Witness DAN to Attend for Defence Cross-Examination, 31 août 2006 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Request for a Subpoena, 11 septembre 2006 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Ntabakuze Motion for Information From the UNHCR and a Meeting With One of Its Officials, 6 octobre 2006 (ICTR-98-41)

T.P.I.Y.: Chambre d'appel, Le Procureur c. Radislav Krstić, Arrêt relative à la demande d'injonction, 1er juillet 2003 (IT-98-33) ; Chambre d'appel, Le Procureur c. Sejér Halilović; Décision de la relative aux citations à comparaître, 21 Juin 2004 (IT-01-48) ; Chambre de première instance, Le Procureur c. Slobodan Milošević, *Décision relative à la demande présentée par les conseils commis d'office en vue d'obtenir l'audition et la déposition de Tony Blair et Gerhard Schröder*, 9 décembre 2005 (ICTR-02-54)

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA,

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov (la « Chambre »),

SAISI de la requête de la Défense de Ntabakuze intitulée Request for Subpoenas of Kofi Annan, Iqbal Riza, Shahayar Khan and Michael Hourigan Pursuant to Rule 54, déposée le25 août 2006,

CONSIDÉRANT les arguments déposés par la Défense de Bagosora le 5 septembre 2006, la lettre du Bureau des affaires juridiques de l'organisation des Nations Unies (la « Lettre »), datée du 7 septembre 2006, et le *mémorandum* de la Défense de Ntabakuze et ses annexes, déposés le 15 septembre 2006,

Introduction

1. La Défense de Ntabakuze demande à la Chambre de première instance d'adresser des citations à comparaître à Kofi Annan et Iqbal Riza, responsables en 1994 du Département des opérations de maintien de la paix (le « Département ») à New York, à Shaharyar Khan, nommé Représentant spécial du Secrétaire général de l'organisation des Nations Unies au Rwanda au milieu de l'année 1994, et à Michael Hourigan, un ancien enquêteur du Bureau du Procureur. Elle lui demande d'enjoindre aux trois derniers de venir déposer devant la Chambre, cependant que M. Annan se verrait seulement contraint à accepter un entretien avec la Défense.

2. Le Bureau des affaires juridiques de l'ONU a répondu à la requête en faisant valoir que la Défense restait devoir exposer les raisons de droit et de fait justifiant la comparution des témoins ou la nécessité d'un entretien avec M. Annan. Il explique qu'il a offert sa coopération entière à la Défense et qu'il reste disposé à le faire. Son opposition à la Requête

« n'est pas imputable à un refus d'aider [la Défense]: mais au fait que celle-ci ne se conforme pas aux dispositions qu'elle a déjà acceptées à maintes reprises et dont elle a à maintes reprises bénéficié »[1] [traduction].

Délibération

(i) Principes généraux

3. Celui qui demande la délivrance d'une citation à comparaître comme témoin ou d'une injonction à accepter un entretien doit s'assurer que les trois conditions suivantes sont remplies : (i) des démarches raisonnables ont été entreprises pour obtenir la coopération volontaire du témoin, (ii) le témoin éventuel possède des renseignements qui apporteront une aide sensible à la cause de la Défense sur des questions précisément identifiées et qui seront débattues au procès, (iii) la déposition du témoin est nécessaire aux fins de la conduite et de l'équité du procès[2]. Il a été dit que

> « les citations à comparaître ne sauraient être délivrées à la légère et que la Chambre devait tenir compte «non seulement [de] l'utilité des informations pour [celui qui les demande], mais aussi [de] l'obligation générale de veiller à ce que le procès soit exhaustif et équitable »[3].

La Chambre d'appel a développé ces points dans les termes que voici :

> [Celui qui sollicite la délivrance] d'une injonction doit démontrer en droit que celle-ci est nécessaire. En particulier, il doit démontrer qu'il existe des motifs raisonnables de croire que le témoin éventuel sera en mesure de donner des renseignements qui apporteront une aide sensible à sa cause sur des questions précisément identifiées et qui seront débattues au procès. Pour remplir cette condition, le [requérant] pourra être tenu de présenter des informations notamment sur le rôle joué par le témoin éventuel dans les événements considérés, les relations qu'il a pu avoir avec l'accusé et qui pourraient être en rapport avec les accusations, le fait qu'il a eu la possibilité d'observer les événements (ou d'en apprendre l'existence) et toute déclaration qu'il a faite [au Procureur] ou à d'autres sur ces événements. La Chambre de première instance jouit d'un pouvoir discrétionnaire pour déterminer si le [requérant] a bien rapporté les preuves requises, ce pouvoir étant essentiel pour veiller à ce que la mesure coercitive qu'est l'injonction ne soit pas appliquée de façon inconsidérée. Comme l'a souligné la Chambre d'appel, [les Chambres de première instance] « ne sauraient délivrer une citation à comparaître à la légère. La délivrance d'injonctions nécessite de recourir à des mesures de coercition et elle est susceptible d'entraîner l'application de sanctions pénales »[4].

Les Chambres ont tenu compte de facteurs tels que la précision avec laquelle le témoignage éventuel a été identifié et le point de savoir si les renseignements recherchés pouvaient être obtenus par d'autres moyens[5].

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[1] La lettre, p. 6.

[2] *Le Procureur c. Krstić*, affaire n°IT-98-33-A, Chambre d'appel, Arrêt relatif à la demande d'injonctions, 1er juillet 2003, par. 10 ; *Le Procureur c. Halilović*, affaire n°IT-01-48-AR73, Chambre d'appel, Décision relative à la délivrance d'injonctions, 21 juin 2004, par. 7 («Décision Halilovic ») ; *Le Procureur c. Bagosora et consorts*, Chambre de première instance, Decision on Request for a Subpoena, 11 septembre 2006, par. 5 ; *Le Procureur c. Karemera et consorts*, affaire n°ICTR-98-44-T, Chambre de première instance, *Decision on Defence Motion for Issuance of Subpoena to Witness T*, 8 février 2006, par. 4.

[3] Décision *Halilović,* par. 7.

[4] *Ibid*., par. 6.

[5] Le Procureur c. Bagosora et consorts, Chambre de première instance, Decision on Request for a Subpoena, 11 septembre 2006, par. 6 ; Le Procureur c. Karemera et consorts, Chambre de première instance, Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defince Witnesses NZ1, NZZ and NZ3, 12 juillet 2006, par. 12 ; Le Procureur c. Milosević, affaire n°IT-02-54-T, Chambre de première instance, Décision relative à la demande présentée par les conseils commis d'office en vue de leur permettre un entretien avec Tony Blair et avec Gerhard Schröder et d'obtenir que ceux-ci déposent au procès, 9 décembre 2005, par. 30 et 33.

(ii) Application

(a) Kofi Annan et Iqbal Riza

4. La Défense fait valoir qu'en tant que responsables en 1994 du Département des opérations de maintien de la paix, MM. Annan et Riza ont des informations pertinentes par rapport au procès. Ils peuvent expliquer les circonstances qui entouraient l'échange de lettres et messages entre les responsables de la MINUAR au Rwanda et le Département des opérations de maintien de la paix [le « Département »] à New York, lettres et messages dont la plupart ont déjà été admis en preuve et à propos desquels le général Roméo Dallaire et le commandant Brent Beardsley, entre autres, ont déposé. La Défense entend prouver que le Département ne possédait aucune information donnant à penser, comme l'indique l'acte d'accusation, qu'il existait, dans les mois ayant précédé avril 1994, un plan ou une entente en vue de commettre le génocide. Les témoignages de M. Annan et de M. Riza pourraient porter sur ce qu'ils ont appris du général Dallaire et d'autres responsables, sur les différentes questions énumérées dans la requête, et sur la façon dont ils comprenaient les évènements à partir de ces informations[6].

5. L'observation directe des faits par le témoin est un critère important lorsqu'il s'agit de déterminer s'il y a lieu de lui adresser une citation à comparaître. Tous les témoins qui ont reçu de telles citations en l'espèce ont pu observer personnellement le comportement des accusés ou de leurs subordonnés[7]. La Défense tente de présenter MM. Annan et Riza comme « des témoins oculaires ou des acteurs des évènements » [traduction], mais leur témoignage éventuel porterait sur des informations qu'ils ont reçues des responsables de la MINUAR au Rwanda et peut-être d'autres sources. Pour la Défense, ils sont « les seuls à pouvoir expliquer les circonstances décrites » [traduction] dans les différents mémorandums, télécopies et télégrammes chiffrés échangés entre la MINUAR et le Département a New york[8].

6. La Chambre ne considère pas MM. Annan et Riza comme des témoins oculaires. La Défense reste devoir établir que l'un ou l'autre d'entre eux pourrait fonder son témoignage sur une observation directe des faits. Certes, M. Riza se serait rendu au Rwanda en mai ou juin 1994, mais la Défense ne donne pas à entendre qu'elle souhaite l'interroger au sujet de cette visite[9]. En revanche, la présente Chambre a entendu plusieurs membres de la MINUAR qui se trouvaient sur place au Rwanda à l'époque des faits, à savoir Jacques Roger Booh-Booh, le général Dallaire, le commandant Beardsley, le lieutenant-colonel Frank Claeys, le colonel Joseph Dewez, le commandant Donald MacNeil, le colonel Aouilli Tchemi Tchambi, le commandant Petrus Maggen, le major Robert Van Putten et le lieutenant-colonel Babacar El Hadj Faye. En réalité, les télégrammes chiffrés envoyés au siège de

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[6] Requête, par. 11 à 13, 18 à 20, 24, 26 et 27.

[7] *Le Procureur c. Bagosora et consorts,* Chambre de première instance, *Decision on Request for a Subpoena,* 11 septembre 2006 (général Marcel Gatsinzi, ancien chef d'état-major de l'armée rwandaise) ; *Le Procureur c. Bagosora et consorts,* Chambre de première instance, *Decision on Request for a Subpoena Compelling Witness DAN to Attend for Defence Cross-Examination,* 31 août 2006 (témoin oculaire du comportement des militaires qui auraient été placés sous le commandement de l'accusé) ; *Le Procureur c. Bagosora et consorts,* Chambre de première instance, *Decision on Request for a Subpoena for Major Jacques Biot,* 14 juillet 2006 (observateur militaire présent à Gisenyi du 6 au 13 avril 1994) ; *Le Procureur c. Bagosora et consorts,* Chambre de première instance, *Decision on Motion Requesting Subpoenas to Compel the Attendance of Defence Witnesses DK 32, DK 39, DK 51, DK 52, DK 311 and DM 24,* 26 avril 2005 ; *Le Procureur c. Bagosora et consorts,* Chambre de première instance, *Decision on Defence's Request for a Subpoena Regarding Mamadou Kane*, 22 octobre 2004 (Conseiller politique auprès du Représentant spécial du Secrétaire général de l'organisation des Nations Unies au Rwanda de décembre 1993 à mai 1994) ; *Le Procureur c. Bagosora et consorts,* Chambre de première instance, *Decision on Prosecutor's Request for a Subpoena Regarding Witness BT,* 25 août 2004 (le *témoin* aurait surpris les propos de l'un des accusés) ; *Le Procureur c. Bagosora et consorts,* Chambre de première instance, Décision relative à la requête tendant à obtenir la délivrance d'une citation à comparaître au général de division Yaache et la coopération de la République du Ghana 23 juin 2004 (citation à comparaître comme témoin adressée au commandant de secteur de la MINUAR).

[8] Requête, par. 11.

[9] Requête, annexe 4, p. 9.

l'ONU à New York faisaient état des observations de ces témoins directs et d'autres responsables de la MINUAR en poste à Kigali à l'époque. Comparées à ces témoignages directs et de première main, les impressions des destinataires de ces rapports au Siège de l'organisation auraient une valeur limitée. Elles ne constituent donc pas des renseignements nécessaires aux fins de la conduite et de l'équité du procès.

7. Le point de vue du Département, en tant que dépositaire central des documents de la MINUAR, peut présenter un intérêt certain sous un rapport particulier, et la Défense entend faire confirmer aux témoins du Département que rien ne leur permettait de croire à l'existence d'une entente ou d'un plan visant à commettre le génocide dans la période qui a précédé le mois d'avril 1994. Toutefois, les documents déjà communiqués à la Défense par le Département, dont beaucoup ont été admis comme pièces à conviction sans que leur authenticité soit contestée, permettent, dans une large mesure, de se faire une meilleure idée des informations que le Département avait à l'époque. Dans la mesure où une confirmation supplémentaire s'avérerait nécessaire de la part des témoins, le Bureau des affaires juridiques reste disposé à coopérer avec la Défense de Ntabakuze en rédigeant une déclaration en lieu et place d'un témoignage oral[10]. Compte tenu de cette coopération qui se poursuit et de la nature des informations recherchées, la Chambre estime que la première des conditions auxquelles est subordonnée la délivrance d'une citation à comparaître, à savoir que toutes les démarches raisonnables doivent avoir été entreprises pour obtenir la coopération volontaire du témoin, n'est pas remplie. Elle ne voit donc pas la nécessité d'examiner plus avant si les informations recherchées sont suffisamment importantes pour remplir les deuxième et troisième conditions.

8. Dans ces conditions, la Chambre ne délivrera pas d'injonction à adresser que ce soit à M. Aman ou à M. Riza.

(b) Shaharyar Khan

9. La Défense demande à la Chambre de délivrer une citation à comparaître comme témoin à adresser à M. Khan, Représentant spécial du Secrétaire général à Kigali de juillet 1994 à mars 1996, relativement à une lettre de 1995 dans laquelle il écrivait que le Département et la MMAR n'avaient nullement été prévenus avant avril 1994 de l'imminence d'un génocide. Par ailleurs, M. Khan aurait dressé durant l'été 1995, la première liste des suspects devant faire l'objet d'enquêtes pour crimes de guerre, et la Défense attache de l'importance au fait que le nom de l'accusé ne figure pas sur cette liste. Enfin, selon la Défense, M. Khan aurait des informations concernant un rapport du HCR [Haut Commissariat des Nations Unies pour les réfugiés] sur les massacres allégués de réfugiés hutus[11].

10. La Chambre considère qu'aucune des informations qu'aurait M. Khan ne justifie la délivrance d'une citation à comparaître. La question que l'on pouvait avoir, à l'époque, de la connaissance d'un plan visant à commettre le génocide a été examinée dans la section précédente à propos des témoins du Département, lesquels sont mieux placés que M. Khan pour éclairer la Chambre. En effet, la Défense n'a pas soutenu que M. Khan avait la moindre connaissance de cette question autre que celle provenant de l'examen à posteriori des documents qui ont déjà été communiqués a la Défense. Le fait que l'accusé ne figure pas sur une liste de suspects dressée par M. Khan en 1995 est une preuve indirecte dont la valeur est limitée et ne justifie pas la délivrance d'une citation à comparaître. Enfin, la pertinence en l'espèce du rapport du HCR a été examinée dans une autre décision, qui a été rendue ce jour[12], et selon laquelle, l'allégation que M. Khan aurait eu connaissance de ce rapport ne peut justifier la délivrance d'une citation à comparaître.

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[10] Lettre, p. 4.
[11] Requête, par. 14 à 20.
[12] Le Procureur c. Bagosora et consorts, Chambre de première instance, Decision on Ntabakuze Motion for Information From the UNHCR and a Meeting With One of Its Officials, 6 octobre 2006 (cette décision conclut au rejet des requêtes aux fins de délivrance d'ordonnances exigeant du HCR qu'il fournisse des informations au sujet du rapport).

(c) Michael Hourigan

11. Selon la Défense, M. Hourigan, un ancien enquêteur du Bureau du Procureur, pourrait déposer à propos de son enquête sur l'écrasement de l'avion présidentiel abattu dans la nuit du 6 avril 1994[13].

12. L'acte d'accusation n'impute la responsabilité de l'attentat contre l'avion présidentiel à aucun des accusés ou de ceux avec lesquels ils se seraient entendus. Le paragraphe [6.1] se borne à cette formulation neutre :

> « Le 6 avril 1994, vers 20 h 30, l'avion ayant à son bord, entre autres passagers, le Président Juvénal Habyarimana, Président de la République rwandaise, a été abattu peu avant son atterrissage à l'aéroport de Kigali, Rwanda ».

Cet évènement est considéré comme le fait qui a déclenché les massacres qui ont suivi, mais à la différence de ce qui est dit dans d'autres passages de l'acte d'accusation, aucune participation des accusés n'y est alléguée, pas plus que le Procureur n'a produit, lors de la présentation des moyens à charge, des éléments de preuve établissant la responsabilité des accusés dans cet assassinat. La seule allusion à pareille responsabilité a été faite par le Procureur durant le contre-interrogatoire de l'accusé Bagosora auquel il a demandé de but en blanc s'il avait pris part à l'attentat contre l'avion présidentiel. Il a précisé par la suite dans sa réponse à une requête distincte déposée par la Défense de Bagosora, que sa question visait uniquement à contester la crédibilité du témoin, celui-ci ayant lui-même soulevé durant l'interrogatoire principal le problème de la responsabilité de l'attentat. Le Procureur n'a pas laissé entendre, comme il l'a, du reste, expressément déclaré, qu'il tenait les accusés pénalement responsables de l'assassinat du président[14].

13. Aucune charge n'a été portée contre les accusés relativement à l'attentat contre l'avion présidentiel, mais la Défense soutient que la question de la responsabilité de cet attentat est néanmoins pertinente en l'espèce. À ses yeux, l'assassinat du Président Habyarimana a été

> « l'amorce de "l'offensive décisive" lancée par l'APR pour s'emparer du pouvoir et qui a déclenché en manière de représailles, comme on s'y attendait, les massacres de civils ... au lieu d'être le fruit d'un quelconque "plan" ou "complot" ourdi par une armée ... qui n'avait les moyens ni de repousser l'offensive lancée par l'APR ni d'arrêter les massacres pressentis, perpétrés par des civils contre d'autres civils »[15] [traduction].

14. La pertinence en droit, en tant que norme régissant l'admission d'éléments de preuve, est définie en ces termes par l'article 89 (C) du Règlement de procédure et de preuve : « La Chambre peut recevoir tout élément de preuve pertinent dont elle estime qu'il a valeur probante ».

Cet article implique les trois critères que voici :

> En premier lieu, l'élément de preuve doit d'une certaine manière se rattacher à un élément constitutif d'un crime imputé à l'accusé. En deuxième lieu, l'élément de preuve doit revêtir une certaine valeur pour établir les éléments constitutifs d'un crime imputé à un accusé. En faisant mention et de la « valeur probante » et du fait que la Chambre doit « estime[r] » que l'élément de preuve à cette qualité, l'article donne à entendre que la valeur probante est un obstacle d'une nature différente et plus complexe que la pertinence. En troisième lieu, même lorsque ces trois critères sont réunis, l'article n'impose pas à la Chambre de recevoir un tel élément de preuve, mais dispose seulement qu'elle peut le faire. [par. 4]

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[13] Requête, par. 21 à 24.
[14] Réponse du Procureur à la requête intitulée, Bagosora Defence Urgent Motion for Investigation and Production of (Additional) Evidence ..., etc., déposée le 19 décembre 2005.
[15] Requête, par. 22.

> La valeur probante ... a été décrite tout simplement comme « un élément qui tend à prouver un point litigieux » et se confond parfois avec la notion de pertinence : « Pour qu'un fait soit pertinent par rapport à un autre, il doit exister entre eux une connexion ou un lien qui permette d'inférer l'existence de l'un de celle de l'autre. Un fait n'est pas pertinent vis-à-vis d'un autre s'il n'a pas de valeur probante réelle vis-à-vis de ce dernier ». [par. 15]
>
> ...
>
> La pertinence, la valeur probante et même le préjudice sont autant de notions apparentées. La teneur des faits allégués doit être définie et ensuite évaluée par rapport à leur valeur éventuelle en tant que preuve de l'existence d'un crime tel qu'il est décrit dans l'acte d'accusation. La nature de cette évaluation explique le pouvoir d'appréciation que l'article 89 (C) du Règlement confère à la Chambre de première instance[16] [par. 18]

La Défense soutient que le FPR est responsable de l'attentat contre l'avion présidentiel abattu dans la nuit du 6 avril 1994. La question qui se pose est de savoir si ce fait, même s'il était avéré, pourrait aider à contester la réalité d'un quelconque des éléments constitutifs d'un quelconque des crimes imputés à l'accusé en l'espèce.

15. L'accusation d'entente portée contre les accusés ne concerne pas l'attentat du 6 avril 1994 contre l'avion présidentiel. Dans sa décision relative aux requêtes en acquittement formées par la Défense après la présentation des moyens à charge, la Chambre a ainsi résumé la nature de cette accusation :

> Le Procureur affirme que les relations que les accusés entretenaient entre eux au sein de l'armée en tant qu'officiers supérieurs plantent le décor de ce qui semble être une série d'actions coordonnées, voire communes : adoption de la définition de l'ennemi, définition dont on peut penser qu'elle a pris pour cibles les civils tutsis; le fait que les accusés ont propagé cette définition à travers les rangs de l'armée; le fait que les quatre accusés aient fort curieusement répété cette définition à différentes occasions; soutien apporté aux *Interahamwe* en utilisant les ressources de l'armée; enfin, témoignages directs selon lesquels certains des accusés se sont trouvés ensemble à diverses occasions au cours d'un ou plusieurs, faits – discours, établissement des listes, ordre de tuer – autant d'actes qui ont sans doute encouragé la commission du génocide[17] .

Le fait, à supposer qu'il soit établi, que d'autres que l'accusé ou ceux qui se seraient entendus avec lui aient participé à l'attentat contre l'avion présidentiel ne rend pas moins vraisemblable aucune de ces allégations.

16. Pareillement, la responsabilité de l'assassinat du Président Habyarimana n'a aucun rapport avec les infractions qui auraient été commises par l'accusé et ses subordonnés après le 6 avril 1994. La culpabilité des auteurs de ces crimes ne saurait être atténuée au motif qu'une personne autre que l'accusé a créé les conditions qui ont conduit à la commission desdits crimes. Dans un cas similaire, la présente Chambre s'est exprimée dans les termes que voici :

> Des descriptions de crimes commis par les troupes du FPR contre la population civile dans des régions éloignées des combats opposant les deux armées en 1994 ne sauraient laisser croire à l'innocence des accusés ou atténuer leur culpabilité. L'impact de ces faits sur le comportement criminel de l'accusé est trop vague et indirect. La Défense n'a pas établi que cet élément d'information pourrait contribuer à réfuter la réalité d'un quelconque des éléments constitutifs

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[16] *Le Procureur c. Bagosora et consorts*, Chambre de première instance, Décision relative à l'admissibilité de la déposition envisagée du témoin DBY, 18 septembre 2003, par. 4, 15 et 18 (renvoi à la note en bas de page omis).
[17] *Le Procureur c. Bagosora et consorts*, Chambre de première instance, Décision relative aux requêtes de la Défense demandant l'acquittement des accusés, 2 février 2005, par. [16].

des infractions imputées aux accusés, ni en quoi il pourrait légitimement excuser ou justifier leur comportement[18] [traduction].

Ceci dit, la Défense a parfaitement le droit de faire des offres de preuve concernant le conflit armé avec le FPR, le poids relatif des forces en présence et les circonstances qui ont entouré la commission des crimes imputés à l'accusé.

17. L'identité des assassins du Président Habyarimana est incontestablement une question qui a son importance pour comprendre le contexte des évènements décrits dans l'acte d'accusation dressé contre l'accusé. Sur cette base, la Chambre a admis certains éléments de preuve qui s'y rapportent. Parallèlement, la Chambre doit exercer le pouvoir d'appréciation que lui reconnaît l'article 89 (C) du Règlement afin de veiller à maintenir le cap en l'espèce. L'admission d'éléments de preuve détaillés portant sur ce qui relève essentiellement de la pertinence indirecte et secondaire n'est pas susceptible d'aider la Chambre à se prononcer sur les questions qui sont au cœur même de l'affaire.

18. La Défense n'a pas établi que le témoin éventuel possédait des renseignements qui apporteraient une aide sensible à la cause de la Défense sur des questions précisément identifiées et qui seront débattues au procès ou que la déposition du témoin était nécessaire aux fins de la conduite et de l'équité du procès[19]. Aucune citation à comparaître ne sera donc adressée à M. Hourigan.

PAR CES MOTIFS, LE TRIBUNAL

REJETTE la requête.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[18] Le Procureur c. Bagosora et consorts, Chambre de première instance, Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A), 8 mars 2006, par. 7.

[19] Cette même position a été adoptée dans de nombreuses décisions relatives à des accusations similaires : Décision *Kayishema,* Chambre d'appel, 28 septembre 2000, p. 3 *(Considérant qu'au soutien de sa demande le Requérant affirme que le Mémorandum Hourigan donne des indications sur les auteurs présumés de l'attentat contre l'avion du Président rwandais ; que le Procureur du Tribunal de l'époque a cru devoir arrêter les enquêtes menées à ce sujet par M. Hourigan ; que ces faits, qui n'étaient pas connus lors du procès du Requérant, rouvriraient le débat sur la question de la culpabilité de celui-ci ; Considérant que le Mémorandum Hourigan n'était bien entendu pas disponible lors du procès en première instance, mais que sa teneur, que le Requérant cite, ne pouvait avoir un rapport avec les questions relatives au génocide sur lesquelles la Chambre de première instance devait se prononcer ; qu'il n'est pas dès lors dans l'intérêt de la justice de l'admettre comme moyen de prévue supplémentaire en appel)* ; *Le Procureur c. Bizimungu et consorts,* Chambre de première instance, *Reconsideration of Oral Ruling of 1 June 2005 on Evidence Relating to the Crash of the Plane Cariying President Habyarimana,* 23 février 2006, par. 10 et 11 *(La responsabilité éventuelle du FPR ou d'autres forces opposées au Gouvernement rwandais ne saurait décharger les accusés de leur responsabilité pour les crimes qui leur ont été imputés. La Chambre est d'avis que des éléments de preuve établissant la responsabilité des auteurs de l'attentat contre l'avion présidentiel ne sont pas susceptibles de l'aider à se prononcer sur la culpabilité ou l'innocence des accusés ... Il ressort de la jurisprudence du Tribunal qu'un témoin peut être interrogé sur la responsabilité de l'attentat contre l'avion présidentiel,* à *condition que les questions n'entrent pas dans le menu détail* [traduction]) ; *Le Procureur c. Karemera et consorts,* Chambre de première instance, *Décision relative à la Requête de Joseph Nzirorera aux fins d'obtenir la coopération du Gouvernement français,* 23 février 2005, par. 11 (rejet d'une requête priant la Chambre de demander au Gouvernement français de communiquer à la Défense un rapport sur les auteurs de l'attentat contre l'avion présidentiel) ; *Le Procureur c. Karemera et consorts,* Chambre de première instance, *Décision sur la requête de la Défense en communication de moyens de preuve à décharge,* 7 octobre 2003, par. [15] (« *[l]a Défense n'a pas démontré dans quelle mesure ces rapports et documents, s'ils existent, pourraient faire croire à l'innocence de l'accusé, lequel n'est pas poursuivi pour sa participation à l'assassinat, ni comment ils pourraient tendre à atténuer la culpabilité personnelle de l'accusé ou porter atteinte a la crédibilité des moyens à charge* ») ; *Le Procureur c. Kabiligi,* Chambre de première instance, *Decision on the Defence motion Seeking Supplementary Investigations,* 1er juin 2000, par. 19, *(La Défense n'a pas établi l'existence d'un lien causal entre les enquêtes demandées au sujet de la responsabilité de l'attentat contre l'avion présidentiel et les actes et omissions qui fondent les charges portées contre Kabiligi dans l'acte d'accusation* [traduction]).

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Décision relative à la requête de Ntabakuze aux fins d'obtenir communication de documents du HCR et un entretien avec l'un de ses fonctionnaires 6 octobre 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Aloys Ntabakuze – Requête aux fins d'obtenir communication de preuve à décharge, Pas de base pour contraindre le Procureur à examiner et à obtenir des informations ne se trouvant pas en sa possession – Coopération des organisations internationales, HCR, Invocation générale de la pertinence d'un document ne suffit pas à justifier la délivrance d'une ordonnance – Requête rejetée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 68 (A) ; Statut, art. 28

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Ignace Bagilishema, Décision sur la requête de la défense pour que la chambre ordonne au Procureur de communiquer les aveux de culpabilité des témoins Y, Z et AA, 8 juin 2000 (ICTR-95-1) ; Chambre de première instance, Le Procureur c. Gérard et Elizaphan Ntakirutimana, Request for Cooperation (United Nations High Commissioner for Refugees), 18 décembre 2001 (ICTR-96-10) ; Chambre de première instance, Le Procureur c. Juvénal Kajelijeli, Décision sur la requête de Kajelijeli en extension de la coopération judiciaire à certains États conformément à l'article 28 du Statut du Tribunal, 9 mai 2002 (ICTR-98-44A) ; Chambre de première instance, Le Procureur c. Jean de Dieu Kamuhanda, Décision relative aux requêtes de Kamuhanda aux fins de coopération de certains États et du HCR en application de l'article 28 du Statut et de la résolution 955 du Conseil de sécurité, 9 mai 2002 (ICTR-99-54) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative à la requête de la Défense aux fins de faire injonction au Département des Opérations de maintien de la paix des Nations Unies de produire certains documents, 9 mars 2004 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, 10 mars 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Pauline Nyiramasuhuko et consorts, Décision relative à la requête de la Défense tendant à l'obtention de la coopération et de l'assistance judiciaire d'un État et du HCR en vertu de l'article 28 du Statut et des résolutions 955 (1994) et 1165 (1998) du Conseil de sécurité, 25 août 2004 (ICTR-98-42) ; Chambre de première instance, Le Procureur c. Aloys Simba, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68, 4 octobre 2004 (ICTR-2001-76) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Demande de coopération et d'assistance adressée à la République française en vertu de l'article 28 du Statut, 22 octobre 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative à la requête de Joseph Nzirorera aux fins de solliciter la coopération d'un gouvernement, 19 avril 2005 (ICTR-98-44) ; Chambre d'appel, Le Procureur c. Juvénal Kajelijeli, Arrêt, 23 mai 2005 (ICTR-98-44A) ; Chambre de première instance, Le Procureur c. Augustin Ndindiliyimana, Décision relative à la requête de Nzuwonemeye intitulée Motion Requesting the Cooperation from the Government of Ghana Pursuant to Article 28 of the Statute, 13 février 2006 (ICTR-2000-56)

T.P.I.Y. : Chambre d'appel, Le Procureur c. Tihomir Blaškić, Arrêt relatif à la Requête de la République de Croatie aux fins d'examen de la Décision de la Chambre de première instance II du 18

juillet 1997, 29 octobre 1997 (IT-95-14) ; Chambre de première instance, Le Procureur c. Blagoje Simić, http://www.icty.org/x/cases/simic/tdec/fr/01018JA514097.htm*Décision relative à la Requête aux fins d'Assistance judiciaire de la part de la SFOR et d'autres Entités*, 18 octobre 2000 (IT-95-9) ; Chambre d'appel, Le Procureur c. Tihomir Blaškić, Jugement, 29 juillet 2004 (IT-95-14) ; Chambre de première instance, Le Procureur c. Radoslav Brđanin, Décision relative aux requêtes par lesquelles l'appelant demande que l'accusation s'acquitte de ses obligations de communication en application de l'article 68 du Règlement et qu'une ordonnance impose au Greffier de communiquer certains documents, 7 décembre 2004 (IT-99-36)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIÉGEANT en la Chambre de première instance I composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI de la requête de Ntabakuze intitulée « *Strictly Confidential Ntabakuze Motion for an Order Compelling the Prosecutor to Disclose Exculpatory Information […]* », déposée le 14 juillet 2006 (la « Requête spécifique »), et, en partie, de la requête intitulée « *Ntabakuze Motion for an Order Compelling the Prosecutor to Disclose Various Exculpatory Documents Pursuant to Rule 68* », déposée le 2 juin 2006 (la « Requête générale »),

VU la réponse du Procureur, déposée le 7 juin 2006, la requête intitulée « *Strictly Confidential Ntabakuze Request for a Timely Decision [...]* », déposée le 28 août 2006, le *mémorandum* intitulé « *Ntabakuze* Memorandum *and Annexes Related to Submissions Made in Court on 13 September 2006* », déposé le 15 septembre 2006, et la requête intitulée « *Extremely Urgent Second Ntabakuze Request for a Timely Decision [...]* », déposée le 18 septembre 2006,

STATUE sur la requête.

Introduction

1. La Défense de Ntabakuze demande à la Chambre : (i) d'enjoindre au Procureur, en vertu de l'article 68 (A) du Règlement de procédure et de preuve (le « Règlement »), d'obtenir du Haut Commissariat des Nations Unies pour les réfugiés (le « HCR ») des rapports « relatifs aux événements survenus au Rwanda en 1994 [traduction] », notamment ceux établis par un fonctionnaire du HCR nommé Robert Gersony, et (ii) d'enjoindre au HCR, en vertu de l'article 28 du Statut, de lui permettre d'avoir un entretien avec M. Gersony en vue de l'appeler à la barre[1]. Subsidiairement, elle prie la Chambre d'adresser à celui-ci une injonction de comparaître lui prescrivant de rencontrer la Défense de Ntabakuze, de communiquer les documents du HCR en question et de comparaître devant la Chambre[2].

2. Le Procureur répond qu'il a déjà communiqué à la Défense un document du HCR intitulé « *Summary of UNHCR Presentation Before Commission of Experts, 10 October 1994* »[3].

Délibération

(i) Demande de communication d'éléments de preuve à décharge en vertu de l'article 68 (A) du Règlement

3. Selon l'article 68 (A) du Règlement, le Procureur a l'obligation de communiquer

[1] Requête spécifique, p. 11 et 12 ; Requête générale, p. 7.
[2] Requête spécifique, p. 12.
[3] Réponse du Procureur, par. 3 (c).

« tous les éléments dont il sait effectivement qu'ils sont de nature à disculper en tout ou en partie l'accusé ou à porter atteinte à la crédibilité de ses éléments de preuve à charge ».

D'après la jurisprudence constante de la Chambre d'appel, pour que le Procureur « sa[che] effectivement », il faut qu'il soit en possession de l'information recherchée[4]. Les dispositions de l'article 68 n'autorisent pas à contraindre le Procureur à examiner et à obtenir des informations d'autres sources[5]. Rien n'oblige donc celui-ci à faire des recherches auprès du HCR et à obtenir de cette institution, ou de toute autre source, des éléments de preuve à décharge.

4. Le Procureur affirme avoir communiqué à la Défense un document du HCR, donnant ainsi à entendre qu'il s'est acquitté de toutes ses obligations au titre de l'article 68. Il est présumé s'en être acquitté de bonne foi[6]. À défaut de preuve contraire, la requête est rejetée.

(ii) Ordonnance adressée au HCR en vertu de l'article 28 du Statut

5. L'article 28 du Statut fait obligation aux États de

« collabore[r] avec le Tribunal international pour le Rwanda à la recherche et au jugement des personnes accusées d'avoir commis des violations graves du droit international humanitaire ».

Une demande d'assistance telle que celle sollicitée par la Défense peut être adressée aussi bien à une organisation internationale qu'à des États particuliers[7]. De fait, le HCR a, par le passé, fait l'objet de plusieurs ordonnances similaires émanant du Tribunal de céans[8].

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[4] Arrêt *Kajelijeli*, 23 mai 2005, par. 262 (« [L]a Défense doit d'abord établir que les éléments de preuve en question se trouvent en la possession du Procureur ») ; affaire *Brdanin*, Décision relative aux requêtes par lesquelles l'appelant demande que l'Accusation s'acquitte de ses obligations de communication en application de l'article 68 du Règlement et qu'une ordonnance impose au Greffier de communiquer certains documents (Chambre d'appel), 7 décembre 2004 (« il [...] appartient [au demandeur] de soumettre à la Chambre tout commencement de preuve de nature à rendre vraisemblable le caractère disculpatoire des éléments de preuve en question ainsi que leur détention par l'Accusation ») ; affaire *Blaskić*, arrêt, 29 juillet 2004, par. 268 (le demandeur doit établir que les éléments en question « pourraient disculper l'accusé et qu'ils sont en la possession de l'Accusation ») ; affaire *Bagosora et consorts*, Décision concernant la communication de pièces relatives aux déclarations des témoins à décharge recueillies par les services d'immigration (Chambre de première instance), 27 septembre 2005, par. 3 (« une demande de production de documents doit indiquer avec suffisamment de précision la nature de l'élément de preuve recherché qui doit être en la possession de la personne à qui s'adresse la requête »).

[5] Affaire *Simba*, *Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68* (Chambre de première instance), par. 8 (« Les obligations de communication que le Statut et le Règlement mettent à la charge du Procureur ne vont pas jusqu'à le contraindre à explorer toutes les voies possibles pour chercher à déterminer la crédibilité d'un témoin pour le compte de la Défense » [traduction]) ; affaire *Bagilishema*, Décision sur la requête de la Défense pour que la Chambre ordonne au Procureur de communiquer les aveux de culpabilité des témoins Y, Z, et AA (Chambre de première instance), 8 juin 2000, par. 6 (« Une interprétation littérale [de l'article 68 (A)] pourrait suggérer qu'il suffirait au Procureur de savoir qu'une tierce partie détient des moyens de preuve à décharge pour voir sa responsabilité engagée aux termes dudit article. Mais retenir une telle interprétation reviendrait, en poussant les choses à l'extrême, à ouvrir la porte à d'innombrables requêtes déposées aux seules fins de forcer le Procureur à l'investigation et à la communication d'éléments dont les requérants estimeraient qu'il a "connaissance". Telle situation contreviendrait à l'article 15 du Statut [qui consacre l'indépendance du Procureur] »).

[6] Arrêt *Blaskić*, 29 juillet 2004, par. 264 ; affaire *Karemera et consorts*, Décision relative à l'appel interlocutoire de Joseph Nzirorera (Chambre d'appel), 28 avril 2006, par. 17 (« La Chambre de première instance est en droit de considérer que le Procureur s'acquitte de ses obligations de bonne foi ») ; affaire *Brdanin*, Décision relative aux requêtes par lesquelles l'appelant demande que l'Accusation s'acquitte de ses obligations de communication en application de l'article 68 du Règlement et qu'une ordonnance impose au Greffier de communiquer certains documents (Chambre d'appel), 7 décembre 2004 (où il est dit qu'une Chambre « doit présumer que l'Accusation agit de bonne foi » lorsqu'il remplit ses obligations).

[7] Affaire *Blaskić*, Arrêt relatif à la requête de la République de Croatie aux fins d'examen de la décision de la Chambre de première instance II rendue le 18 juillet 1997, 29 octobre 1997, par. 50, note de bas de page 68 (où il est dit qu'une injonction de produire ne devrait pas être adressée au responsable d'une organisation internationale dans le but d'obtenir un document de ladite organisation ; « [i]l semblerait plus judicieux de s'adresser à l'organisation internationale au nom de laquelle [celui-ci] devait produire le document ») ; affaire *Karemera et consorts*, Décision relative à la requête de la Défense aux fins de faire injonction au Département des Opérations de maintien de la paix des Nations Unies de produire certains documents (Chambre de première instance), 9 mars 2004, par. 9 à 19 ; affaire *Simić et consorts*, Décision relative à la requête aux fins d'assistance judiciaire de la part de la SFOR et d'autres entités (Chambre de première instance), par. 46 à 49.

6. Pour que la Chambre rende une ordonnance sur le fondement de l'article 28 du Statut, trois conditions doivent être réunies : (i) il faut déterminer avec un degré raisonnable de précision la nature des informations recherchées ; (ii) il faut démontrer que ces informations sont pertinentes par rapport au procès ; (iii) il faut établir que des efforts raisonnables ont été faits pour obtenir les informations sans l'intervention de la Chambre[9]. Selon la deuxième condition, celle de la pertinence, le demandeur doit démontrer que les informations recherchées sont pertinentes pour la question dont le juge, ou la Chambre de première instance, est saisi et qu'elles sont nécessaires à un règlement équitable de celle-ci[10].

7. La Défense demande que soit délivrée une injonction lui permettant d'interroger Robert Gersony[11]. On peut supposer, bien que ce ne soit pas explicite, qu'elle demande aussi communication de tous rapports ou documents établis par M. Gersony et ses collègues. Celui-ci aurait connaissance de massacres de civils hutus perpétrés « par le FPR pendant l'invasion, et [du fait] que ces massacres participaient d'une politique délibérée [traduction] »[12]. La Défense affirme que le « FPR est responsable de massacres de civils qui ont été perpétrés dans l'est du pays et dont la responsabilité est attribuée à l'accusé [traduction] »[13]. Plus généralement, elle soutient que :

> Dans la mesure où l'on peut démontrer que les massacres pour lesquels le Procureur entend retenir la responsabilité de l'accusé n'ont pas été perpétrés ou ont résulté, directement ou indirectement, d'une stratégie de guerre délibérée du FPR, la responsabilité potentielle de l'accusé s'en trouve atténuée sur tous les plans, notamment en ce qui concerne l'entente en vue de commettre le génocide, la planification, les crimes de guerre, etc. [traduction][14].

8. Les documents présentés par la Défense donnent à penser que M. Gersony ne se trouvait pas au Rwanda avant août 1994. Ses enquêtes semblent n'avoir porté que sur le traitement des réfugiés hutus lorsque ceux-ci rentraient chez eux, au lendemain de la guerre entre les forces gouvernementales et le

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[8] Affaire *Nyiramasuhuko et consorts*, Décision relative à la requête de la Défense tendant à l'obtention de la coopération et de l'assistance judiciaire d'un État et du HCR en vertu de l'article 28 du Statut et des résolutions 955 (1994) et 1165 (1998) du Conseil de sécurité, (Chambre de première instance), 25 août 2004 ; affaire *Kajelijeli*, Décision sur la requête de Kajelijeli en extension de la coopération judiciaire à certains États conformément à l'article 28 du Statut du Tribunal (Chambre de première instance), 9 mai 2002 ; affaire *Kamuhanda*, Décision relative aux requêtes de Kamuhanda aux fins de coopération de certains États et du HCR en application de l'article 28 du Statut et de la résolution 955 du Conseil de sécurité (Chambre de première instance), 9 mai 2002 ; affaire *Ntakirutimana*, *Request for Cooperation (United Nations High Commissioner for Refugees)* (Chambre de première instance), 18 décembre 2001.

[9] Affaire Bagosora et consorts, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (Chambre de première instance), 10 mars 2004.

[10] D'une instance à l'autre, la question de la pertinence n'a pas toujours été formulée exactement dans les mêmes termes. Certaines décisions, en particulier lorsque la pertinence des informations recherchées est évidente, se contentent de rappeler que le demandeur doit indiquer sa « pertinence par rapport à l'espèce ». Affaire *Ndindiliyimana et consorts*, Décision relative à la requête de Nzuwonemeye intitulée *Motion Requesting the Cooperation from the Government of Ghana Pursuant to Article 28 of the Statute* (Chambre de première instance), 13 février 2006, par. 6 ; affaire *Bagosora et consorts*, Demande de coopération et d'assistance adressée à la République française en vertu de l'article 28 du Statut (Chambre de première instance), 22 octobre 2004, par. 3. Toutefois, lorsque la pertinence des informations est contestée, il doit être démontré que celles-ci sont « pertinentes à la question dont le juge, ou la Chambre de première instance, est saisi et qu'elles sont nécessaires à un règlement équitable » de celle-ci. Affaire *Karemera et consorts*, Décision relative à la requête de Joseph Nzirorera aux fins de solliciter la coopération d'un gouvernement (Chambre de première instance), 19 avril 2005, par. 8. Ces termes reflètent le critère consacré à l'article 54 *bis* du Règlement de procédure et de preuve du TPIY, qui prévoit précisément les conditions et les modalités de délivrance d'ordonnances aux États en vertu de l'article 29 du Statut du TPIY. La Chambre estime que ce critère est approprié. La condition selon laquelle l'information recherchée doit être « nécessaire à un règlement équitable » de la question dont la Chambre est saisie, témoigne du souci légitime d'éviter que les États et les organisations internationales soient assaillis de nombreuses demandes d'informations au seul motif que les informations recherchées sont pertinentes, critère susceptible d'ouvrir indûment la porte à d'innombrables requêtes. Par ailleurs, il s'agit là d'un domaine où il serait souhaitable que les tribunaux internationaux appliquent le même critère.

[11] Requête spécifique, p. 11.

[12] *Ibid*., par. 17.

[13] *Ibid*., par. 18.

[14] Id.

Front patriotique rwandais[15]. En l'occurrence, l'argument de la Défense selon lequel les massacres « dont la responsabilité est attribuée à l'accusé » font partie des faits dont M. Gersony a connaissance, est surprenant. Tout indique au contraire que les informations en la possession de M. Gersony concernent des événements survenus après le départ de toutes les troupes que l'accusé pouvait avoir sous son commandement. À cet égard, la Chambre rappelle la décision qu'elle a rendue précédemment au sujet d'informations détenues par le Procureur, relatives à la conduite présumée du FPR :

> La description des crimes commis contre des civils par le FPR, dans des zones géographiques physiquement éloignées du théâtre des combats entre les forces armées adverses en 1994, ne sont pas de nature à disculper en tout ou en partie les accusés. L'impact de tels faits sur le comportement criminel reproché à ceux-ci est trop lointain et indirect. La Défense n'a pas démontré que de telles informations aideraient à réfuter l'un quelconque des éléments constitutifs des crimes qui leur sont imputés, ni indiqué dans quelle mesure elles pourraient constituer une excuse ou une justification valable pour les actes qui leur sont reprochés. De l'avis de la Chambre, les différentes utilisations que l'on peut faire de ces informations, telles que proposées par la Défense, ne sont pas disculpatoires [traduction][16].

Invoquer d'une manière générale la pertinence ne suffit pas à justifier la délivrance d'une ordonnance au titre de l'article 28 du Statut. Si la Défense ne peut établir expressément dans quelle mesure des aspects quelconques des informations détenues par M. Gersony se rapportent aux questions en litige en l'espèce et sont, par ailleurs, « nécessaires à un règlement équitable » de ces questions, le critère de la pertinence n'aura pas été satisfait. Aucune ordonnance n'est alors justifiée en vertu de l'article 28.

(iii) Demande de délivrance d'une injonction de comparaître adressée à M. Gersony

9. Celui qui demande la délivrance d'une injonction de comparaître doit démontrer (i) que des efforts raisonnables ont été faits pour obtenir la coopération volontaire du témoin, (ii) que la déposition du témoin apportera une aide sensible à sa cause sur des questions précisément identifiées, et (iii) que la déposition du témoin est nécessaire et pertinente pour la conduite et l'équité du procès[17]. Pour les motifs exposés dans le paragraphe précédent, ni la deuxième, ni la troisième condition ne sont satisfaites.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête.

Arusha, le 6 octobre 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[15] Requête spécifique, annexe 5, p. 1 et 2 (Télégramme codé adressé à Annan par Shaharyar Khan, 14 octobre 1994).
[16] Affaire Bagosora et consorts, Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A) (Chambre de première instance), 8 mars 2006, par. 7. La décision porte sur la communication en vertu de l'article 68 (A) du Règlement, mais les principes généraux qui y sont énoncés sont tout aussi valables pour les questions de pertinence.
[17] Affaire *Halilović*, Décision relative à la délivrance d'injonctions (Chambre d'appel), 21 juin 2004, par. 6 ; affaire *Bagosora et consorts, Decision on Request for a Subpoena* (Chambre de première instance), 11 septembre 2006, par. 5.

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Décision relative à la requête de la défense intitulée « Motion to request the Testimony of Witnesses YUL-39 and LAX-23 To Be Heard via Video-Link and the entirety of the testimony of Witness LAX-23 in Closed Session » 19 octobre 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Gratien Kabiligi – Témoignage à huis clos, Témoignage par vidéo-Conférence, Intérêts de la justice, Démonstration du fait que le témoin dispose d'une raison valable pour refuser de venir témoigner au Tribunal, Témoin craignant d'être l'objet d'un mandat d'arrêt international délivré sur l'ordre du Gouvernement rwandais, Témoin occupant un poste important dans l'administration sous l'ancien Gouvernement rwandais – Requête partiellement acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 54 and 75

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Ferdinand Nahimana et consorts, Décision sur la requête du Procureur aux fins d'ajouter le témoin X à sa liste de témoins et de se voir accorder des mesures de protection, 14 septembre 2001 (ICTR-99-52) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 octobre 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la déposition par vidéo-conférence du témoin Amadou Deme, 29 août 2006 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la requête de la Défense de Kabiligi intitulée Motion to Request the Testimony of Kabiligi Witnesses KX-38 and KVB-46 Via Video-Link, 5 octobre 2006 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Requests to Hear Testimony in Closed Session, 18 octobre 2006 (ICTR-98-41)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI de la requête intitulée « Motion to Request the Testimony of Witnesses YUL-39 and LA.-23 to be Heard Via Video-Link and the Entireîy of the Testimony of Witness LAX-23 in Closed Session », déposée par la Défense de Kabiligi le 12 octobre 2006,

STATUE sur ladite requête.

Introduction

1. La Défense de Kabiligi demande que le témoin WL-39 et le témoin LAX-23 soient autorisés à déposer par vidéoconférence. Les deux témoins craignent de compromettre leur sécurité en quittant le pays où ils résident actuellement, car ils étaient tous deux des personnalités en vue de l'ancien Gouvernement rwandais. Ils croient qu'ils s'exposent à être arrêtés en cours de route ou qu'ils pourraient être pris pour cible par des tueurs.

Délibération

2. La déposition par vidéoconférence peut être ordonnée conformément à l'article 54 du Règlement de procédure et de preuve [le « Règlement »], au motif que l'intérêt de la justice le commande, ou comme une mesure de protection du témoin prise en vertu de l'article 75, qui exige que la vidéoconférence soit « nécessaire pour protéger [...] la sécurité du témoin »[1]. Pour déterminer si le recueil de la déposition d'un témoin par vidéoconférence est dans l'intérêt de la justice et rendre une ordonnance en vertu de l'article 54 du Règlement, il faut tenir compte de trois facteurs : l'importance de la déposition, l'incapacité pour le témoin de comparaître ou son refus de le faire, et la raison qui aura été avancée pour justifier ce refus ou cette incapacité[2]. Il n'est pas absolument nécessaire de justifier le refus de manière objective, mais il faut à tout le moins établir que le témoin se fonde sur des motifs crédibles et que ceux-ci sont sincères[3].

3. Le témoin WL-39 refuse de se rendre à Arusha au motif qu'il pourrait faire l'objet d'un mandat d'arrêt international délivré sur l'ordre du Gouvernement rwandais. Il croit qu'il risque d'être arrêté sur le territoire d'un pays par lequel il serait obligé de transiter pour se rendre en Tanzanie à partir du pays où il réside actuellement. Les documents figurant dans l'annexe confidentielle unilatérale jointe à la requête établissent non seulement que le témoin redoute sincèrement cette possibilité, mais aussi que cette crainte pourrait être fondée. Le témoin serait en mesure de décrire les attributions et fonctions du bureau du G3, et de contredire directement la déposition du témoin à charge XXQ en ce qui concerne les événements de Ruhengeri.

4. Le témoin LAX-23 occupait un poste important dans l'administration sous l'ancien Gouvernement rwandais. Selon la requête, il est persuadé que son nom figure sur une liste de personnes à assassiner. La liste en question comporte le nom d'au moins une personne qui aurait été assassinée au Kenya en 1998[4]. Le témoin connaîtrait de première main la date du retour de l'accusé au Rwanda en avril 1994 et peut, de ce fait, fournir des éléments de preuve importants à l'appui de l'alibi invoqué par l'accusé.

5. La Défense a établi que les deux témoins refusent de se rendre à Arusha parce qu'ils éprouvent des craintes sincères. La Chambre aurait préféré disposer de preuves plus directes concernant l'état d'esprit du témoin LAX-23, mais elle accepte, en l'espèce, que les assertions contenues dans la requête de la Défense traduisent fidèlement l'état d'esprit des deux témoins. Tous deux semblent en mesure de faire, sur des questions bien définies, des dépositions susceptibles de disculper l'accusé. La Chambre conclut donc qu'il est dans l'intérêt de la justice de leur permettre de déposer par vidéoconférence.

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[1] Affaire *Bagasora et consorts, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link,* Chambre de première instance, 8 octobre 2004, par. 5 à 8 ; affaire *Nahimana et consorts,* Décision sur la requête du Procureur aux fins d'ajouter le témoin X à sa liste de témoins et de se voir accorder des mesures de protection, Chambre de première instance, 14 septembre 2001.

[2] Affaire *Bagosora et consorts,* Décision relative à la requête de la Défense de Kabiligi intitulée *Motion to Request the Testimony of Kabiligi Witnesses KX-38 and KVB-46 Via Video-Link,* Chambre de première instance, 5 octobre 2006, par. 3 ; affaire *Bagosora et consorts, Decision on Testimony by Video-Conference,* Chambre de première instance, 20 décembre 2004, par. 4 ; affaire *Bagosora et consorts, Decision on Prosecutidn Request forTestimony of Witness BT via Video Link,* Chambre de première instance, 8 octobre 2004, par. 6.

[3] Affaire *Bagosora et consorts,* Décision relative à la requête de la Défense de Kabiligi intitulée *Motion to Request the Testimony of Kabiligi Witnesses KX-38 and KVB-46 Via Video Link,* Chambre de première instance, 5 octobre 2006, par. 3 ; affaire *Bagosora et consorts,* Décision relative à la déposition par vidéoconférence du témoin Amadou Deme, Chambre de première instance, 29 août 2006, par. 5 ; affaire *Bagosora et consorts, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link,* Chambre de première instance, 8 octobre 2004, par. 6 et 13.

[4] Requête de la Défense, par. 26.

6. En général, les demandes aux fins d'entendre entièrement la déposition d'un témoin à huis clos font l'objet d'une décision orale après que la Chambre a eu l'occasion d'entendre le témoin exposer ses craintes[5]. La Chambre a le plus souvent adopté une approche libérale face à de telles préoccupations et se montre prudente lorsqu'il s'agit de protéger l'identité des témoins[6]. Elle ne statuera donc pas sur le point de savoir s'il y a lieu d'entendre entièrement la déposition du témoin LAX-23 à huis clos avant d'avoir eu l'occasion de l'entendre à ce sujet au début de sa déposition.

PAR CES MOTIFS, LA CHAMBRE

AUTORISE le recueil des dépositions des témoins YUL-39 et LAX-23 par voie de vidéoconférence ;

CHARGE le Greffe de prendre, en concertation avec les parties, toutes les dispositions nécessaires pour le recueil de ces dépositions par voie de vidéoconférence et d'enregistrer celles-ci sur vidéocassette pour que, le cas échéant, la Chambre puisse s'y référer ;

REJETTE, au motif qu'elle est prématurée, la demande faite par la Défense d'entendre l'intégralité de la déposition du témoin LAX-23 à huis clos.

Fait à Arusha, le 19 octobre 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[5] Affaire Bagosora et consorts, Decision on Requests to Hear Testimony in Closed Session, Chambre de première instance, 18 octobre 2006, par. 1.
[6] Voir le compte rendu de l'audience du 3 octobre 2006, p. 15 à 18 (témoin LCH-1) et p. 46 à 50 (témoin LX-1).

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Décision relative à la requête de Théoneste Bagosora intitulée Request for Trial Chamber to Order the Governement of Tanzania to Cooperate and for Subpoena for Ambassador Mpungwe
19 octobre 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Citation à comparaître, Ancien officiel du Gouvernement tanzanien (facilitateur lors de la négociation des Accords d'Arusha), Base suffisante établissant que le témoin potentiel dispose d'informations pertinentes, Efforts raisonnables de la Défense pour obtenir la coopération volontaire du témoin – Requête acceptée

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Decision on Defence Motion for Issuance of Subpoena to Witness T, 8 février 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision de la Chambre de première instance relative à la requête de Théoneste Bagosora intitulée Request for Subpoena of Ambassador Mpungwe and Cooperation of the United Republic of Tanzania, 29 août 2006 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Request for a Subpoena, 11 September 2006 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Request for Subpoenas of United Nations Officials, 6 octobre 2006 (ICTR-98-41)

T.P.I.Y. : Chambre d'appel, Le Procureur c. Radislav Krstić, Arrêt relative à la demande d'injonction, 1er juillet 2003 (IT-98-33) ; Chambre d'appel, Le Procureur c. Sejér Halilović; Décision de la relative aux citations à comparaître, 21 Juin 2004 (IT-01-48)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov (la « Chambre »),

SAISI de la requête de la Défense de Bagosora intitulée Request for Trial Chamber to Order the Government of Tanzania to Cooperate and for Subpoena for Ambassador Mpungwe, déposée le 29 septembre 2006,

VU les écritures de la Défense de Bagosora intitulées *Submissions in Support,* déposées le 12 octobre 2006,

STATUE sur la requête.

1. La Défense de Bagosora demande qu'une citation à comparaître comme témoin soit adressée à Ami R. Mpungwe, ancien haut fonctionnaire tanzanien qui est intervenu comme facilitateur lors de la négociation des Accords d'Arusha en 1992 et 1993.

2. Celui qui demande la délivrance d'une telle citation doit démontrer que les trois conditions suivantes sont remplies : (i) des efforts raisonnables ont été faits pour obtenir la coopération volontaire

du témoin ; (ii) les renseignements dont dispose le témoin éventuel apporteront une aide sensible à sa cause sur des questions précisément identifiées et qui seront débattues au procès ; (iii) la déposition du témoin est nécessaire et pertinente pour la conduite et l'équité du procès[1].

3. La Défense a déjà saisi la présente Chambre d'une requête, déposée le 7 juillet 2006, pour lui demander d'adresser une injonction à M. Mpungwe aux fins d'un entretien avec la Défense et d'inviter le Gouvernement tanzanien à faciliter le déroulement de cette rencontre. Dans sa décision datée du 29 août 2006, la Chambre a estimé que les deuxième et troisième conditions [visées au paragraphe 2 ci-dessus] étaient réunies :

> [D]es motifs valables donnant à penser que M. Mpungwe pourrait disposer d'informations concernant l'attitude du colonel Bagosora aux pourparlers de paix d'Arusha, attitude au sujet de laquelle la Chambre a recueilli des témoignages directs qui sont susceptibles d'incriminer l'accusé. En outre, ces éléments de preuve ont trait à des allégations précises portées au paragraphe 5.10 de l'acte d'accusation, selon lesquelles l'accusé « a manifesté ostensiblement son opposition aux concessions faites par le représentant du Gouvernement [...] au point de quitter la table des négociations. Le Colonel Théoneste Bagosora a quitté Arusha en déclarant qu'il rentrait au Rwanda pour « préparer l'apocalypse ». La Défense a des raisons sérieuses de croire que l'Ambassadeur Mpungwe dispose peut-être d'informations qui pourraient se rapporter directement à ces allégations[2].

4. La Chambre a cependant refusé de faire droit à la requête, au motif que des efforts raisonnables pour obtenir la coopération du témoin pouvaient encore être déployés. La Défense, appuyée par le Greffe, a certes entrepris à partir du 28 avril 2006[3], de nombreuses démarches pour organiser une rencontre avec M. Mpungwe, mais celles-ci semblent n'avoir pas abouti parce que le témoin croyait en toute bonne foi qu'il devait être autorisé par son Gouvernement à s'entretenir avec la Défense :

> [M. Mpungwe] semble disposé à s'entretenir de son plein gré avec la Défense de Bagasora, à condition que le Gouvemement tanzanien l'y autorise. La Chambre relève néanmoins que cet entretien devrait avoir lieu le plus tôt possible. Le procès en est à sa phase finale, et la Défense doit avoir une possibilité raisonnable d'évaluer la nature des éléments d'information dont dispose M. Mpungwe pour pouvoir, le cas échéant, le citer à la barre[4].

5. La Chambre avait précisé que l'entretien devait avoir lieu « le plus tôt possible »[5], mais il a fallu encore attendre jusqu'au 5 octobre 2006, soit cinq semaines plus tard. Le 11 octobre 2006, la Défense ayant demandé une réponse à des questions écrites supplémentaires, l'avocat de M. Mpungwe a dit que c'était exclu. Le lendemain, la Défense a demandé, par l'intermédiaire dudit avocat, que M. Mpungwe comparaisse sans délai devant la Chambre, et elle a déposé la présente requête[6]. A s'en tenir au calendrier du procès, la présentation des moyens de la Défense de Bagosora devait s'achever le 13 octobre 2006, la fin du procès étant fixée au 13 décembre 2006.

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[1] *Le Procureur c. Krstić,* affaire n°IT-98-33-A, Arrêt relatif à la demande d'injonctions rendu le 1er juillet 2003, par. 10 ; *Le Procureur c. Halilović,* affaire n°IT-01-48-AR73, Décision relative à la délivrance d'injonctions rendue par la Chambre d'appel le 21 juin 2004, par. 7 ; affaire *Bagosora et consorts,* décision de la Chambre de première instance intitulée *Decision on Request for Subpoenas of United Nations Officials,* rendue le 6 octobre 2006, par. 3 ; dans la même affaire, décision de la Chambre de première instance intitulée *Decision on Request for a Subpoena,* rendue le 11 septembre 2006, par. 5 ; affaire *Karemera et consorts,* décision de la Chambre de première instance intitulée *Decision on Defence Motion for Issuance of Subpoena to Witness T,* rendue le 8 février 2006, par. 4.

[2] Affaire *Bagosora et consorts,* Décision de la Chambre de première instance relative à la requête de Théoneste Bagosora intitulée *Request for Subpoena of Ambassador Mpungwe and Cooperation of the United Republic of Tanzania,* rendue le 29 août 2006, par. 3.

[3] *Ibid*., par. 1.

[4] *Ibid*., par. 4.

[5] Id.

[6] Submissions in Support, par. 6 et 7.

6. La Chambre estime que la Défense a fourni des efforts raisonnables pour amener M. Mpungwe à coopérer de son plein gré et qu'il s'impose à présent de citer celui-ci à comparaître pour qu'il puisse être entendu en temps utile. Les retards importants enregistrés ne sont pas le fait de la Défense, car elle semble avoir fait preuve de diligence pour obtenir la déposition du témoin avant la date butoir de la fin de la présentation de ses moyens. Le procès étant près de se terminer et compte tenu de la longue histoire des retards susmentionnée, une citation à comparaître est désormais indispensable pour s'assurer que M. Mpungwe dépose durant la prochaine session du procès.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la requête ;

INVITE le Greffier à établir, conformément à la présente décision, une citation à comparaître comme témoin en l'espèce à adresser à M. Ami R. Mpungwe ;

INVITE le Greffier à faire tenir à M. Mpungwe, par la voie diplomatique, cette citation à comparaître accompagnée d'une copie certifiée conforme de la présente Décision.

Fait à Arusha, le 19 octobre 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Décision relative à la requête de la défense de Théoneste Bagosora en vue d'obtenir la coopération de la République française afin qu'elle autorise et permette la comparution du Colonel Maurin
20 octobre 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora – Coopération des Etats, France, Information pouvant être obtenue autrement qu'en entendant le témoin, Précédentes rencontres montrant que le témoin potentiel n'a qu'une connaissance limitée de l'accusé, Connaissance générale des Forces armées rwandaises et des événements survenus à Kigali entre le 7 et le 14 avril 1994 – Requête rejetée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 92 bis ; Statut, art. 28

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, 10 mars 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Demande de coopération et d'assistance adressée à la République française en vertu de l'article 28 du Statut, 22 octobre 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative à la requête de Joseph Nzirorera aux fins de solliciter la coopération d'un gouvernement, 19 avril 2005 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Augustin Ndindiliyimana et consorts, Décision relative à la requête de Nzuwonomeye

intitulée Motion Requesting Cooperation From the Government of Ghana Pursuant to Article 28 of the Statute, 13 février 2006 (ICTR-2000-56) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Request for Subpoenas of United Nations Officials, 6 octobre 2006 (ICTR-98-41)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov (la « Chambre »),

SAISITe la Requête de la défense de Théoneste Bagosora en vue d'obtenir la Coopération de la République Française afin qu'elle autorise et permette la comparution du colonel Maurin, déposée le 13 décembre 2005 par la Défense de Bagosora,

VU les conclusions intitulées « *Submissions* » et le Mémoire Additionnel, déposés par la Défense de Bagosora respectivement les 21 septembre et 16 octobre 2006,

STATUE sur la requête.

Introduction

1. La Défense de Bagosora souhaite citer à la barre un officier français qui se trouvait au Rwanda pendant que s'y déroulaient certains des événements décrits dans l'acte d'accusation. Elle demande à la Chambre de rendre une ordonnance demandant au Gouvernement français d'autoriser le témoin à comparaître. Depuis le dépôt de la requête à la fin 2005, la Défense a interrogé cet officier à deux reprises, avec le consentement et la coopération des autorités françaises. La France a aussi annoncé qu'elle était disposée à autoriser l'officier à déposer à certaines conditions, dont certaines ont été rejetées par la Défense de Bagosora[1].

Délibération

2. Aux termes de l'article 28 du Statut, les États sont tenus de

> « collabore[r] avec le Tribunal pénal international pour le Rwanda à la recherche et au jugement des personnes accusées d'avoir commis des violations graves du droit international humanitaire ».

Pour que la Chambre rende une telle ordonnance, trois conditions doivent être réunies, à savoir : (i) il faut déterminer avec un degré raisonnable de précision la nature des informations recherchées ; (ii) il faut démontrer que ces informations sont pertinentes au procès ; (iii) il faut établir que des efforts raisonnables ont été faits pour obtenir les informations sans l'intervention de la chambre[2]. Selon la deuxième condition, le demandeur doit démontrer que les informations sont pertinentes à la question dont le juge, ou la Chambre de première instance, est saisi et qu'elles sont nécessaires à un règlement équitable de la cause[3]. Une condition similaire est mise à la délivrance d'une citation à

[1] Mémoire additionnel, par. 35

[2] Bagosora et consorts, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, Chambre de première instance, 10 mars 2004.

[3] La question de la pertinence n'a pas toujours été formulée exactement dans les mêmes termes d'une affaire à l'autre. Certaines décisions, en particulier quand la pertinence des informations est évidente, se bornent à dire que le demandeur doit articuler la « pertinence de sa demande par rapport à l'espèce ». Voir *Ndindiliyimana et consorts,* Décision relative à la requête de Nzuwonomeye intitulée *Motion Requesting Cooperation From the Government of Ghana Pursuant to Article 28 of the Statute,* Chambre de première instance, 13 février 2006, par. 6 ; voir aussi *Bagosora et consorts,* Demande de coopération et d'assistance adressée à la République Française en vertu de l'article 28 du Statut, Chambre de première instance, 22 octobre 2004, par. 3. Toutefois, lorsque la pertinence est contestée, il faut déterminer que non seulement « l'information recherchée intéresse ou non une question quelconque dont la Chambre est saisie », mais en outre qu'elle est

comparaître ; dans ce contexte, la Chambre examine si l'information recherchée peut être obtenue « autrement qu'en entendant un témoin potentiel »[4] [traduction].

3. La Défense affirme que le témoin potentiel peut déposer à partir de la connaissance qu'il a des Forces armées rwandaises et des événements survenus à Kigali en 1994. Il se serait, en particulier, trouvé à l'état-major la nuit du 6 au 7 avril 1994[5].

4. Comme indiqué plus haut, le témoin potentiel s'est entretenu avec la Défense à deux reprises ; à la suite d'un de ces entretiens, il a répondu par écrit à des questions de la Défense. Ces réponses, qui ont été communiquées à la Chambre et à la Défense, font apparaître que le témoin n'a qu'une connaissance limitée de l'accusé[6]. Il semble avoir rencontré l'accusé en deux occasions banales, en 1992 et 1993. La nuit du 6 au 7 avril 1994, il a vu Bagosora à l'état-major, mais ne semble pas l'avoir entendu tenir des propos de fond. Il l'a rencontré à nouveau lors de deux brèves réunions, d'abord le 7 avril, en présence d'une autre personnalité française ; ensuite, le 9 avril 1994. Le témoin se souvient de la teneur des demandes que lui-même et ses collègues ont faites lors de ces deux réunions, mais il ne paraît guère se souvenir de la réponse ou de l'attitude du colonel Bagosora[7] .

5. Les réponses écrites du témoin potentiel traduisent une connaissance générale des Forces armées rwandaises et des événements survenus à Kigali entre le 7 et le 14 avril 1994. Toutefois, la Chambre n'estime pas que sa déposition à cet égard s'impose et est nécessaire à la conduite et à l'équité du procès. Elle a déjà entendu les dépositions détaillées de témoins des deux parties sur ces questions générales. Par ailleurs, si les circonstances le justifient, la Chambre peut examiner des déclarations écrites qui ne concernent pas les actes et le comportement de l'accusé, sans devoir nécessairement exiger la comparution du témoin[8]. Étant donné le caractère général que revêtirait la déposition, la portée pléonastique de la déposition par rapport aux témoignages déjà entendus, et les autres formes sous lesquelles elle pourrait être admise, la Chambre ne saurait conclure que la comparution du témoin s'impose et est nécessaire à la conduite du procès.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête.

Fait à Arusha, le 20 octobre 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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«nécessaire pour que la Chambre puisse statuer équitablement » sur cette question. Voir *Karemera et consorts,* Décision relative à la requête de Joseph Nzirorera aux fins de solliciter la coopération d'un gouvernement, Chambre de première instance, 19 avril 2005, par. 8. Cette formulation traduit bien la norme énoncée à l'article 54 *bis* du Règlement du TPIY, lequel traite précisément des conditions et modalités de délivrance par la Chambre d'une ordonnance à un Etat en vertu de l'article 29 du Statut du TPIY. La présente Chambre considère que cette norme est appropriée. En exigeant en outre que les informations soient « nécessaires « au règlement équitable» de la question dont la Chambre est saisie, le Règlement du TPIY exprime le souci réel d'éviter que les Etats et les organisations internationales ne soient submergés par un flot de demandes d'information fondées uniquement sur la pertinence, car, à lui seul, ce critère risque, selon l'expression courante, de « ratisser trop large ». De plus, on se trouve ici dans un domaine où une norme commune aux tribunaux internationaux s'avère souhaitable.

[4] Bagosora et consorts, Decision on Request for Subpoenas of United Nations Officials, Chambre de première instance, 6 octobre 2006, par. 3.

[5] *Requête,* par. 20 à 23

[6] *Mémorandum interservices,* 10 juillet 2006, du Greffe adresse au Conseil principal de Bagosora (ICTR/IOR/ERSPS/07/06/82-RD)

[7] Réponses aux questions 3 et 53.

[8] Article 92 *bis* du Règlement de procédure et de preuve.

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Décision relative à la requête de la défense de Bagosora visant la collaboration de l'Etat du Rwanda 26 octobre 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora – Coopération des Etats, Rwanda, Réponse aussitôt que possible du gouvernement rwandais à une demande de documents préalablement formée, Documents pertinents pour le procès en cours – Requête partiellement acceptée

Instrument international cité :

Statut, art. 28

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, 10 mars 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la demande de coopération et d'assistance adressée au Royaume des Pays-Bas, 7 février 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la demande d'assistance adressée à la République togolaise en vertu de l'article 28 du Statut, 31 octobre 2005 (ICTR-98-41)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIEGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI de la Requête de la Défense de Bagosora visant la collaboration de l'État du Rwanda, déposée le 28 mars 2006,

VU la lettre de la Défense de Bagosora, déposée de manière unilatérale le 4 octobre 2006,

STATUE sur ladite requête,

Introduction

1. Dans sa Décision du 10 mars 2004, répondant à-une requête de la Défense de Bagosora, la Chambre avait demandé au Gouvernement mandais de déterminer s'il avait en sa possession les pièces énumérées dans l'annexe A de ladite décision et, si tel était le cas, de les transmettre dès que possible au Greffe pour qu'il les communique à la Défense[1]. Celle-ci indique [dans la Requête du 28 mars 20061 que les autorités rwandaises n'ont pas fourni une réponse complète. Par ailleurs, elle dit s'être

[1] Le Procureur c. Bagosora et consorts, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, (Chambre de première instance), 10 mars 2004 (la «Décision du 10 mars 2004 »).

vainement efforcée d'obtenir d'autres renseignements nécessaires pour la préparation de la défense de l'accusé[2]. Aussi prie-t-elle la Chambre d'amener le Gouvernement rwandais à coopérer.

2. Depuis que la présente requête a été déposée, le Ministère rwandais des affaires étrangères a fourni un complément d'information concernant deux des pièces demandées par la Défense[3]. Par ailleurs, dans sa lettre du 4 octobre 2006, la Défense a fait savoir à la Chambre qu'elle avait reçu d'autres informations de la part du Gouvernement rwandais[4].

Délibération

3. L'article 28 du Statut du Tribunal fait obligation aux États de

> « [collaborer] avec le Tribunal international pour le Rwanda à la recherche et au jugement des personnes accusées d'avoir commis des violations graves du droit international humanitaire ».

Toute demande adressée à la Chambre aux fins de délivrance d'une ordonnance au titre de l'article 28 du Statut doit définir la nature de l'information sollicitée, établir la pertinence de cette information par rapport au procès et préciser les démarches qui ont été faites pour obtenir celle-ci. Les demandes d'assistance formulées en vertu de l'article 28 doivent aussi déterminer avec précision la nature de l'aide souhaitée[5].

(i) Pièces dont il est question dans la décision du 10 mars 2004

4. La Chambre a déjà conclu que les pièces dont il était question dans sa décision du 10 mars 2004 avaient été sollicitées en bonne et due forme par la Défense de Bagosora. Celle-ci a obtenu des informations concernant certaines de ces pièces[6]. La Chambre est convaincue qu'une réponse du Gouvernement rwandais concernant les autres pièces énumérées à l'annexe A de ladite décision serait appropriée et souligne qu'elle devrait être faite le plus tôt possible.

(ii) Autres pièces

5. Les autres pièces sollicitées par la Défense sont les suivantes :

a. Une copie du dossier judiciaire établi en 1996 par le Parquet Général de Kigali à l'appui de la demande d'extradition de Bagosora adressée aux autorités camerounaises ;
b. La copie intégrale de l'agenda 1993 de Bagosora ;
c. La déclaration que Jean-Bosco Nkulikiyinka a faite à l'Auditorat militaire en 1998 concernant un barrage routier établi à Kigali ;
d. La liste et la composition de la classe de 3e Année «A»-Électromécanique, de l'école EFOTEC pour l'année scolaire 1993/94 ;
e. Les fiches scolaires avec les différentes classes suivies par trois élèves en particulier ;
f. Une interview de Faustin Twagiramungu, datant de juin 1992, dans laquelle il donne son point de vue sur l'attaque menée par le FPR à cette période ;
g. Le discours prononcé par Froduald Karamira en octobre 1993, après l'assassinat du Président du Burundi, Melchior Ndadaye ;

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[2] Requête de la Défense de Bagosora, par. 9 et 10.
[3] Note verbale du 10 juillet 2006 du Ministère rwandais des affaires étrangères et de la coopération adressée au Greffe du Tribunal (concernant des documents demandés par la Défense, à savoir les copies des passeports civils, militaires et diplomatiques du colonel Bagosora de 1990 à 1994, et la liste et la durée de ses missions de juin 1992 à juillet 1994).
[4] La Défense a indiqué dans cette lettre qu'elle avait reçu des informations concernant les listes d'élèves des différentes classes de l'EFOTEC pour l'année scolaire 1993/94, ainsi que les fichiers téléphoniques de Rwandatel-Terracom.
[5] Affaire *Bagosora et consorts,* (Chambre de première instance), Décision relative à la demande d'assistance et de coopération adressée au Royaume des Pays-Bas, 7 février 2005, par. 5 ; affaire *Bagosora et consorts,* (Chambre de première instance), Décision relative à la demande d'assistance adressée à la République togolaise en vertu de l'article 28 du Statut, 31 octobre 2005, par. 2.
[6] Voir notes 3 et 4 ci-dessus.

h. Le discours prononcé par Félicien Gatabazi en janvier ou février 1994, lors d'un meeting de son parti, le PSD.

6. La Chambre estime que la Défense a dûment précisé la nature des pièces sollicitées et fourni une relation circonstanciée et documentée des efforts qu'elle a déployés pour tenter d'obtenir lesdites pièces.

7. La Chambre considère que les pièces se rapportant directement à Bagosora (voir a. et b. ci-dessus) sont manifestement pertinentes à la procédure engagée contre lui. Par ailleurs, les deux pièces (voir d. et e.) concernant l'école EFOTEC peuvent être pertinentes au procès. La déclaration de Nkulikiyinka (voir c.) peut, elle aussi, être pertinente, car elle porte apparemment sur un sujet (un barrage routier qui aurait été établi à Kigali en avril 1994) ayant fait l'objet de dépositions au procès[7]. Comme la Chambre l'a relevé dans sa Décision du 10 mars 1994, des éléments de preuve ont été admis au procès, à propos d'événements survenus en 1992, qui établissent, selon le Procureur, l'existence d'une entente tout au long de l'année 1994[8]. La Chambre juge que l'interview de Twagiramungu (voir f.) et les discours prononcés par Karamira et Gatabazi (voir respectivement g. et h) peuvent, eux aussi, se rattacher a cette question[9]. Ces pièces sont énumérées à l'annexe B de ladite Décision.

PAR CES MOTIFS, LA CHAMBRE

RAPPELLE au Gouvernement rwandais l'obligation de collaborer avec le Tribunal que lui fait l'article 28 du Statut ;

PRIE le Gouvernement rwandais de répondre dès que possible à la Demande de coopération et d'assistance du 10 mars 2004 en ce qui concerne les documents énumérés dans l'annexe A de ladite Décision ;

PRIE ÉGALEMENT le Gouvernement rwandais de déterminer s'il a en sa possession les pièces énumérées dans l'annexe B de ladite Décision et, si tel est le cas, de les transmettre le plus tôt possible au Greffe pour qu'il les communique à la Défense ;

INVITE le Greffier à prendre contact sans retard avec les autorités du Gouvernement rwandais, à rester activement saisi de la question, jusqu'à ce qu'une réponse à la demande de coopération et d'assistance du 10 mars 2004 soit obtenue, et d'en rendre compte à la Chambre ;

REJETTE la requête sous tous autres rapports.

Fait à Arusha, le 26 octobre 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov*

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* Voyez les annexes dans la version anglaise de la décision.

[7] Compte rendu de l'audience du 17 septembre 2003, p. 17 et 18 ; compte rendu de l'audience du 19 septembre 2003, p. 60 et 61 ; compte rendu de l'audience du 11 novembre 2003, p. 10, 11, 13 et 14.

[8] Décision du 10 mars 2004, par. 10

[9] Par exemple, le Procureur a appelé à la barre un témoin expert qui a déposé sur l'impact à Kigali de l'assassinat du Président Ndadaye. Cette déposition relate avec précision le discours prononcé par Froduald Karamira et fait état du rôle qu'il aurait joué dans le rassemblement des forces d'où est sorti le mouvement appelé «Pouvoir Hutu ». Compte rendu de l'audience du 18 septembre 2002, p. 12 à 20.

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Décision relative à la requête du Procureur intitulée Motion Regarding Defence Refusal to Provide Witness Statements and Requesting Certain Relief for Deficiencies in the Kabiligi Pre-Defence Brief 30 octobre 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Gratien Kabiligi – Obligation de fournir des informations permettant d'identifier ses témoins, Faute du fait de ne pas fournir dans les délais prescrits les informations permettant d'identifier les témoins, Obligation de la défense de communiquer les déclarations de ses témoins – Requête partiellement acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 73 ter (B) (iii) (a)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Sufficiency of Witness Summaries, 5 juillet 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Commencement of Kabiligi Defence and Filing of Pre-Defence Brief, 21 juin 2006 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on the Nsengiyumva Motion to Add Six Witnesses to its Witness List, 11 septembre 2006 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Bagosora Motion to Modify its Witness List, 11 septembre 2006 (ICTR-98-41)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIEGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov (la « Chambre »),

SAISI de la requête du Procureur intitulée Motion Regarding Defence Refusal to Provide Witness Statements and Requesting Certain Relief for Deficiencies in Kabiligi Pre-Defence Brief; déposée le 5 octobre 2006,

VU la réponse du Procureur, déposée le 10 octobre 2006,

STATUE sur la requête.

Introduction

1. Le Procureur demande que des témoins de la Défense de Kabiligi ne soient pas autorisés à déposer, leur identité et les résumés de leurs dépositions attendues ne lui ayant pas été communiqués. Il fait notamment valoir que : (i) très peu de renseignements concernant l'identité de cinq témoins lui ont été fournis ; (ii) les résumés des dépositions attendues de 21 témoins ne lui ont pas été

communiqués ; (iii) dix-sept témoins ne figurent pas sur la liste établie pour la dernière session du procès, qui débutera le 6 novembre 2006[1].

Délibération

(i) Identité des témoins

2. L'obligation faite à la Défense de fournir des informations permettant d'identifier ses témoins est bien précisée dans une décision antérieure de la Chambre en l'espèce :

> La Chambre a jugé, en application de l'article 73 *ter* (B) (iii) (a) du Règlement, que les renseignements concernant l'identité de chaque témoin de la Défense devraient comporter les mêmes éléments que ceux fournis par le Procureur pour les témoins à charge. Une importance toute particulière s'attache à l'activité professionnelle du témoin en 1994, à sa filiation et à son lieu de naissance, ainsi qu'à son pays de résidence actuel. Tout en admettant que la Défense ne détient peut-être pas tous ces renseignements pour chacun des témoins, la Chambre estime cependant que de telles lacunes devraient être rares et comblées rapidement. Le sentiment d'insécurité qu'éprouveraient des témoins ne justifie pas que leur lieu de résidence soit tenu secret. Des mesures strictes de protection de témoins sont prises afin de dissiper les craintes que ceux-ci pourraient avoir dans ce sens. La Défense ne saurait s'appuyer sur le sentiment d'insécurité exprimé par des témoins pour refuser de communiquer des renseignements permettant de les identifier[2] [traduction].

La Défense de Kabiligi ne semble pas contester cette obligation, mais elle soutient qu'elle « n'a pas l'intention » d'appeler des témoins à la barre sans avoir fourni de renseignements concernant leur identité au moins 35 jours avant leur comparution[3] [traduction]. Certes, la Chambre, usant de son pouvoir discrétionnaire, a autorisé la Défense à inscrire des témoins supplémentaires sur ses listes, sous réserve de notification 35 jours au moins avant leur comparution, mais il ne s'agit pas là d'une procédure ou d'un délai qui va de soi[4]. Au contraire, la Chambre a déjà ordonné que

> « le mémoire préalable de la Défense de Kabiligi comportant les informations permettant d'identifier les témoins, ainsi qu'un résumé des faits sur lesquels chacun d'eux sera entendu soit déposé d'ici au 7 juillet 2006[5] [traduction]. »

Le fait de ne pas fournir dans les délais prescrits les informations permettant d'identifier les témoins est une faute. Dans une décision antérieure, la Chambre a estimé que cette faute pouvait être excusée dans certains cas, mais que ceux-ci devraient « être rares et qu'il devait y être remédié sans retard ». Il appert des courriels annexés à la requête du Procureur qu'à tout le moins certaines des lacunes relevées sont imputables à un manque d'information, et non pas à la volonté manifeste d'ignorer les instructions de la chambre[6]. En outre, quelques-unes des annexes donnent à penser que la Défense s'est peut-être, jusqu'à un certain point, conformée à ladite ordonnance pour ce qui est de certains des témoins.

3. La Chambre confirme ses instructions précédentes par lesquelles elle invitait la Défense à communiquer les renseignements suivants concernant ses témoins : nom, nationalité, sexe, filiation,

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[1] Trois des cinq témoins du premier groupe font également partie du second. Pour le reste, ces groupes ne semblent pas se chevaucher.
[2] Affaire *Bagosora et consorts,* Décision de la Chambre de première instance intitulée *Decision on Sufficiency of Witness Summaries,* rendue le 5 juillet 2005, par. 8.
[3] Réponse, par. 13.
[4] Affaire *Bagosora et consorts,* décision de la Chambre de première instance intitulée *Decision on the Nsengiyumva Motion to Add Six Witness to its Witness List,* rendue le 11 septembre 2006, et, dans la même affaire, décision de la Chambre de première instance intitulée *Decision on Bagosora Motion to Modify its Witness List,* rendue le 11 septembre 2006.
[5] *ibid*., Décision de la Chambre de première instance intitulée *Decision on Commencement of Kagiligi Defence and Filing of Pre-Defence Brief*; rendue le 21 juin 2006, p. 2.
[6] Requête, annexe 1.

lieu de naissance, date de naissance, profession actuelle et profession exercée en avril 1994, et pays de résidence. S'il n'a pas été remédié à l'une ou l'autre de ces lacunes à la date de la présente Décision, le Procureur est autorisé à déposer des écritures supplémentaires exposant en détail la nature des renseignements manquants, les lacunes relevées dans des explications de la Défense, et l'incidence de ces lacunes sur les enquêtes.

(ii) Déclarations de témoins

4. La Défense de Kabiligi affirme qu'elle n'est absolument pas tenue de communiquer au Procureur le texte des déclarations de ses témoins.

5. La Défense n'est nullement obligée de recueillir des déclarations de ses témoins, mais lorsqu'elle le fait, elle doit communiquer le texte de toutes celles qui ont été recueillies. La Chambre n'a pas rappelé expressément cette obligation dans sa décision écrite qui fixait la date de dépôt du mémoire préalable au procès de la Défense de Kabiligi, mais ladite obligation a été énoncée sans ambages dans le cadre des obligations générales de communication s'imposant aux quatre équipes de la Défense[7]. Si les déclarations écrites des vingt et un témoins mentionnés par le Procureur existent et si elles sont en la possession de la Défense, elles doivent être communiquées sans délai.

(iii) Ordre de comparution

4. Le fait qu'un témoin ne figure pas sur la liste des témoins qui seront appelés à la barre ne constitue pas un motif suffisant pour écarter ce témoignage. On considère que l'ordre de comparution est provisoire, et qu'il peut changer au gré d'évènements sur lesquels la partie qui cite les témoins n'a aucune prise. Une certaine souplesse est donc nécessaire pour permettre à la partie concernée de présenter efficacement sa cause. Les changements de dernière minute sont bien entendu soumis au contrôle de la Chambre pour assurer l'équité du procès et faire en sorte qu'aucune des parties ne puisse être prise au dépourvu.

PAR CES MOTIFS, LA CHAMBRE

CONFIRME que la Défense est tenue de dévoiler sans retard l'identité de ses témoins, conformément à la décision antérieure de la Chambre ;

INVITE la Défense à communiquer sans retard au Procureur toutes les déclarations de ses témoins qui existeraient et seraient en sa possession ;

REJETTE tous les autres points de la requête

Fait à Arusha, le 30 octobre 2006.

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[7] Compte rendu de l'audience du 21 décembre, p. 46 et 47 : (« M. LE PRÉSIDENT : Demain ou le 3 janvier, vous allez fournir au Procureur les pseudonymes de chacun des témoins, le résumé des faits sur lesquels chaque témoin va déposer, les points de l'[a]cte d'accusation sur lesquels chaque témoin sera entendu et la durée probable de chaque déposition. Le 7, vous allez remettre les noms [des témoins et les informations permettant de les identifier], les déclarations non caviardées qui ont déjà été données par les témoins. M[e] TREMBLAY : Monsieur le Président, j'ai de la difficulté à comprendre pourquoi et en vertu de quoi on serait obligé de donner les déclarations des témoins non caviardées. Je ne vois aucune disposition dans le Règlement qui nous oblige à remettre au Procureur les déclarations signées des témoins. Je ne vois pas là ! M. LE PRÉSIDENT: L'article 73 *ter* (B), dernier paragraphe. On l'a toujours fait dans d'autres affaires »). Compte rendu de l'audience du 16 mai 2005, p. 32 et 33: («M. LE PRÉSIDENT : Il y a un résumé. Donc, il serait très utile que Monsieur White nous communique cette page concernant les mesures demandées dans cette requête. Et cette discussion s'est avérée très utile ... « Fournir des déclarations chaque fois que cela est possible et, sinon, donner [un résumé exhaustif des dépositions attendues]. Ce qui nous amène maintenant à la question de savoir quelles sont les déclarations qui manquent ; nous [ ] reviendrons là-dessus plus tard. Et, bien sûr, l'obligation [persiste] ».

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Décision relative à la requite de Kabiligi intitulée Motion for the Cooperation from the Government of France Pursuant to Article 28 of the Statute of the ICTR and Issuance of Subpoenas Pursuant to Rule 54 of the Rules of Procedure and Evidence 31 octobre 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Gratien Kabiligi – Coopération des Etats, France, Coopération sans retard, Citation à comparaître prématurée – Requête rejetée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 54 ; Statut, art. 20 (4) (e), 28 et 28 (2)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision de la Chambre de première instance relative à la requête de Théoneste Bagosora intitulée Request for Subpoena of Ambassador Mpungwe and Cooperation of the United Republic of Tanzania, 29 août 2006 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Request for Subpoenas of United Nations Officials, 6 octobre 2006 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la requête de la Défense de Théoneste Bagosora en vue d'obtenir la coopération de la République française afin qu'elle autorise et permette la comparution du colonel Maurin, Chambre de première instance, 20 octobre 2006 (ICTR-98-41)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov (la « Chambre »),

SAISI de la requête de la Défense de Kabiligi intitulée Motion for Cooperation from the Government of France Pursuant to Article 28 of the Statute of the ICTR and Issuance of Subpoenas Pursuant to Rule 54 of the Rules of Procedure and Evidence, déposée le 4 octobre 2006,

VU les observations du Greffier déposées le 10 octobre 2006,

STATUE sur la requête.

Introduction

1. La Défense de Kabiligi prie la Chambre d'adresser au Gouvernement français une demande à l'effet de permettre à la dite Défense de s'entretenir avec quatre officiers à la retraite qu'elle se propose d'appeler à la barre. Conformément à la procédure dont les autorités françaises ont demandé avec insistance qu'elle soit suivie lorsqu'il s'agit d'agents d'autorité, en poste ou à la retraite, la Défense demande l'assistance du Gouvernement français pour qu'il autorise les officiers concernés à

répondre à un questionnaire écrit et à se présenter ensuite à des entretiens informels et à des auditions formelles lors desquels les témoins potentiels ont a répondre a des questions préétablies. Faisant état du retard déjà pris et du délai tout proche fixé pour la clôture du procès, la Défense demande à la Chambre de fixer une date précise pour la tenue des entretiens avant le début de la prochaine session du procès prévue pour le 6 novembre 2006 et de délivrer aux officiers des citations a comparaître comme témoins devant la Chambre.

Délibération

2. Aux termes de l'article 28 du Statut du Tribunal (le « Statut »), les États sont tenus de

> « collabore[r] avec le Tribunal pénal international pour le Rwanda à la recherche et au jugement des personnes accusées d'avoir commis des violations graves du droit international humanitaire ».

L'expression « la recherche et le jugement des personnes » ne vise pas uniquement les enquêtes du Procureur, mais bien l'ensemble de la procédure judiciaire, y compris le droit reconnu à l'accusé par l'article 20 (4) (e) du Statut d'

> « obtenir la comparution et l'interrogatoire des témoins à décharge dans les mêmes conditions que les témoins a charge »[1].

L'article 28 (2) du Statut oblige plus précisément les États à répondre « sans retard » aux demandes d'assistance concernant la « réunion de témoignages et [la] production des preuves ».

3. Le 16 mars 2006, le Greffier a transmis au Gouvernement français une demande d'assistance adressée par la Défense aux autorités françaises afin que celles-ci autorisent quatre anciens officiers à remplir un questionnaire conformément à la procédure établie[2]. De nouvelles demandes en ce sens ont été transmises les 2 juin et 12 juillet 2006[3]. Le 16 août 2006, les autorités françaises se sont engagées à prêter assistance à la Défense dans sa recherche de renseignements en lui faisant parvenir les réponses aux questions écrites «dans les meilleurs délais possibles » et en facilitant les entretiens et les auditions des quatre témoins, une condition préalable, en droit français, à la comparution de témoins dans un procès. Elles n'étaient pas sûres toutefois que la tenue des entretiens informels et des auditions formelles des quatre témoins potentiels puisse avoir lieu au cours d'un seul séjour de la Défense en France.

3. La clôture du présent procès est fixée au 13 décembre 2006. Dans ces conditions, il est urgent et impératif que le Gouvernement français s'acquitte avec diligence de son engagement à fournir les réponses écrites aux questionnaires et à permettre les entretiens avec les témoins.

4. Il serait prématuré de délivrer des citations à comparaître aux quatre témoins potentiels. La Défense de Kabiligi a donné une idée générale de la teneur des dépositions attendues des témoins, mais la Chambre ne peut, au stade actuel de la procédure, ni évaluer la pertinence des dépositions au procès ni déterminer si elles sont nécessaires pour l'équité du procès[4]. De même, elle ne juge ni

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[1] Affaire Bagosora et consorts, Décision relative à la requête de Théoneste Bagosora intitulée « Bagosora Defence Amended Strictly Confidential and Ex Parte Request for Subpoena of Ambassador Mpungwe and Cooperation of the United Republic of Tanzania », Chambre de première instance, 29 août 2006, par. 2.
[2] Note verbale, Ref. ICTR/IOR/ERSPS/03/06/38-RD1, 6 mars 2006.
[3] *Ibid*., Ref. ICTR/RO/06/06/262-sw, 2 juin 2006 ; *Ibid*., Ref. ICTR/IOR/ERSPS/07/06/83-RD, 2 juillet 2006:
[4] Affaire *Bagosora et consorts, Decision on Request for Subpoenas of United Nations Qfficials,* Chambre de première instance, 6 octobre 2006, par. 3 (Pour que soit délivrée une injonction à comparaître, la déposition d'un témoin potentiel doit « s'imposer et être nécessaire à la conduite et à l'équité du procès ») ; Affaire *Bagosora et consorts,* Décision relative à la requête de la Défense de Théoneste Bagosora en vue d'obtenir la coopération de la République française afin qu'elle autorise et permette la comparution du colonel Maurin, Chambre de première instance, 20 octobre 2006, par. 5 (La Chambre a refusé de délivrer une injonction à comparaître au motif que la déposition envisagée « [ne] s'impos[ait] pas et [n'était] pas nécessaire à la conduite et à l'équité du procès).

nécessaire ni indiqué de fixer des dates précises pour les entretiens informels et les auditions formelles. Malgré les retards qui se sont succédés de la part du Gouvernement français depuis la première demande de la Défense datée du 16 mars 2006, rien n'autorise la Chambre à douter que celui-ci fera montre de diligence et veillera à ce que les renseignements demandés soient transmis en temps utile en tenant compte d'un calendrier judiciaire des plus serrés.

PAR CES MOTIFS, LA CHAMBRE

PRIE le Gouvernement français de tenir sans retard son engagement à transmettre les réponses écrites aux questionnaires adressés à chacun des quatre témoins potentiels ;

PRIE le Gouvernement français de mener à bien les procédures prescrites par ses propres lois dans les meilleurs délais, compte tenu du calendrier précisé dans la présente décision ;

REJETTE la demande de délivrance de citations à comparaître, et de fixation d'un calendrier des audiences, la jugeant prématurée.

Fait à Arusha, le 31 octobre 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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Décision relative à la requête tendant à obtenir que soit délivrée une citation à comparaître adressée à un agent
7 novembre 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Citation à comparaître, Coopération et volonté du témoin à venir témoigner – Requête rejetée

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI de la requête de la Défense de Ntabakuze intitulée *Motion for a Subpoena to Compel the Attendance and Testimony of a Witness,* déposée le 25 octobre 2006,

VU la Réponse du Procureur, déposée le 26 octobre 2006,

STATUE sur la requête.

Le Greffe a informé la Chambre que des dispositions étaient prises, en collaboration avec l'État dont il est un agent d'autorité, afin que le témoin comparaisse sans retard devant le Tribunal. Une lettre de l'État concerné, datée du 7 novembre 2006 qui décrit ces dispositions, est jointe à la présente lettre en annexe A. Elle a été déposée séparément et comme document confidentiel, car elle contient des informations susceptibles de révéler l'identité d'un témoin protégé. Au regard de cette coopération

et de la volonté manifeste du témoin de venir déposer, il n'est nullement nécessaire de délivrer une citation à comparaître.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête de la Défense.

Fait à Arusha, le 7novembre 2006.

[Signé] : Erik Møse

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Décision relative à la demande de certification d'appel de Kabiligi intitulée « Request for certification of the Decision on Kabiligi Motion for Inspection of Documents Under Rule 66 (B) of 6 December 2006 » 12 décembre 2006 (ICTR-98-41-T)

(Original: Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Gratien Kabiligi – Autorisation d'interjeter appel, Importance du choix d'un accusé de déposer ou non à son propre procès sur le déroulement de l'instance – Catégories de documents sujettes à obligation de communication, Caractère nécessaire des documents demandés – Requête rejetée

Instrument international cité :

Règlement de Procédure et de preuve, art. 66 (B) et 73 (B)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 juillet 2005 (ICTR-98-41) ; Chambre d'appel, Le Procureur c. Théoneste Bagosora et consorts, Decision on the Interlocutory Appeal Relating to Disclosure Under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence, 25 septembre 2006 (ICTR-98-41)

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le « Tribunal ») :

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov (la « Chambre »),

SAISI de la demande de certification d'appel intitulée « Kabiligi Request for Certification of the "Decision on Kabiligi Motion for Inspection of Documents Under Rule 66 (B)" of 6 December 2006 », déposée par la Défense de Kabiligi le 11 décembre 2006,

VU les conclusions orales présentées par les parties à l'audience du même jour,

STATUE COMME SUIT,

Introduction

1. La Défense de Kabiligi demande à pouvoir faire appel (à titre interlocutoire) de la décision rendue par la Chambre quant à l'examen de documents en vertu de l'article 66 (B) du Règlement, la requête formée à cette fin ayant été accueillie à certains égards et rejetée à d'autres[1]. La Chambre a ainsi autorisé la Défense à examiner les déclarations et autres pièces soumises par l'accusé à des services nationaux d'immigration, de même que tous les documents saisis chez lui par les enquêteurs du Tribunal, mais a rejeté sa requête en ce qu'elle avait trait à des

> « documents ou pièces relatifs à l'alibi de l'accusé Kabiligi et aux déplacements que le général Kabiligi aurait effectués à travers le Rwanda au cours de la période visée dans l'acte d'accusation » [traduction],

ainsi qu'à

> «tous agendas, journaux, passeports, photographies, carnets de route et documents de voyage personnels de l'accusé, et toutes pièces de correspondance dont il était le destinataire ou l'expéditeur et qui ont été rédigées durant la période visée dans l'acte d'accusation, dans l'intervalle allant jusqu'à son arrestation et depuis son entrée au centre de détention relevant du Tribunal » [traduction].

Délibération

2. L'article 73 (B) du Règlement autorise l'appel interlocutoire dès lors que la Chambre de première instance s'est assurée que la contestation envisagée

> « touche une question susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue, et que son règlement immédiat par la Chambre d'appel pourrait concrètement faire progresser la procédure ».

3. S'il est indéniable que le choix d'un accusé de déposer ou non à son propre procès a une grande incidence sur le déroulement de l'instance, la question qui se pose en l'occurrence est de savoir si le fait pour la Défense de se voir refuser l'examen de certaines catégories de documents « est susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue » et si le fait de porter tel refus en appel à ce stade de la procédure pourrait concrètement faire progresser celle-ci. Dans la décision contestée, la Chambre a autorisé la Défense à examiner deux des catégories de documents dont celle-ci souhaitait prendre connaissance, les estimant bien définies et d'une importance manifeste pour la préparation de la cause de l'accusé ; elle lui a par contre refusé l'examen de documents relevant de deux autres catégories, qu'elle a jugées « par trop larges et vagues » et «d'une incidence fort variable sur le choix de l'accusé de témoigner ou non à son procès »[2] [traduction]. La Chambre a été guidée, ce faisant, par la déclaration de la Chambre d'appel selon laquelle

> « l'article 66 (B) du Règlement ne fait pas peser sur le Procureur une obligation générale de communiquer l'ensemble des documents qui pourraient avoir un rapport avec le contre-interrogatoire auquel il entend soumettre les témoins »,

les requêtes formées en vertu de cette disposition devant être « suffisamment précises »[3] [traduction]. Une fois qu'elle a défini une catégorie de documents avec suffisamment de précision, la Défense doit encore fournir les « éléments requis » [traduction] pour établir que les pièces visées sont nécessaires à sa préparation. Il incombe alors à la Chambre de première instance d'« apprécier selon le

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[1] Le Procureur c. Bagosora et consorts, Decision on Kabiligi Motion for Inspection of Documents Under Rule 66 (B), Chambre de première instance, 6 décembre 2006 (la « décision contestée »).
[2] Décision contestée, par. 5.
[3] Le Procureur c. Bagosora et consorts, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66 (B) of the Tribunal's Rules of procedure and Evidence (Chambre d'appel), 25 septembre 2006, par. 10.

contexte de l'affaire » si ces pièces se distinguent effectivement, par leur caractère « nécessaire », de « l'ensemble des documents qui auraient un rapport » avec le contre-interrogatoire des témoins[4].

4. De l'avis de la Chambre, le règlement au second degré de la question soulevée en l'occurrence – à savoir le caractère par trop vague reconnu à deux catégories de documents – ne saurait concrètement faire progresser la procédure. Le fait d'« apprécier selon le contexte de l'affaire » si telle ou telle catégorie de documents a été définie avec suffisamment de précision relève du pouvoir d'appréciation fondamental de la Chambre de première instance. La première des deux catégories dont l'examen a été refusé en l'espèce, c'est-à-dire, selon les termes de la Défense, les

> « documents ou pièces relatifs à l'alibi de l'accusé Kabiligi et aux déplacements que le général Kabiligi aurait effectués »,

pourrait s'étendre à toute pièce faisant quelque référence aux lieux où l'accusé se serait trouvé en 1994 et, partant, à nombre de documents qui, n'ayant qu'un rapport accessoire avec le choix de celui-ci de témoigner ou non à son procès, ne seraient pas nécessaires à sa défense. La seconde catégorie est également vague en ce qu'elle recouvre des documents qui pourraient s'avérer nécessaires à la préparation de la Défense, mais aussi quantité d'autres qui ne le seraient probablement pas. La Chambre estime que la certification du recours envisagé contre sa décision de refuser l'examen de ces grandes catégories de documents au motif qu'elles étaient par trop vagues et mal définies ne ferait pas concrètement progresser la procédure[5]

5. Assurément, certains documents relevant des deux catégories refusées pourraient avoir de l'importance pour la préparation de la Défense. Il n'en résulte pas pour autant que l'examen de ces catégories prises dans leur globalité, sans autre précision, est une question « susceptible de compromettre sensiblement l'équité et la rapidité du procès ». En effet, rien n'empêche la Défense de faire valoir, au moment du contre-interrogatoire de l'accusé, que tel ou tel document tombe sous le coup de la communication au sens de l'article 66 (B) du Règlement. La Chambre a déjà, à une occasion, empêché que ne soient posées des questions relatives à un document non communiqué, alors qu'une requête en vertu de l'article 66 (B) du Règlement avait été dûment formée à cette fin[6]. Si un tel cas se présente lors du contre-interrogatoire de l'accusé en l'espèce, la Défense pourra soulever une objection et, si elle n'est pas satisfaite de la décision de la Chambre, saisir celle-ci d'une demande de certification d'appel. Une telle demande, portant sur un document précis dont l'importance est concrètement mesurable, pourrait effectivement toucher une question susceptible de compromettre sensiblement l'équité du procès et de faire concrètement progresser la procédure. La Défense n'a cependant pas montré en quoi ces deux conditions étaient remplies dans le cas des catégories visées, telles que les définit la décision contestée.

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[4] *Ibid*., par. 9.

[5] Les appels interlocutoires ne peuvent être autorisés que s'ils concernent des arguments et thèses présentés en première instance. Or, certaines des conclusions orales présentées par la Défense en l'espèce vont au-delà de l'argumentation que sa requête initiale développait relativement aux deux catégories visées de documents, révélant une prétention beaucoup plus ambitieuse, exprimée en ces termes à l'audience : « ... nous avons donc le droit de savoir à quoi nous attendre…» (Compte rendu de l'audience du 11 décembre 2006, p. 9) (projet). La requête initiale se fondait sur des arguments plus limités, à savoir le caractère nécessaire des catégories de documents définies par la Défense. Pour décider de l'opportunité d'autoriser un appel interlocutoire, la Chambre se doit de considérer les seuls arguments et questions soulevés dans la requête initiale. Voir *Le Procureur c. Bagosora et consorts, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries,* Chambre de première instance, 21 juillet 2005, par. 5 et 6 («Le fait d'autoriser un appel à titre interlocutoire sur la base d'arguments que les parties n'ont pas fait valoir dans le cadre de leurs requêtes initiales ouvrirait la porte à la multiplication des contestations et pourrait par ailleurs amener la Chambre d'appel à se prononcer sur des questions qui n'auraient pas fait l'objet d'un examen au fond en première instance. S'il est loisible à la Chambre de première instance saisie d'une demande de certification d'analyser à nouveau la substance de sa décision, elle ne procédera de la sorte qu'au regard des critères énoncés à l'article 73 (B) du Règlement. La demande de certification ne saurait valablement servir à introduire une nouvelle argumentation. Une certification accordée sur de telles bases risquerait de prendre la partie adverse par surprise et de court-circuiter la procédure régissant l'examen au fond des requêtes. » [traduction]).

[6] Compte rendu de l'audience du 28 septembre 2006, p. 24 et 25 (témoin KVB-19).

6. Le caractère nécessaire que pourraient revêtir ces deux catégories de documents est d'autant moins probable que, selon le Procureur, certaines des pièces qu'elles recouvrent auraient déjà été communiquées. Il en serait notamment ainsi de toutes les déclarations préalables et photographies de l'accusé[7]. Qui plus est, maintes pièces relevant de la seconde catégorie – journaux, passeports et agendas personnels – sont déjà soumises à l'obligation de communication en ce sens que la décision contestée prescrit l'examen des « documents saisis chez l'accusé » [traduction]. N'ayant pas exclu de ces catégories des pièces qui lui avaient déjà été communiquées et ayant formulé sa requête en des termes généraux, la Défense a placé la Chambre, qui aurait pour le moins dû être informée du type particulier de documents dont il s'agissait, dans l'impossibilité d'en apprécier le caractère nécessaire.

7. La Chambre conclut que la Défense n'a pas montré en quoi l'appel envisagé pourrait concrètement faire progresser la procédure, ni en quoi il toucherait des questions susceptibles de compromettre sensiblement l'équité et la rapidité du procès, ou son issue.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la demande.

Fait Arusha, le 12 décembre 2006.

[Signé] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

[7] Compte rendu de l'audience du 11 décembre 2006, p. 21 (projet).

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The Prosecutor v. Jean Bosco BARAYAGWIZA, Ferdinand NAHIMANA and Hassan NGEZE

Case N° ICTR-99-52

Case History: Jean Bosco Barayagwiza

• Name: BARAYAGWIZA

• First Names: Jean Bosco

• Date of Birth: 1950

• Sex: male

• Nationality: Rwandan

• Former Official Function: Director of Political Affairs in the Ministry of Foreign Affairs

• Date of Indictment's Confirmation: 23 October 1997

• Date of Indicment's Amendments: see Decisions of 5 November 1999 and 11 April 2000

• Date of the decision to joint Trials: 6 June 2000 with Ferdinand Nahimana and Hassan Ngeze (Case N°ICTR-99-52)

• Counts: genocide, complicity in genocide, conspiracy to commit genocide, direct and public incitement to commit genocide and crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

• Date and Place of Arrest: 27 March 1996, in Cameroon

• Date of Transfer: 19 November 1997

• Date of Initial Appearance: 23 February 1998

• Pleading: not guilty

• Date Trial Began: 23 October 2000

• Date and content of the Sentence: 3 December 2003, sentenced to life imprisonment, reduced to 35 years imprisonment

• Appeal: 28 November 2007, sentence reduced to 32 years imprisonment

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Case History: Ferdinand Nahimana

• Name : Nahimana

• First Name: Ferdinand

• Date of birth: 15 June 1950

• Sex: male

• Nationality: Rwandan

• Former Official Function: Director of *Radio Télévision Libre Milles Collines* (RTLM)

• Date of indictment's Confirmation: 12 July 1996

• Date of indictment's Amendments: 10 November 1999

• Date of the decision to joint Trials: 30 November 1999 with Hassan Ngeze and 6 June 2000 with Jean Bosco Barayagwiza (Case N° ICTR-99-52)

• Counts: conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, complicity in genocide, crimes against humanity

• Date and Place of Arrest: 27 March 1996, in Cameroon

• Date of transfer: 23 January 1997

• Date of Initial Appearance: 19 February 1997

• Pleading: not guilty

• Date Trial Began: 23 October 2000

• Date and content of the Sentence: 3 December 2003, sentenced to life imprisonment

• Appeal: 28 November 2007, sentence reduced to 30 years imprisonment

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Case History: Hassan Ngeze

• Name: NGEZE

• First Name: Hassan

• Date of Birth: 1961

• Sex: male

• Nationality: Rwandan

• Former Official Function: Chief Editor of the *Kangura* Newspaper

• Date of indictment's Confirmation: 3 October 1997

• Date of indictment's Amendments: 10 November 1999

• Date of the decision to joint Trials: 30 November 1999 with Ferdinand Nahimana and 6 June 2000 with Jean Bosco Barayagwiza (Case N° ICTR-99-52)

• Counts: conspiracy to commit genocide, genocide, complicity in genocide, direct and public incitement to commit genocide and crimes against humanity

• Date and Place of Arrest: 18 July 1997, in Kenya

• Date of Transfer: 18 July 1997

• Date of Initial Appearance: 19 November 1997

• Pleading: not guilty

• Date Trial Began: 23 October 2000

• Date and content of the Sentence: 3 December 2003, sentenced to life imprisonment

• Appeal: 28 November 2007, sentence reduced to 35 years imprisonment

Decision on Hassan Ngeze's Motions Requesting a Status Conference to be Held in Arusha on 8 February 2006
31 January 2006 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Andrésia Vaz, Pre-Appeal Judge

Hassan Ngeze – Emmanuel Ndindabahizi – Status Conference, Purpose of a status conference, No precision on the matters the Appellant wishes to raise, Motion by the Accused himself while the Counsel is in charge of the procedure – Motion dismissed

International Instruments cited :

Rules of Procedure and Evidence, rules 65 bis (A), 73, 107 and 115 ; Statute, art. 20 (4) (e)

International Case cited :

I.C.T.R. : Appeals Chamber, Emmanuel Ndindabahizi v. The Prosecutor, Scheduling Order, 6 January 2006 (ICTR-2001-71)

I, ANDRESIA VAZ, Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) and Pre-Appeal Judge in this case;[1]

BEING SEIZED OF two motions filed by Hassan Ngeze ("Appellant") on 19 January 2006[2], in which he requests the Appeals Chamber to grant him "an hour of being heard on a possible status conference to be held in Arusha on 8th February 2006"[3];

NOTING that the Prosecution has not filed a response to the Appellant's 19 January 2006 Motions;

NOTING that the Appellant requests convening a status conference pursuant to Article 20 (4) (e) of the Statute of the Tribunal and Rules 73, 107 and 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules")[4] without providing any further details on the matters that he wishes to raise, and

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[1] Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005; Corrigendum to the Order of the Presiding Judge Designating the Pre-Appeal Judge, 25 August 2005.

[2] " the appellant Hassan Ngeze in Person makes an extremely urgent motion to the Appeals Chamber requesting an equal treatment, similar to the one given to Co-detainee Emmanuel Ndindabahizi in the matter regarding the Grant of status conference only, and further re-submits a request of having an hour of being heard on a possible status conference to be held in Arusha on 8th February 2006, as it is a routine in Emmanuel Ndindabahizi Case (Case n°ICTR-07-71-A)", 19 January 2006 ("First Motion"), and "The appellant Hassan Ngeze in Person Further submits his additional request of being included in the Appeal Scheduling Order of 8th February 2006 in his request of being given similar treatment like those given to Emmanuel Ndindabahizi (Case n°ICTR-01-71-A) in the matter only regarding status conference is granted", 19 January 2006 ("Second Motion", or "19 January 2006 Motions", jointly).

[3] First Motion, p. 2 ; Second Motion, p. 2.

[4] First Motion, p. 2.

submits that an opportunity granted to him address "his problems" through a status conference would be in the interests of justice[5];

NOTING that the Appellant refers[6] to the Scheduling Order of 6 January 2006 in the case of *Emmanuel Ndindabahizi v. The Prosecutor* currently pending on appeal[7]; which orders that a status conference be held before the Pre-Appeal Judge in that case in the presence of Emmanuel Ndindabahizi and his Lead Counsel on 8 February 2006[8];

CONSIDERING that, pursuant to Rule 65 *bis* (A) of the Rules, the purpose of a status conference is "to organise exchanges between the parties so as to ensure expeditious trial proceedings";

CONSIDERING also that it is the prerogative of the Appeals Chamber and/or the Pre-Appeal Judge to convene a status conference given the circumstances of each particular case;

RECALLING the Pre-Appeal Judge's "Decision on Hassan Ngeze's request of an Extremely Urgent Status Conference Pursuant to Rule 65 *bis* of the Rules of Procedure and Evidence" of 20 September 2005 ("Decision of 20 September 2005") and "Decision on Hassan Ngeze's Request for a Status Conference" of 13 December 2005 ("Decision of 13 December 2005"), both denying the Appellant's request to convene a status conference to discuss the matters submitted by him, including *inter alia*, the restrictive measures imposed on the Appellant[9];

CONSIDERING that, in his 19 January 2006 Motions, the Appellant does not provide any details concerning the matters that he wishes to address during a status conference;

CONSIDERING that the Appellant has not shown that a status conference would facilitate expeditious proceedings on appeal at the present stage[10];

FINDING, therefore, that there is no need to convene a status conference in this case on 8 February 2006;

CONSIDERING that in light of the abovementionned Pre-Appeal Judge's Decisions of 20 September and 13 December 2005, the request of the Appellant to have a status conference convened on 8 February 2006, without substantiating the Request, is frivolous;

RECALLING, that a counsel assigned to an accused "shall deal with all stages of procedure and all matters arising out of the representation of the […] accused or of the conduct of his Defence"[11];

CONSIDERING, therefore, that it was improper for the Appellant's Counsel to simply "forward"[12] the 19 January 2006 Motions to the Appeals Chamber while they were clearly prepared by the Appellant himself;

FOR THE FOREGOING REASONS,

DISMISS both 19 January 2006 Motions;

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[5] *Ibid*., p. 3.
[6] Idem.
[7] Case n°ICTR-01-71-A.
[8] *Emmanuel Ndindabahizi v. The Prosecutor*, Case n°ICTR-01-71-A, Scheduling Order, 6 January 2006, p. 2.
[9] Decision of 20 September 2005, p. 3 ; Decision of 13 December 2005, p. 4.
[10] See also, *idem*.
[11] Directive on the Assignment's Lead Counsel of 9 January 1996, as amended, Article 15 (A).
[12] See Letters from the Appellant's Lead Counsel addressed to the Coordinator of the Court Management Section of the Appeals Chamber and accompanying the 19 January 2006 Motions.

DIRECT the Registrar to withhold the payment of fees, if claimed, in relation to both 19 January 2006 Motions and attachments thereto;

Done in English and French, the English text being authoritative.

Dated this 31st day of January 2006, at The Hague, The Netherlands.

[Signed] : Andrésia Vaz

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Decision on Hassan Ngeze's Motion requesting to Rectify the Differential and Unequal Treatment between the ICTR and ICTY in Sentencing Policies and Other Rights
23 February 2006 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron

Hassan Ngeze – ICTR and ICTY Sentencing Policies, Allegation of unequal, Grounds of Appeal, No possible seizure of the Appeals Chamber of a general matter – Motion dismissed

International Instrument cited :

Statute, art. 24

International Case cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Judgement and Sentence, 3 December 2003 (ICTR-99-52)

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "ICTR", respectively),

BEING SEIZED OF the "Appellant Hassan Ngeze's Request for the Appeal [*sic*] Chamber to Take Appropriate Steps to Rectify the Differential and Unequal Treatment between the ICTR and ICTY in Sentencing Policies and Other Rights" filed by Hassan Ngeze ("Appellant") on 28 November 2005 ("Motion");

NOTING that the Office of the Prosecutor of the ICTR ("Prosecution") has not filed a response to the Motion;

NOTING that the Appellant submits that there are "explicit differences" in the operation of the ICTR as compared to the International Criminal Tribunal for the former Yugoslavia ("ICTY") in different areas "from indictment to sentencing", leading the Appellant to conclude that

"those accused by the ICTR do not receive the same level of judicial propriety and fairness as their counterparts in the ICTY",[1]

and requests the Appeals Chamber to

"take adequate measures to rectify the differential and unequal treatment of the [A]ppellant Hassan Ngeze besides others, in its sentencing policies and other rights in comparison to the treatment of accused/s and convicts of the ICTY";[2]

NOTING that, with regard to the Appeals Chamber's jurisdiction, the Appellant argues that, due to the novelty and exceptional nature of his request,[3] the Appeals Chamber should consider the Motion for the sake of "principles of equity and fairness"[4] and "as a measure to develop and strengthen international criminal law jurisprudence",[5] despite the fact that the Motion "cannot be based on a discernable rule";[6]

NOTING that, the Appellant contends that he has *locus standi* to bring such a request because (a)

"the Trial Chamber's judgment against the Appellant is one of the decisions that the Memorandum refers to in its statistics analysis"

and he, thus, has "interest in the review requested";[7] and (b)

"as an individual member of the global community [he] also has an obligation [sic] to expect efficacy and transparency";[8]

NOTING that the main differences between the ICTR and ICTY alleged by the Appellant relate to the following elements: conditions of detention;[9] presumption of innocence and burden of proof beyond reasonable doubt;[10] impartiality of the Trial Chambers;[11] verdicts and sentencing;[12] hierarchy of the crimes provided for by the respective Statutes of the ICTR and ICTY;[13] and selectiveness of prosecutions;[14]

CONSIDERING that Article 24 of the Statute of the ICTR provides that the Appeals Chamber has jurisdiction to hear "appeals from persons convicted by the Trial Chambers or from the Prosecution" on the grounds of

"(a) [a]n error on a question of law invalidating the decision; or (b) [a]n error of fact which has occasioned a miscarriage of justice"

with the view to "affirm, reverse or revise the decisions taken by the Trial Chambers";

CONSIDERING that, pursuant to Article 24 of the ICTR Statute, an accused or appellant cannot seize the Appeals Chamber of a general matter without alleging that there has been an error of law or

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[1] Motion, paras 3 and 5. In support of these submissions, the Appellant refers principally to Annex I to the Motion, a memorandum dated 31 October 2005 and entitled "Denunciation of a Two-Speed and Discriminatory International Justice", addressed by certain detainees to, *inter alia,* the United Nations Secretary-General ("Memorandum").
[2] *Ibid*., Prayer.
[3] *Ibid*., para. 6.
[4] *Ibid*., para. 10.
[5] *Ibid*., para. 11.
[6] *Ibid*., para. 10.
[7] *Ibid*., para. 12.
[8] *Ibid*., para. 14.
[9] *Ibid*., para. 17.
[10] *Ibid*., paras 18 – 19.
[11] *Ibid*., para. 20.
[12] *Ibid*., para. 21.
[13] *Ibid*., para. 22.
[14] *Ibid*., para. 25.

of fact arising from a decision, order or judgement rendered by a Trial Chamber, which directly concerns him or her;

CONSIDERING that the Appellant had the possibility to raise, in his Notice of Appeal[15] and Appellant's Brief,[16] all issues pertaining to alleged errors of law and of fact in the Trial Judgement rendered in the present case;[17]

FINDING that the Motion does not set forth an error that the Appeals Chamber has jurisdiction to consider;

FOR THE FOREGOING REASONS,

DISMISSES the Motion in its entirety.

Done in English and French, the English text being authoritative.

Dated this 23rd day of February 2006, At The Hague, The Netherlands.

[Signed] : Fausto Pocar

[15] Amended Notice of Appeal, 9 May 2005.
[16] Appeal Brief, 2 May 2005.
[17] *The Prosecutor v. Ferdinand Nahimana et al.*, Case N°ICTR-99-52-T, Judgement and Sentence, 3 December 2003.

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Order Convening a Status Conference 9 March 2006 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Andrésia Vaz, Pre-Appeal Judge

Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Status Conference

International Instrument cited :

Rules of Procedure and Evidence, rules 54, 65 bis (A) and 65 bis (B)

International Case cited :

I.C.T.R. : Trial Chamber , The Prosecutor v. Ferdinand Nahimana et al., Judgement and Sentence, 3 December 2003 (ICTR-99-52)

I, Andrésia Vaz, Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (the "Appeals Chamber" and the "Tribunal" respectively) and Pre-Appeal Judge in the instant case;[1]

CONSIDERING the Judgement of Trial Chamber I of the Tribunal rendered on 3 December 2003;[2]

CONSIDERING that Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze (the "Appellants") are currently in detention awaiting the hearing of their respective appeals;

CONSIDERING that the last status conference was held on 9 March 2005;[3]

WHEREAS pursuant to Rule 65 *bis* (A) and (B) of the Tribunal's Rules of Procedure and Evidence (the "Rules"), a Judge of the Appeals Chamber may convene a status conference for the purpose of organising exchanges between the parties so as to ensure expeditious trial proceedings;

WHEREAS a status conference would be useful at this stage of the proceedings to ensure that the case proceeds without undue delay;

PURSUANT TO RULES 54 AND 65 *BIS* (B) OF THE RULES

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[1] *Order of the Presiding Judge Designating the Pre-Appeal Judge,* 19 August 2005; Corrigendum to the "Order of the Presiding Judge Designating the Pre-Appeal Judge", 25 August 2005.

[2] Judgement and Sentence, 3 December 2003.

[3] A status conference was also held on 1 April 2005 by video link to afford Appellant Barayagwiza and his Counsel (who was absent from the status conference of 9 March 2005) the possibility of raising issues of compensation and time-limits.

HEREBY ORDER the parties to appear before me for a status conference on 7 April 2006 at 3 p.m. and INFORM them, without prejudice to their right to raise issues relating to the progress of the case, that the status conference will address the following issues:

- schedule of proceedings, including the time-limits for filing the translations of certain procedural documents;
- matters relating to the representation of the Appellants;
- conditions of detention of the Appellants, including their physical and mental health;
- status of motions filed by the parties and a reminder of the applicable principles and directions for filing motions with a view to ensuring speedy and fair proceedings on appeal;

ORDER Lead Counsel for the Appellants to attend the status conference, or to participate therein by teleconference if the Appellants concerned consent thereto in writing, or, failing that, to have themselves represented by their Co-Counsel;

REQUEST the Registrar to make the necessary arrangements for organising this status conference, including the provision of interpretation services and preparation of the minutes of the status conference in English and French.

Done in French and English, the French text being authoritative.

Done on 9 March 2006 at The Hague (The Netherlands).

[Signed] : Andrésia Vaz

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Decision on "Prosecutor's Motion for Reconsideration of the Appeals Chamber's Decision regarding the Timeliness of the Filing of the Prosecutor's Response to 'Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Witness AEU'" 7 April 2006 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron

Hassan Ngeze – Motion for reconsideration, Late filing due to a wrong stamped date on a Prosecution's Response, Inherent discretionary power of the Appeals Chamber to reconsider its interlocutory decisions, No demonstration of the existence of a clear error or reasoning, No prejudice to the Defence due to the mistake of the date of the filing of the Prosecution's Response – Motion dismissed

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005 (ICTR-99-52) ; Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgement, 23 May 2005 (ICTR-98-44A)

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law

Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) ;

NOTING the "Decision on Appellant Hassan Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage", issued confidentially on 23 February 2006 ("Decision"), in which the Appeals Chamber found that the "Prosecutor's Response to 'Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Witness AEU'" ("Prosecution's Response to the Fourth Motion") had been filed one day late and consequently did not consider in its disposing of "Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Witness AEU" filed on 16 June 2005 ("Fourth Motion");[1]

CONSIDERING that the Appeals Chamber based such finding on the fact that the front page of the Prosecution's Response to the Fourth Motion was stamped as confidentially filed on 28 June 2005 ;

BEING SEIZED OF the "Prosecutor's Motion for Reconsideration of the Appeals Chamber's Decision Regarding the Timeliness of the Filing of the Prosecutor's Response to 'Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Witness AEU'", filed on 3 March 2006 ("Motion"), in which the Prosecution submits that the date recorded in the registry's stamp on the front page of the Prosecution's Response to the Fourth Motion is wrong and should have been dated one day earlier and requests the Appeals Chamber to reconsider the aforementioned finding,[2] to recognize the Prosecution's Response to the Fourth Motion as timely filed on 27 June 2005,[3] and to correct the record accordingly ;[4]

NOTING that in its Motion, the Prosecution specifies that it "does not request the Appeals Chamber to examine the Appellant's Motion and the Response afresh";[5]

NOTING that Appellant Hassan Ngeze did not file any response to the Motion ;

CONSIDERING that, after it rendered its Decision, the Appeals Chamber received a *memorandum* from the Registry dated 30 June 2005, which specifies that, with regard to the Prosecution's Response to the Fourth Motion, "the filing date should read 27 June 2005 and not 28 June 2005" and attaches the confidentially filed Prosecution's Response to the Fourth Motion bearing the Registry Stamp of 27 June 2005";

CONSIDERING that the Appeals Chamber has an inherent discretionary power to reconsider its own previous interlocutory decisions of the existence of a clear error or reasoning has been demonstrated or if it is necessary in order to prevent an injustice ;[6]

CONSIDERING that on the basis of the documents before it at the time it rendered its Decision, the Appeals Chamber did not err in finding that the Prosecution's Response to the Fourth Motion was untimely filed ;

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[1] Decision, para. 3.
[2] Motion, para. 2.
[3] *Ibid*., para. 8.
[4] *Ibid*., para. 5.
[5] *Ibid*., para. 3.
[6] *Juvénal Kajelijeli v. The Prosecutor*, Case n°ICTR-98-44A-A, Judgement, 23 May 2005, para. 203 (*Kajelijeli* Appeal Judgement) ; Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005, p. 2.

CONSIDERING that in its Decision, the Appeals Chamber dismissed the Fourth Motion and the Prosecution, as the prevailing party, was in no way prejudiced by the mistake made concerning the date of the filing of the Prosecution's Response to the Fourth Motion, and that the timeliness issue is therefore moot;

CONSIDERING that reconsideration of an Appeals Chamber's interlocutory decision is "exceptional"[7] and that the Prosecution has provided no reason that this step should be taken other than "in order to correct the record" concerning a confidential decision by the Appeals Chamber ;

FINDING therefore that the Prosecution has failed to demonstrate that this is an exceptional case meeting discretionary reconsideration; it has not demonstrated a "clear error" in the Appeals Chamber's reasoning, nor the necessity of reconsideration to prevent an injustice;[8]

On the basis of the foregoing, hereby DISMISSES the Motion.

Done in English and French, the English version being authoritative.

Done this 7th day of April 2006, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

[7] *Kajelijeli* Appeal Judgement, para. 204.
[8] Id.

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Decision on Appellant Jean-Bosco Barayagwiza's Motion for leave to present Additional Evidence Pursuant to rule 115 5 May 2006 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron

Jean Bosco Barayagwiza – Additional evidence, Party seeking the admission of additional evidence on appeal must provide the Appeals Chamber with the evidence, Material unavailable before the court of first instance, Inter alia : Bruguière's Report – Late Filing of the Rule 115 Motion, Demonstration of good cause : failure of the Defence to fails to establish why his current Lead Counsel was not able to begin effective work – Sanctions on the Appellant's Counsel : non-payment of fees and costs associated – Motion dismissed

International Instruments cited :

Practice Direction on Formal Requirements for Appeals from Judgement, para. 7 ; Rules of Procedure and Evidence, rules 73 (F) and 115 ; Statute, art. 28 (2) (b)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Jean Kambanda, Decision on the Appellant's Motion for Admission of New evidence, 13 June 2000 (ICTR-97-23) ; Appeals Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on Clarification of Time Limits and on Appellant Barayagwiza's Extremely Urgent Motion for Extension of Time to File his Notice of Appeal and his Appellant's Brief, 6 September 2005 (ICTR-99-52) ; Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza et al., Decision on Appellant Hassan Ngeze's Six Motions for Admission of Additional Evidence on Appeal and /or Further Investigation, 23 February 2006 (ICTR-99-52)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Zoran Kupreškić et al., Decision on the Motions of Drago Josipovic, Zoran Kupreškić and Vlatko Kupreškić to admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken pursuant to Rule 94 (B), 8 May 2001 (IT-95-16)

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of "The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)" ("Rule 115 Motion") confidentially filed by Jean-Bosco Barayagwiza ("Appellant") on 28 December 2005, in which he requests the Appeals Chamber to admit twelve pieces of additional evidence on appeal.

2. The Prosecution responded to the Rule 115 Motion on 9 January 2006 requesting the Appeals Chamber to dismiss it in its entirety.[1] The Appellant filed two different versions of his reply on 16 and 17 January 2006.[2]

I. Procedural Background

3. Trial Chamber I rendered its Judgement in the present case on 3 December 2003.[3] The Appellant filed a first Notice of Appeal on 22 April 2004,[4] which was amended on 27 April 2004.[5] The initial Appellant's Brief was filed by him on 25 June 2004.[6]

4. The proceedings in relation to the Appellant were stayed from 19 May 2004[7] through 26 January 2005,[8] pending the assignment of a new lead counsel. The current Lead Counsel was assigned to the Appellant by the Registrar on 30 November 2004, and on 19 January 2005, the Appeals Chamber dismissed the Appellant's challenge to this assignment.[9] The Appellant's request for reconsideration of the Decision of 19 January 2005 was dismissed by the Appeals Chamber on 4 February 2005.[10]

5. As per the decisions of 17 May 2005[11] and 6 September 2005,[12] both his "Amended Notice of Appeal" and "Amended Appellant's Brief" were filed by the Appellant on 12 October 2005.

II. Preliminary Matters

6. The Appeals Chamber recalls the Pre-Appeal Judge's decision of 23 January 2006 in the present case, which granted both the Appellant's and Prosecution's requests for extension of the page limit for the Rule 115 Motion and Response thereto respectively, and which found the filing of both versions of the Rule 115 Reply to be untimely and frivolous, accordingly ordering that they be expunged from the record ("Decision of 23 January 2006").[13] Pursuant to the same decision, the

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[1] "The Prosecutor's Response to the Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)", 9 January 2006, para. 50 ("Response to Rule 115 Motion").
[2] "The Appellant Jean-Bosco Barayagwiza's Reply to the Prosecutor's Response to the Appellant's Motion for Leave to Present Additional Evidence (Rule 115)", 16 and 17 January 2006. For the purposes of the present decision these will be referred to collectively as the "Rule 115 Reply".
[3] *The Prosecutor v. Ferdinand Nahimana et al.,* Case N°ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("Judgement").
[4] « Notice d'Appel (conformément aux dispositions de l'article 24 du Statut et de l'article 108 du Règlement) », 22 April 2004.
[5] « Acte d'appel modifié aux fins d'annulation du Jugement rendu le 03 décembre 2003 par la Chambre I dans l'affaire 'Le Procureur contre Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze, ICTR-99-52-T' », 27 April 2004.
[6] « Mémoire d'Appel », 25 June 2004.
[7] Decision on Jean-Bosco Barayagwiza's Motion Appealing Refusal of Request for Legal Assistance, 19 May 2004.
[8] Order Lifting the Stay of Proceedings in Relation to Jean-Bosco Barayagwiza, 26 January 2005 ("Order of 26 January 2005"). In particular, the Appellant was initially ordered to file "any amended or new Notice of Appeal no later than 21 February 2005 (i.e., thirty days from the Decision of 19 January 2005)" and "any amended or new Appellant's Brief no later than 9 May 2005 (i.e., seventy-five days after the time limit for filing the Notice of Appeal)."
[9] Decision on Jean-Bosco Barayagwiza's Motion Concerning the Registrar's Decision to Appoint Counsel, 19 January 2005 ("Decision of 19 January 2005").
[10] Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005 ("Decision of 4 February 2005").
[11] Decision on "Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", 17 May 2005.
[12] Decision on Clarification of Time Limits and on Appellant Barayagwiza's Extremely Urgent Motion for Extension of Time to File his Notice of Appeal and his Appellant's Brief, 6 September 2005.
[13] Decision on Formal Requirements Applicable to the Parties' Filings Related to the Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence, 23 January 2006 ("Decision of 23 January 2006"), p. 7.

Prosecution's submission referred to as its "sur-reply"[14] was found invalidly filed and moot,[15] and was also expunged from the record.[16]

A. Appellant's Request for Clarification of the Decision of 23 January 2006

7. On 31 January 2006, the Appellant seized the Appeals Chamber with a request for clarification of the Decision of 23 January 2006.[17] The Appellant

> "specifically request[s] [the Appeals Chamber] to make an order permitting the re-filing of a [r]eply to the [p]rosecution [r]esponse".[18]

The Prosecution has not responded to the Motion for Clarification.

8. The Appeals Chamber considers that the Appellant's request for clarification is in fact a motion for reconsideration of the Decision of 23 January 2006 and finds that none of the arguments raised by the Appellant establish cause for reconsideration.[19] As to the Appellant's argument that the Rule 115 Reply contained "arguments and submissions of law and fact which are currently not before the Appeals Chamber",[20] this does not constitute a valid cause to be relieved from the failure to file a reply in time. In addition, the Appeals Chamber recalls that a reply should be limited to arguments contained in the response and that, to the extent the Rule 115 Reply included any completely new submission of law or fact, it was improper.[21]

9. In his Motion for Clarification, the Appellant also requests the Appeals Chamber to order an oral hearing to consider the Appellant's Motion for Additional Evidence to enable "a full argument as to the admissibility of the proposed additional evidence", given "both the gravity and complexity of the issues" set out in the Rule 115 Motion and Response thereto.[22] Pursuant to Rule 115 (C) of the Tribunal's Rules of Procedure and Evidence ("Rules"), the Appeals Chamber may decide a motion for leave to present additional evidence on appeal "with or without an oral hearing". Generally, the granting of an oral hearing is a matter for the discretion of a Chamber and may legitimately be regarded as unnecessary when the information before the Chamber is sufficient to enable it to reach an informed decision.[23] In the instant case, the Appeals Chamber finds that the Appellant has not put

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[14] "The Prosecutor's Requested Sur-Reply to 'The Appellant Jean-Bosco Barayagwiza's Reply to the Prosecutor's Motion for Leave to Present Additional Evidence (Rule 115)'", 20 January 2006.
[15] Decision of 23 January 2006, p. 5.
[16] *Ibid*., p. 7.
[17] "The Appellant Jean-Bosco Barayagwiza's Extremely Urgent Motion Requesting Clarification of the Decision of the Appeals Chamber, Dated 23rd January 2006, on the Formal Requirements Applicable to the Parties Filings", 31 January 2006 ("Motion for Clarification").
[18] *Ibid*., para. 2.
[19] The Appeals Chamber has an inherent discretionary power to reconsider its own previous interlocutory decisions if the existence of a clear error of reasoning has been demonstrated or if it is necessary in order to prevent an injustice (Decision of 4 February 2005, p. 2; *Juvénal Kajelijeli v. The Prosecutor*, Case N°ICTR-98-44A-A, Judgement, 23 May 2005, para. 203). No such error or injustice has been shown here.
[20] Motion for Clarification, para. 2..
[21] *Prosecutor v. Miroslav Kvočka et al*., Case N°IT-98-30/1-A, Decision on Prosecution's Motion to Strike Portion of Reply, 30 September 2002, p. 3. *Cf*. generally, Practice Direction on Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005, para. 6. *Cf*. also *Prosecutor v. Blagoje Simić*, Case N°IT-95-9-A, Decision on Prosecution's Motion to Strike Parts of the Brief in Reply, 27 September 2004, p. 3; *Prosecutor v. Stanislav Galić*, Case N°IT-98-29-A, Decision on Prosecution's Motion to Strike New Argument Alleging Errors by Trial Chamber Raised for First Time in Appellant's Reply Brief, 28 January 2005, p. 3; *Prosecutor v. Miroslav Deronjić*, Case N°IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005, para. 145.
[22] Motion for Clarification, para. 5.
[23] *Prosecutor v. Fatmir Limaj et al*., Case N°IT-03-66-AR65, Decision on Fatmir Limaj Request for Provisional Release, 31 October 2003, para. 17; *Prosecutor v. Momčilo Krajišnik,* Case N°IT-00-39-AR73.1, Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment, 25 April 2005, para. 4; *Prosecutor v. Mitar Rašević and Savo Todović*, Case N°IT-97-25/1-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todović's Application for Provisional Release, 7 October 2005, para. 29.

forward any convincing reasons justifying that written submissions are inadequate to put forward his arguments in relation to the Rule 115 Motion and thus, does not consider that the efficient conduct of the present proceeding requires an oral hearing prior to rendering its decision on the Rule 115 Motion.[24]

10. On the basis of the foregoing, the Appeals Chamber dismisses the Motion for Clarification. Moreover, the Appeals Chamber considers the Motion for Clarification as frivolous and, pursuant to Rule 73 (F), imposes sanctions against the Appellant's Counsel in the form of non-payment of fees and costs associated with it.

B. Annexes to the Rule 115 Motion

11. Due to the apparent inconsistencies of the Rule 115 Motion with the formal requirements set out in Paragraph 7 of the Practice Direction on Formal Requirements for Appeals from Judgement ('Practice Direction"),[25] the Pre-Appeal Judge ordered the Appellant to "re-file, no later than 30 January 2006, appendices to the Rule 115 Motion which should be copies of the evidence that he is applying to present before the Appeals Chamber in strict accordance with the precise list of such evidence already contained in his Rule 115 Motion".[26]

12. In "[t]he Appellant Jean-Bosco Barayagwiza's Extremely Urgent Corrigendum to the Rule 115 Motion Filed 28 December 2005, pursuant to the Order of the Pre-Appeal Judge of 23 January 2006" filed on 31 January 2006 ("*Corrigendum* to Rule 115 Motion"),[27] the Appellant requests the Appeals Chamber to accept an "amended list of annexed documents referred to in the contents of the Rule 115 Motion itself"[28] and provides as annexes "all the documents referred to in the body of the Appellant's Rule 115 Motion".[29]

13. The Appeals Chamber accepts the documents annexed to the *Corrigendum* to Rule 115 Motion only inasmuch as they correspond to the pieces of evidence mentioned in the Rule 115 Motion itself but omitted from its annexes. Indeed, the *Corrigendum* to Rule 115 Motion cannot be used to widen the scope of the Rule 115 Motion.

C. Prosecution Request of 10 February 2006 and Reply Thereto

14. On 10 February 2006,[30] the Prosecution filed the "Prosecutor's Request to File a Response Limited to Fresh Additional Evidence Appended to 'The Appellant Jean-Bosco Barayagwiza's Extremely Urgent *Corrigendum* to the Rule 115 Motion Filed 28 December 2005, Pursuant to the Order of the Pre-Appeal Judge of 23 January 2006'" ("Prosecution Request of 10 February 2006"), in which the Prosecution requests the Appeals Chamber to consider its response to "fresh matters

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[24] The Appeals Chamber has on numerous occasions determined the admissibility of evidence without a separate oral hearing on a Rule 115 motion, including cases where evidence of gross negligence of counsel was involved: *Prosecutor v. Jean-Paul Akayesu,* Case N°ICTR-96-4-A, Decision (On the Consolidation or Summarization of Motions not yet Disposed of), 22 August 2000, p. 6; *Prosecutor v. Jean Kambanda,* Case N°ICTR-97-23-A, Decision on the Appellant's Motion for Admission of New Evidence, 13 June 2000 (*Kambanda* Decision of 13 June 2000); See also *Prosecutor v. Zoran Kupreškić et al.*, Decision on the Motions of Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić to Admit Additional Evidence, issued confidentially on 26 February 2001, paras 52, 62, 66.

[25] 16 September 2002.

[26] Decision of 23 January 2006, p. 7.

[27] It appears that the Appellant sent the *Corrigendum* to Rule 115 Motion to the Registry by e-mail on 30 January 2006, and the Appeals Chamber will thus consider it as timely filed.

[28] *Corrigendum* to Rule 115 Motion, para. 3. The Appellant contends that "[t]he original list of annexes should be expunged from the record as an inaccurate and incomplete list of documents" (para. 2) and that the corrections are "administrative and typographical" and properly reflect the substance of the Rule 115 Motion (para. 4)

[29] *Corrigendum* to Rule 115 Motion, para. 2.

[30] The distribution to the parties by the Registry took place on 13 February 2006.

appearing in the *Corrigendum*" to the Rule 115 Motion.[31] The Appellant replied on 16 February 2006, submitting that the Prosecution Request of 10 February 2006 should be expunged from the record as "an inappropriate use of the Rules" of the Tribunal.[32]

15. The Appeals Chamber notes that both the Prosecution Request of 10 February 2006 and the Appellant's reply thereto contain arguments on the merits of the Rule 115 Motion which in substance, constitute a response and a reply to the *Corrigendum* to Rule 115 Motion. In that respect, the Appeals Chamber considers both the Prosecution Request of 10 February 2006 and the Appellant's reply thereto as validly filed. However, the Appeals Chamber will only take into account arguments pertaining to documents referred to in the Rule 115 Motion but not initially annexed to it or to alleged changes between the documents filed with the Rule 115 Motion and those filed with the *Corrigendum* to Rule 115 Motion. The Appeals Chamber notes that the Prosecution Request of 10 February 2006 and the reply thereto may not be used indirectly as a vehicle to make new submissions that should have been made in the Response to Rule 115 Motion or in a timely reply to it. In conformity with this principle, the Appeals Chamber also denies the Appellant's request to file "a full reply given that the original reply has been expunged from the record".[33]

D. Prosecution's Request to Submit a Fuller Response

16. In its Response to Rule 115 Motion, the Prosecution requested the authorization to submit, at a later stage, a fuller response to certain matters raised by the Appellant in his Rule 115 Motion.[34] The Appeals Chamber notes the Prosecution's submission that this is necessary because of the voluminous and unorganized annexes attached to the Rule 115 Motion.[35] The Appeals Chamber does not agree. Because (1) the Decision of 23 January 2006 ordered the Appellant to re-file the annexes; (2) the Appellant did so through his Corrigendum to Rule 115 Motion and, (3) the Appeals Chamber has already stated[36] that it will consider the arguments in the Prosecution Request of 16 February 2006 as long as they are really in response to "fresh matters appearing in the *Corrigendum*", the Appeals Chamber is of the view that the Prosecution need not be authorized to submit another response to the Rule 115 Motion.

E. Appellant's Motion of 29 March 2004

17. Lastly, in his Rule 115 Motion, the Appellant submits that he considers his motion filed on 29 March 2004[37] as still pending before the Appeals Chamber.[38] As the Appellant notes himself,[39] the Pre-Appeal Judge ordered him "to notify the Appeals Chamber of his intention to pursue or abandon the Motion for Additional Evidence no later than 21 February 2005".[40] Since the Appellant failed to do

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[31] Prosecution Request of 10 February 2006, para. 1. In particular, the Prosecution submits that there are apparent changes between the copies of the documents filed with the Rule 115 Motion and the copies of the purportedly same documents attached to the *Corrigendum* to Rule 115 Motion.
[32] "Appellant's Reply to the Prosecutor's Request to File a Response to [*sic*] Limited to Fresh Additionla [*sic*] Evidence Appended to 'The Appellant Jean-Bosco Barayagwiza's Extremely Urgent *Corrigendum* to the Rule 115 Motion Filed 28 December 2005, Pursuant to the Order of the Pre Trial [*sic*] Appeal Judge of 23rd January 2006'", 16 February 2006 ("Reply to the Prosecution Request of 10 February 2006"), para. 1.
[33] Idem.
[34] Response to Rule 115 Motion, para. 6.
[35] *Ibid*., paras 2 – 3.
[36] *See supra* para. 15.
[37] « Requête d'acceptation des moyens de preuves supplémentaires pour des motifs valables qui permettent d'accorder une extension du délai ex article 115 du Règlement de Procédure et de Preuve (concernant le Rapport du Juge d'instruction français Jean-Louis Bruguière sur le crash d'avion présidentiel au Rwanda) », 29 March 2004 ("Motion of 29 March 2004").
[38] Rule 115 Motion, para. 7.
[39] *Ibid*., para. 4.
[40] Order of 26 January 2005, p. 3.

so,[41] the Appeal Chamber considers that he waived his right to pursue the Motion of 29 March 2004. The Appeals Chamber notes that this does not prejudice the Appellant in any way, as the requests contained in the Motion of 29 March 2004 are reiterated in the current Rule 115 Motion.[42] The Appeals Chamber is also of the view that, while the Motion of 29 March 2004 was abandoned by the Appellant, this does not amount to a general waiver of the Appellant's right to pursue the admission of additional evidence on appeal.[43]

III. Discussion

A. Materials Submitted by the Appellant for Admission as Additional Evidence on Appeal

18. The Appeals Chamber recalls that a party seeking the admission of additional evidence on appeal must provide the Appeals Chamber with the evidence sought to be admitted.[44] For the sake of clarity and in light of the Appeals Chamber's findings above,[45] the Appeals Chamber notes that not all of the materials referred to in the Rule 115 Motion and/or contained in the Annexes thereto can in fact be considered as meeting the formal requirements for submission of additional evidence to be considered for admission on appeal.

19. In particular, pursuant to Article 7 of the Practice Direction,[46] the following documents should fall out of the consideration by the Appeals Chamber since they were either not annexed to the Rule 115 Motion and not later submitted with the *Corrigendum* or were annexed to the Rule 115 Motion but not listed therein and the Rule 115 Motion thus contains no arguments as to their admissibility: "*Affidavit* from Dr. Shimamungu Eugène, Expert in Kinyarwanda language and in political speech on the use of certain terms imputed to the Appellant"[47]; "Fax of 6 February 1994 on the election of JBB as President of Gisenyi";[48] "CDR Internal Rules".[49] Similarly, the Appeals Chamber notes that Annexes 1[50] and 2[51] to the Rule 115 Motion are referred to by the Appellant as relevant to the respective request for leave to submit additional evidence on appeal in respect of Judge Bruguière's Report. While he admits that these two documents "fall within the generic description" contained in the Rule 115 Motion,[52] he persists that they "should be considered as evidence which may undermine the convictions"[53] but does not make any argument as to their admissibility in his Rule 115 Motion.[54] The

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[41] The Appeals Chamber notes that the first time that the Appellant referred to his Motion of 29 March 2004, since the Order of 26 January 2005, was in his current Rule 115 Motion, justifying the delay by the fact that the current counsel for the Appellant only "started effectively his work" in April 2005 and that "no coherent or reasoned decision could be taken in relation to the motion for additional evidence until the Appeal Brief had been filed" (Rule 115 Motion, paras 5 – 6). The Appeals Chamber is not convinced by these arguments.
[42] Rule 115 Motion, paras 18 – 28.
[43] As argued by the Prosecution in its Response to Rule 115 Motion, paras 47 – 49.
[44] Decision on Appellant Hassan Ngeze's Motion for Leave to Present Additional Evidence, 14 February 2005, p. 3.
[45] See paras 13 and 15-16 above.
[46] Pursuant to this provision, a motion applying to present additional evidence shall contain:
"(a) a precise list of the evidence the party is seeking to have presented;
(b) an identification of each ground of appeal to which the evidence relates and, where applicable, a request to submit any additional grounds of appeal based on such evidence;
(c) arguments in relation to the requirements of non-availability at trial, relevance and credibility;
(d) arguments in relation to the requirement that the admission of the additional evidence could have been a decisive factor in reaching the decision made by the Trial Chamber to which the additional evidence is directed;
(e) an appendix with copies of the evidence the party is applying to present before the Appeals Chamber".
[47] Annex N°9 to the *Corrigendum* to the Rule 115 Motion, but not referred to in the Rule 115 Motion.
[48] Rule 115 Motion, para. 50, but not attached as Annex.
[49] *Ibid*.,paras. 42-43, but not attached as Annex.
[50] "Statement by the Appellant before Judge Bruguière during his investigation on the murder of President Habyarimana", Rule 115 Motion, footnote 24.
[51] "Extract from Newspaper *Le Monde* dated 10 March 2004".
[52] Reply to the Prosecution Request of 10 February 2006, para. 10.
[53] *Ibid*., para. 11.
[54] Rule 115 Motion, paras 18 – 28.

Appellant re-filed these documents in his *Corrigendum* to the Rule 115 Motion despite a clear indication of the discrepancy between the contents of his Rule 115 Motion and Annexes thereto made to him by the Pre-Appeal Judge.[55] Therefore, the Appeals Chamber does not consider Annex 1 and Annex 2 as documents tendered as additional evidence on appeal.

20. With regard to the report allegedly issued by the French *juge d'instruction* Bruguière on the results of the investigation with regard to the President Habyarimana's plane crash on 6 April 1994, the Appellant affirms that he "cannot succeed in obtaining" it by himself and prays the Appeals Chamber to request the said report from the French authorities under Article 28 of the Statute of the Tribunal "or summon Judge Bruguière to appear as a witness before the Appeals Chamber".[56] The Appeals Chamber recalls that it has "the authority to summon a witness, in appropriate circumstances, to testify before the Chamber so as to facilitate the effective conduct of appeal proceedings, and especially Rule 115's power to admit additional evidence."[57] Similarly, the Appeals Chamber has the power to request a State to provide judicial assistance by producing certain evidence under Article 28 (2) (b) of the Statute of the Tribunal. However, the purpose of Rule 115 is to deal with the situation

> "where a party is in possession of material that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial."[58]

The Rule does not permit a party to merely request a particular person to be summoned as a witness to give evidence or that a State be requested to produce certain documentation.[59] In this case, the Appellant has failed to provide material in his possession that would be admissible as additional evidence directed to a specific finding of fact of the Trial Chamber.[60] Therefore, the Appellant's request falls out of the scope of a motion filed pursuant to Rule 115.

21. Finally, the Appellant tenders a number of documents (all referred to in the Rule 115 Motion but not attached as Annexes),[61] which were in fact already admitted into evidence at trial and therefore do not constitute "additional evidence" to be admitted in this case. The Appeal Chamber notes that it is consequently not necessary to examine them in considering the Rule 115 Motion.[62]

B. Late Filing of the Rule 115 Motion

22. As to the remainder of the material tendered as additional evidence on appeal, under Rule 115 (A) of the Rules, a motion to present additional evidence on appeal must be filed "not later than seventy-five days from the date of the judgement", which in this case was 16 February 2004, "unless good cause is shown for further delay."

23. The Appellant submits that his current Lead Counsel could only start his work effectively in April 2005, that the Defence team only became complete with the appointment of the legal assistant

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[55] Decision of 23 January 2006, p. 6.
[56] Rule 115 Motion, para. 28. The Prosecution argues that the piece of evidence in question is "irrelevant to the Appellant's case and could not be a decisive factor in the decision to convict him at trial" (Response to Rule 115 Motion, para. 21).
[57] *Prosecutor v. Kupreškić et al.*, Case N°IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94 (B), 8 May 2001 ("*Kupreškić* Decision"), para. 5.
[58] *Kupreškić* Decision, para. 5; Decision on Appellant Hassan Ngeze's Six Motions for Admission of Additional Evidence on Appeal and /or Further Investigation, 23 February 2006 ("Decision of 23 February 2006"), para. 40.
[59] *Kupreškić* Decision, para. 5.
[60] Idem.
[61] "273 tapes in Kinyarwanda" (Exhibit P103) - Rule 115 Motion, para. 67; "Information on dialogue between the CDR and RPF: 'Letter of 28 March 1993 from CDR to RPF' (Exhibit 2D32), 'Speech delivered by Martin Bucyana on 23 March 1992' (Exhibit P141)" – *Ibid.*, paras 29-30; "Letter of Jean Nduwayezu to the President of CDR dated 14 December 1992 (Exhibit P203)" - *Ibid.*, para. 38; "The Appellant's report of a mission to Europe dated on 7 September 1993 (Exhibit 140)" – *Ibid.*, paras 42 and 49; "General Assembly creating the CDR party 22 February 1992" (Exhibits 2D12 and 3D80A) – *Ibid.*, para. 52; "Document on the Organization and Structure of the broad Initiative Committee" (Exhibit P53) – *Ibid.*, para. 57.
[62] *Cf.* e.g., *Kambanda* Decision of 13 June 2000, pp. 2-3 and Rule 109 (A) of the Rules.

on 13 June 2005, and that the legal assistant could only start working on documents in Kinya-rwanda language around 20 August 2005.[63] He adds that by the time the Defence team became familiarised with the case and the Tribunal's procedures, the priority had to be given to the preparation of the Amended Notice of Appeal and Amended Appellant's Brief.[64] It was in the course of preparation of these filings, that the Appellant could identify "numerous materials of exculpatory nature which were not put before the Trial Chamber and which could have had great impact on its findings and its judgement and sentence for the benefit of the accused".[65] Finally, he requests that the Rule 115 Motion be considered as validly filed in the interests of justice.[66]

24. The Prosecution asserts that the explanation provided by the Appellant is unsatisfactory and unconvincing given, in particular, the "Appellant's knowledge of his own case and appeal strategy" and the fact that the delay in the appointment of the Lead Counsel is "attributable to the Appellant's opposition to it".[67]

25. The Appeals Chamber considers that the Appellant has failed to show good cause for the late filing of his Rule 115 Motion. In the first place, he fails to establish why his current Lead Counsel was only able to begin effective work in this case in April 2005 although he had been appointed in November 2004, the stay on proceedings in this case was lifted on 26 January 2005, and the appointment of Lead Counsel was confirmed by the Appeals Chamber on 4 February 2005. Furthermore, the Appellant fails to provide a convincing explanation for why the legal assistant was only able to begin working on documents in Kinyarwanda at the end of August 2005 even though appointed in June 2005, and why the Appellant himself was not able to assist his Lead Counsel in dealing with such documents.

26. Even if the Appeals Chamber were to count the seventy-five days period from the date on which the Appellant claims that the current Defence team was complete (13 June 2005), such that the deadline for filing the Rule 115 Motion would have been 27 August 2005, the Rule 115 Motion would still have been filed 123 days late. The Appeals Chamber reiterates that

> "a Counsel, when accepting assignment as Lead Counsel in a case before the Tribunal, is under an obligation to give absolute priority to observe the time limits as foreseen in the Rules."[68]

The Appeals Chamber is not convinced by the Appellant's argument that the Defence team could not file a timely motion for admission of additional evidence under Rule 115 because it had to focus on preparation of the Amended Notice of Appeal and Amended Appellant's Brief. The Appeals Chamber recalls that the Appellant was granted generous extensions of time for filing these submissions as early as May 2005, such that both were accepted as timely filed on 12 October 2005.[69] The additional time allowed for preparing the Amended Notice of Appeal and Amended Appellant's Brief should have allowed for the Appellant to work with his Defence team to prepare a timely motion pursuant to Rule 115.

27. On the basis of the foregoing, the Appeals Chamber finds that the Appellant has not shown good cause for the delay.

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[63] Rule 115 Motion, para. 6.
[64] Idem.
[65] *Ibid*., para. 7.
[66] *Ibid*., para. 8.
[67] Response to Rule 115 Motion, paras 47 – 48.
[68] Decision on Clarification of Time Limits and on Appellant Barayagwiza's Extremely Urgent Motion for Extension of Time to File his Notice of Appeal and his Appellant's Brief, 2 September 2005, p. 5.
[69] Decision on "Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice, 17 May 2005, p. 4. The Appellant was granted a further extension of time by the Decision of 2 September 2005 (p. 3).

IV. Disposition

28. For the foregoing reasons, the Appeals Chamber DISMISSES the Motion for Clarification in its entirety as frivolous and imposes sanctions on the Appellant's Counsel pursuant to Rule 73 (F) in the form of non-payment of fees and costs associated with it; FINDS that the Motion of 29 March 2004 was abandoned by the Appellant and dismisses it as such; and DISMISSES the Rule 115 Motion in its entirety.

Done in English and French, the English text being authoritative.

Dated this 5th day of May 2006.

At The Hague, The Netherlands.

[Signed] : Fausto Pocar

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Decision on Appellant Hassan Ngeze's Motions for Approval of Further Investigations on Specific Information Relating to the Additional Evidence of Potential Witnesses
20 June 2006 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron

Hassan Ngeze – Additional evidence, Statement from Jean-Bosco Barayagwiza, No need of a decision of the Chamber, No authorization needed in general to contact potential witnesses unless they are subject to protective measures, Request for further investigation – Late filing of the Motion, Demonstration of good cause : Jean-Bosco Baraygwiza's refusal to participate in the trial, Request for further investigation – Motion dismissed

International Instrument cited :

Rules of Procedure and Evidence, rules 115 and 115 (A)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on the Appellant's Rule 115 Motion and Related Motion by the Prosecution, 21 october 2005 (ICTR-99-52) ; Appeals Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence pursuant to Rule 115, 5 May 2006 (ICTR-99-52)

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of two motions filed by Appellant Hassan Ngeze ("Appellant"):

- "Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Potential Witness – Jean Bosco Barayagwiza (Co-Appellant)" filed on 6 January 2006 ("First Motion");
- "Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Potential Witness – the then Corporal Habimana" filed on 16 January 2006 ("Second Motion").

2. The Prosecution responded to the First and the Second Motions on 16 and 25 January 2006, respectively.[1] The Appellant's replies were filed on 26 and 30 January 2006, respectively.[2]

3. The Appeals Chamber notes that the Reply to the First Motion was filed by the Appellant six days late[3] and that no good cause has been shown for such delay. Accordingly, the Appeals Chamber will not consider the Reply to the First Motion.

I. Applicable law

4. The Appeals Chamber recalls that an appeal pursuant to Article 24 of the Statute of the Tribunal ("Statute") is not a trial *de novo*,[4] and cannot be viewed as an opportunity to remedy any "failures or oversights" by a party during the pre-trial and trial phases.[5] For these reasons, investigations should be carried out during the pre-trial and trial stages.[6]

5. Further, according to Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), for additional evidence to be admissible on appeal, the following requirements must be met. The Appeals Chamber must find "that the additional evidence was not available at trial and is relevant and credible." When determining the availability at trial, the Appeals Chamber will be mindful of the following principles:

> [T]he party in question must show that it sought to make "appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence […] before the Trial Chamber." In this connection, Counsel is

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[1] "Prosecutor's Response to 'Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Potential Witness – Jean Bosco Barayagwiza (Co-Appellant)'", 16 January 2006 ("Response to the First Motion"); Prosecutor's Response to 'Appellant Hassan Ngeze's Motion for the Approval of further Investigation of the Specific Information relating to the Additional Evidence of Potential Witness – the then Corporal Habimana'", 25 January 2006 ("Response to the Second Motion").

[2] "'Reply to the Prosecutor's Response', to the Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Potential Witness – Jean Bosco Barayagwiza (Co-Appellant)", 26 January 2006 ("Reply to the First Motion"); "Appellant Hassan Ngeze's Reply to 'The Prosecutor's Response to Appellant Hassan Ngeze's to [*sic*] Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Potential Witness – the then Corporal Habimana", 30 January 2006 ("Reply to the Second Motion").

[3] See Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, 16 September 2002, para. 12, which provides, *inter alia*, that a reply must be filed within four days of the filing of the response.

[4] Decision on Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator, 4 October 2005 ("Decision of 4 October 2005"), p. 3; Decision on Appellant Hassan Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage, 23 February 2006 ("Decision on Six Motions"), para. 5; see also *Prosecutor v. Akayesu,* Case N°ICTR-96-4-A, Judgement, 1 June 2001, para. 177.

[5] Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, 3 May 2005 ("Decision on Investigation"), p. 3; Decision on Six Motions, para. 5; *Prosecutor v. Erdemović*, Case N°IT-96-22-A, Judgement, 7 October 1997, para. 15.

[6] The Registrar generally does not fund investigations at the appeal stage (Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase, 3 May 2005 ("Decision on Assistance"), para. 2; Decision on Investigation, p. 3; Decision of 4 October 2005, p. 4; Decision on Six Motions, para. 5). However, in an exceptional case, the Appeals Chamber may order the Registrar to fund investigations at the appeal stage, if the moving party shows, for example, that it is in possession of specific information that needs to be investigated further in order to avoid a miscarriage of justice, and that this specific information was not available at trial through the exercise of due diligence (Decision on Assistance, para. 3; Decision on Six Motions, para. 5).

expected to apprise the Trial Chamber of all the difficulties he or she encounters in obtaining the evidence in question, including any problems of intimidation, and his or her inability to locate certain witnesses. The obligation to apprise the Trial Chamber constitutes not only a first step in exercising due diligence but also a means of self-protection in that non-cooperation of the prospective witness is recorded contemporaneously.[7]

With regard to relevance, the Appeals Chamber will consider whether the proposed evidence sought to be admitted relates to a material issue. As to credibility, the Appeals Chamber will admit evidence at this stage only if it appears to be reasonably capable of belief or reliance. Admission of the evidence is without prejudice to the later determination of the weight that the new evidence will be afforded.[8]

6. Once it has been determined that the additional evidence meets these conditions, the Appeals Chamber will determine whether the evidence "could have been a decisive factor in reaching the decision at trial."[9] To satisfy this, the evidence must be such that it *could* have had an impact on the verdict, i.e. it, in the case of a request by a defendant, it *could* have shown that a conviction was unsafe.[10] Accordingly, the additional evidence must be directed at a specific finding of fact related to a conviction or to the sentence.

7. The Appeals Chamber has considered that, where the additional evidence is relevant and credible, but was available at trial, or could have been discovered through the exercise of due diligence, the evidence may still be admitted if the moving party establishes that its exclusion *would* amount to a miscarriage of justice, inasmuch as, had it been adduced at trial, it *would* have had an impact on the verdict.[11]

8. The Appeals Chamber recalls that, whether the additional evidence was available at trial or not, it must always be assessed in the context of the evidence presented at trial, and not in isolation.[12]

II. FIRST MOTION

9. In the First Motion, the Appellant requests the Appeals Chamber to

"allow further investigation of the specific information in possession of the Appellant relating to the additional evidence of witness Jean Bosco Barayagwiza in order to avoid miscarriage of justice and enable him to file motion to present additional evidence of the potential witness Jean

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[7] *Prosecutor v. Ntagerura, et al.*, ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004 ("*Ntagerura et al.* Decision of 10 December 2004"), para. 9. [internal references omitted].
[8] See, e.g., Decision on Six Motions, para. 7; *Prosecutor v. Kupreškić et al.*, Case N°IT-95-16-A, Decision on Motions for the Admission of Additional Evidence filed by the Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić, 26 February 2001, para. 28.
[9] Rule 115 (B) of the Rules.
[10] Decision on Six Motions, para. 8; *Prosecutor v. Kupreškić et al.*, Case N°IT-95-16-A, Appeal Judgement, 23 October 2001, para. 68; *Prosecutor v. Krstić*, Case N°IT-98-33-A, Decision on Application for Admission of Additional Evidence on Appeal, 5 August 2003 ("*Krstić* Decision of 5 August 2003"), p. 3; *Prosecutor v. Blaškić*, Case N°IT-95-14-A, Decision on Evidence, 31 October 2003 ("*Blaškić* Decision of 31 October 2003"), p. 3.
[11] Decision on Six Motions, para. 9; *Kajelijeli v. Prosecutor*, Case N°ICTR-98-44A-A, Decision on Defence Motion for the Admission of Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, 28 October 2004 ("*Kajelijeli* Decision of 28 October 2004"), para. 11; *Ntagerura et al.* Decision of 10 December 2004, para 11. See also *Prosecution v. Delić*, Case N°IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002, para. 18; *Prosecution v. Krstić*, Case N°IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para. 16; *Krstić* Decision of 5 August 2003, p. 4, *Blaškić* Decision of 31 October 2003, p. 3.
[12] Decision on Six Motions, para. 10; *Kajelijeli* Decision of 28 October 2004, para. 12; *Ntagerura et al.* Decision of 10 December 2004, para. 12. See also *Blaškić* Decision of 31 October 2003, p. 3; *Nikolić v. Prosecutor*, Case N°IT-02-60/1-A, Decision on Motion to Admit Additional Evidence, 9 December 2004, para. 25.

Bosco Barayagwiza which was not available at trial and could not have been discovered despite the exercise of due diligence".[13]

The Prosecution opposes this request and submits that the First Motion should be dismissed in its entirety.[14]

A. Submissions of the Parties

10. The Appellant submits that the new evidence that could be provided by Jean-Bosco Barayagwiza if the First Motion were granted, is crucial to the issue of conspiracy between the three co-Appellants in the present case, notably with regard to the Trial Chamber's finding that "the accused Jean-Bosco Barayagwiza acted as the lynchpin among the three Accused, collaborating closely both with Nahimana and Ngeze".[15] More specifically, he claims that Jean-Bosco Barayagwiza "is ready and willing to testify before the Appeals Chamber" and, if allowed to do so, would provide details and clarifications concerning his role in the CDR and the RTLM activities and thereby undermine the abovementioned finding of the Trial Chamber.[16] The Appellant further submits that this evidence is particularly relevant to the "Appellant's connection with the alleged criminal acts narrated by witness AHA" and would not only have an impact on the verdict but would also "have the effect of demolishing the credibility of the said witness AHA".[17]

11. The Appellant avers that this evidence was not available to him at trial and could not be obtained through the exercise of due diligence due to the "non accessibility" of Jean-Bosco Barayagwiza.[18] The Appellant requests the Appeals Chamber to authorize him to take a written statement of Jean-Bosco Barayagwiza with a view to filing a motion pursuant to Rule 115 of the Rules requesting the Appeals Chamber to summon Jean-Bosco Barayagwiza as a witness on appeal.[19] The Appellant affirms that such exercise would not result in any expenses to the Registry nor would it prejudice the Prosecution.[20]

12. The Prosecution responds that the First Motion does not meet the requirements that would justify the request for further investigation, in particular, because the Appellant has neither demonstrated the existence of exceptional circumstances, nor adequately addressed the "'specific information' to be further investigated".[21] According to the Prosecution, the First Motion suggests a "fishing expedition" since it is unclear what further investigation is requested, what information is sought, or, what is the source of such information.[22]

13. Further, the Prosecution submits that the alleged evidence is "neither credible nor reliable, nor *could* it or *would* it have any impact on the verdict under appeal".[23] It also argues that the Appellant has not demonstrated that the tendered evidence was not available at trial or was not discoverable through due diligence.[24] In particular, it points out that during the cross-examination by the Appellant's Counsel in November 2000, Witness AHA testified at length as to his relationship with the Appellant

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[13] First Motion, preambulary para.
[14] Response to the First Motion, paras 2 and 17.
[15] First Motion, paras 1 and 5 with reference to *The Prosecutor v. Ferdinand Nahimana et al.,* Case N°ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("Trial Judgement"), paras 1050, 887-889, 938, 939, 943, 969, 1042, 1043, 1045-1047, 1049 and 1051-1055.
[16] First Motion, para. 1.
[17] *Ibid*., paras 6 and 11.
[18] *Ibid*., paras 2-4.
[19] *Ibid*., para. 7.
[20] *Ibid*., para. 13.
[21] Response to the First Motion, paras 2-4, 7.
[22] *Ibid.,* para. 7.
[23] *Ibid.,* paras 2, 5-6, 9-10.
[24] *Ibid.,* paras 13-15.

and Jean-Bosco Barayagwiza as well as about their positions in RTLM, CDR and Kangura.[25] The Prosecution also refers to the fact that the Appellant has had access to and discussions with Jean-Bosco Barayagwiza, the purported source of the additional evidence.[26] Thus, the requested investigation cannot result in identifying any new and specific information that was not known to the Appellant during the trial.[27]

14. Moreover, the Prosecution submits that compelling one co-accused to testify for another co-accused in the same case would constitute a breach of the accused's right to silence in terms of Article 20 (4) (g) of the Statute.[28] It concludes that it is a matter for Jean-Bosco Barayagwiza to decide whether he wishes to cooperate with the Appellant's Counsel and that the Appeals Chamber cannot compel him to do so.[29]

B. Discussion

15. As a preliminary matter, the Appeals Chamber notes that the subject of the First Motion is not clear.[30] The Appeals Chamber will only examine the Appellant's request for obtaining a written statement from Jean-Bosco Barayagwiza, since only that request is explicitly formulated in the First Motion. Also, the Appeals Chamber considers that the Appellant's Counsel does not need the Appeals Chamber's authorization or an order from the Appeals Chamber to obtain a statement from Jean-Bosco Barayagwiza. In this regard, the Appeals Chamber notes the Appellant's submission that Jean-Bosco Barayagwiza is prepared to provide a written statement to him,[31] as well as the fact that Jean-Bosco Barayagwiza is a detainee in the United Nations Detention Facility in Arusha, not subject to any restrictive or protective measures that would preclude the Appellant's Counsel from taking a statement from him. Furthermore, the Appeals Chamber notes that the Appellant submits that taking the statement from Jean-Bosco Barayagwiza would not result in any expenses for the Registry of the Tribunal.

16. In any event, noting that the Appellant seeks to obtain Jean-Bosco Barayagwiza's statement with a view to seeking leave to present additional evidence, the Appeals Chamber recalls that under Rule 115 (A) of the Rules, a motion for admission of additional evidence on appeal must be filed within seventy-five days from the date of the trial judgement, unless good cause is shown for the delay. The Appeals Chamber understands the Appellant to submit that good cause for the delay of such a filing more than two years after the Trial Judgement[32] is that, in light of Jean-Bosco Baraygwiza's refusal to participate in the trial, there was no accessibility to him until recently, even through his own counsel.[33] However, the Appeals Chamber notes that the Appellant has not indicated how and when he was first able to gain access to Jean-Bosco Barayagwiza for evidence or information. Even if Jean-Bosco Barayagwiza's absence during the trial were to be considered by the Appeals Chamber as justifying the fact that such evidence was neither available at trial nor could have been obtained through the exercise of due diligence, the Appellant has failed to show why such a request could not have been submitted in time during the appeals proceedings. In this regard, the Appeals Chamber notes that Jean-Bosco Barayagwiza has actively participated in the preparation of his own appeal since the beginning of the appeals proceedings in early 2004.

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[25] *Ibid*., para. 13.
[26] *Ibid*., para. 15.
[27] Id.
[28] *Ibid*., para. 11.
[29] Id.
[30] First Motion, paras 6-7: the use of the term "the said witness" with regard to both Witness AHA and Jean-Bosco Barayagwiza is confusing.
[31] *Ibid*., para. 1.
[32] The Appeals Chamber recalls that the Trial Judgement in this case was rendered on 3 December 2003.
[33] First Motion, paras 3-4.

17. The Appeals Chamber is also not persuaded by the Appellant's argument that the information referred to in the First Motion was only first obtained partly through issues raised in the confidential "Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)" of 28 December 2005 ("Barayagwiza's Rule 115 Motion").[34] The paragraphs of the said motion referred to by the Appellant[35] only address general issues with regard to Witness AHA's testimony at trial and Jean-Bosco Barayagwiza's potential testimony on appeal concerning *his* role in the events which occurred in Rwanda in 1990 – 1994. The Appeals Chamber considers that the Appellant has failed to establish that Barayagwiza's Rule 115 Motion contains new information pertinent for the Appellant's case that was unknown to the Appellant before the date on which it was filed, thereby preventing him from filing his First Motion until 6 January 2006. Therefore, the Appeals Chamber finds that the filing of Barayagwiza's Rule 115 Motion at the end of December 2005 also does not constitute good cause for the late submission of the First Motion.

18. In light of the findings above, the Appeals Chamber does not consider it necessary to address the other arguments made by the Appellant.

III. Second Motion

19. The Appellant requests the Appeals Chamber to authorize further investigation of information relating to

> "the additional evidence of potential witness Habimana in order to avoid miscarriage of justice and enable him to file motion to present additional evidence of the potential witness Habimana",[36]

which he cannot do without conducting further interviews of Habimana and obtaining a written statement from him with the leave of the Appeals Chamber.[37] He further requests the Appeals Chamber to allow him to interview former Defence investigators Joseph Nzakunda and Augustine Tumwesige.[38] The Prosecution objects to the Second Motion and prays the Appeals Chamber to dismiss it in its entirety.[39]

A. Submissions of the Parties

20. The Appellant submits that he has "specific information" that the then Corporal Habimana informed the Appellant's former Defence investigators that he was now ready and willing to testify that

> "during the period between 6th April and 9th April 1994 while he was on duty as Corporal at the military camp at Gisenyi under the Command of the then Colonel Anatole Nsengiyumva, he witnessed […] the Appellant in military custody at the said camp during the said dates".[40]

The Appellant argues that such evidence would undermine the credibility of Prosecution Witnesses Serushago, EB and AHI, as well as impact the Trial Chamber's finding with regard to the Appellant's alibi.[41]

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[34] First Motion, para. 2.
[35] "Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)", 28 December 2005, paras 80, 103 and 104. Also see Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence pursuant to Rule 115, 5 May 2006, para. 27 finding Jean-Bosco Barayagwiza's request to testify in his own case under Rule 115 of the Rules as being filed untimely without good reason shown for such delay.
[36] Second Motion, preambulary para.
[37] *Ibid.*, para. 5.
[38] *Ibid.*, para. 10.
[39] Response to the Second Motion, para. 2.
[40] Second Motion, para. 1.
[41] *Ibid.*, paras 3, 4 with references to the Trial Judgement, paras 775, 812, 824 and 829.

21. The Appellant submits that this information was neither available to him earlier nor could it have been obtained through exercise of due diligence, since

> "the said Corporal Habimana had left the country [] when the RPF took over, and was presumed to have died during [c]holera epidemic in Congo".[42]

The Appellant argues that non-admission of such evidence would result in further miscarriage of justice.[43]

22. The Prosecution responds that in the Second Motion, the Appellant has not shown the existence of exceptional circumstances that would justify the request for further investigation.[44] It adds that no new and specific information that was unknown to the Appellant during his trial has been identified in the Second Motion as the Appellant submitted the same material allegation at trial through a number of witnesses and his own testimony.[45]

23. As to the reliability of the alleged information, the Prosecution asserts that it is incredible that

> "more than 10 years after the events, one Corporal Habimana, who has been allegedly living outside Rwanda, […] would now be able to recall the precise dates and time he saw the Appellant in military custody, among other detainees".[46]

The Prosecution also notes that the purportedly new information had been collected by two former investigators of the Appellant who were dismissed from the case in February 2001, for dishonesty.[47]

24. It further argues that the

> "[p]urported evidence needs not be further investigated as it *could* and *would* not have any impact on the verdicts under appeal",

but would rather add to the material inconsistencies found by the Trial Chamber.[48]

25. Finally, the Prosecution adds that the Second Motion "can only be understood as a request for approval to seek funding from the Registrar"[49] in order "to go out and verify what amounts to nothing more tangible than rumor and innuendo" and is thus framed to suggest a "fishing expedition"[50]. It insists that the

> "requested investigation would be redundant and a further waste of the time and resources of the Tribunal".[51]

26. The Appellant replies that he is not in possession of any more specific information with regard to his request and that is why he is seeking authorization to conduct a further investigation.[52] He adds that it was not possible for him to discover the information

> "until recently when the said potential witness expressed his wish to testify before the Appeals Chamber".[53]

The Appellant claims that, if authorized, the requested investigation will be carried out by the existing and available members of the Defence team and would not entail, at this stage, any funding

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[42] *Ibid*., para. 2.
[43] *Ibid*., para. 7-8.
[44] Response to the Second Motion, paras 2, 4.
[45] *Ibid*., paras 11-13.
[46] *Ibid*., para. 6 (footnotes omitted).
[47] *Ibid*., paras 7-9.
[48] *Ibid*., paras 2, 14-16.
[49] *Ibid*., para. 3.
[50] *Ibid*., para. 5.
[51] *Ibid*., para. 16.
[52] Reply to the Second Motion, para. 2.
[53] *Ibid*., para. 3.

from the Tribunal.[54] Finally, he argues that "any discussion about the application of Rule 115 at this stage is premature, irrelevant and ought not to be taken into consideration for the purpose of the present motion".[55]

B. Discussion

27. The Appeals Chamber first notes, as it did with the Appellant's First Motion, that generally, no authorization is needed for the Appellant's Counsel to contact potential witnesses with the view of obtaining written statements from them, unless any such witnesses are subject to specific protective measures. Since the Appellant neither requests any funding from the Registry of the International Tribunal for such "further investigation" nor justifies why his Counsel would be unable to collect such information on his behalf without intervention of the Appeals Chamber, there was no reason for the Appellant to seize the Appeals Chamber with such request at this stage.

28. Likewise, considering that the Appellant seeks in the Second Motion to obtain the potential witness' statement with a view to seeking leave to present additional evidence on appeal under Rule 115 of the Rules,[56] the Appeals Chamber finds it appropriate, as it did with the First Motion, to associate the request for further investigation with the requirements for timely filing of a motion under Rule 115.[57]

29. The Appeals Chamber notes that submission of the additional evidence that the Appellant seeks to obtain in the Second Motion would take place more than two years after the Trial Judgement was rendered, which makes the filing of the Second Motion untimely. The Appeals Chamber recalls that, in order to demonstrate that it was not able to comply with the time limit set in Rule 115 of the Rules for filing a motion for additional evidence within 75 days from the date of the rendering of the trial judgement, the moving party is required to demonstrate good cause for the delay and submit the motion in question "*as soon as possible* after it became aware of the existence of the evidence sought to be admitted".[58] The Appellant has failed to show that he has complied with these requirements.

30. In this regard, the Appeals Chamber considers that the Second Motion contains no indication as to how and when the Appellant was able to gain access to the purported information. Indeed, the Appellant contented himself with fairly general allegations as to unavailability of such information at earlier stages without specifying how, when and where the potential witness became available to the Appellant's former investigators or how such information was further transmitted to the Appellant and/or his counsel. Moreover, the Appeals Chamber reiterates that the relevant time is when the witness became available to give evidence to the moving party, and not when a witness statement was in fact taken.[59]

31. In light of the foregoing, the Appeals Chamber considers it unnecessary to address the remainder of the Appellant's arguments in his Second Motion.

IV. Disposition

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[54] *Ibid.,* para. 1.
[55] *Ibid.,* para. 5.
[56] Second Motion, preambulary para.
[57] See Section I on Applicable Law; see also para. 17 above. It is furthermore recalled that, when seized with motions for funding of investigation in appeal, it is relevant for the Appeals Chamber to consider whether it is likely that the evidence thereby obtained would meet the requirements for subsequent admission under Rule 115 (*Sylvestre Gacumbitsi v. The Prosecutor*, Case N°ICTR-01-64-A, Decision on the Appellant's Rule 115 Motion and Related Motion by the Prosecution, 21 October 2005, para. 13).
[58] *Kordić and Čerkez* Decision, p. 2.
[59] *Ibid.,* p. 3.

32. For the foregoing reasons, the Appeals Chamber DISMISSES both the First and the Second Motions.

Done in English and French, the English text being authoritative.

Dated this 20th day of June 2006, At The Hague, The Netherlands.

[Signed] : Fausto Pocar

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Decision on Jean-Bosco Barayagwiza's Urgent Motion Requesting Privileged Access to the Appellant Without Attendance of Lead Counsel 17 August 2006 ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron

Jean Bosco Barayagwiza – Appelant detained in the United Nations Detention Facility in Arusha, Request to grant the Legal Assistant privileged access to the Accused in the UNDF in the absence of the Lead Counsel, Legal assistant working on reference books while Legal Counsel has no sufficient time to work on reference books, Primary responsibility of the Commanding Officer of the UNDF for all aspects of the daily management of the Detention Unit, including communications and visitations, Jurisdiction of the Appeals Chamber to review decisions of the Tribunal's Registrar and President under the Detention Rules, Review ordinarily available only after a detainee has followed the requisite complaints procedure in the Detention Rules – Motion dismissed

International Instruments cited :

Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, Rules 3, 61, 65, 82 and 83 ; Rules of Procedure and Evidence, rule 73 (F)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Hassan Ngeze, Decision on "Appellant Hassan Ngeze's Motion for Leave to Permit his Defence Counsel to Communicate with him during Afternoon Friday, Saturday, Sunday and Public Holidays", 25 April 2005 (ICTR-97-27) ; Appeals Chamber, The Prosecutor v. Ferdinand Nahimana, Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase, 3 May 2005 (ICTR-96-11) ; Appeals Chamber, The Prosecutor v. Hassan Ngeze, Decision on Hassan Ngeze's Motion for a Psychological Examination, 6 December 2005 (ICTR-97-27) ; Appeals Chamber, The Prosecutor v. Hassan Ngeze, Decision on Hassan Ngeze's Motion to Set Aside President Møse's Decision and Request to Consummate his Marriage, 6 December 2005 (ICTR-97-27) ; Appeals Chamber, The Prosecutor v. Hassan Ngeze, Decision on Hassan Ngeze's Request to Grant him Leave to Bring his Complaints to the Appeals Chamber, 12 December 2005 (ICTR-97-27) ; Appeals Chamber, The Prosecutor v. Hassan Ngeze, Decision on Hassan Ngeze's Request for a Status Conference, 13 December 2005 (ICTR-97-27)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Milan Milutinović et al., Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003 (IT-05-87)

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively),

BEING SEIZED of "The Appellant Jean Bosco-Barayagwiza's [*sic*] Extremely Urgent Motion Requesting Privileged Access to the Appellant without the Attendance of Lead Counsel" filed on 31 July 2006 ("Appellant" and "Motion", respectively);

NOTING that the Prosecution has filed no response to the Motion;

NOTING that the Appellant is currently detained in the United Nations Detention Facility in Arusha, Tanzania ("UNDF");

NOTING that the Appellant requests the Appeals Chamber to grant his Legal Assistant privileged access to him in the UNDF, in the absence of the Lead Counsel, for a period of three weeks from 19 August 2006;[1]

FURTHER NOTING that the Appellant's Counsel submits that such privileged access is necessary in order to ensure that the reference books are prepared for the appeal, including a "collation of a number of legal articles, books and text references", "a task which need [not] be performed by Lead Counsel";[2]

NOTING that the Appellant's Counsel intends to visit his client in the UNDF for two weeks in August 2006, but submits that during this time, he will be working on the merits of the appeal, "particularly preparing for the oral hearing" and will not have sufficient time to work on reference books;[3]

ALSO NOTING that the Appellant maintains that similar requests have previously been denied by the Registry in the past, and that – in light of "the urgency of this situation" and the fact that "the President is currently in Norway" – "the only recourse available is to make a direct request to the Appeals Chamber itself";[4]

NOTING that Rule 65 of the Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal ("Detention Rules")[5] governs privileged communications between the Appellant and his Counsel and that, in the absence of Lead or Co-Counsel, legal assistants are generally allowed non-privileged visitations under Rule 61 of the Detention Rules;[6]

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[1] Motion, para. 3.
[2] *Ibid*., para. 4.
[3] *Ibid*., para. 5.
[4] *Ibid*., para. 6.
[5] Adopted on 5 June 1998.
[6] Visits to the UNDF under Rule 65 are subject to the same security controls as are imposed under Rule 61 of the Rules of Detention. However, communications between the Counsel and the detainee under the privileged regime of Rule 65 are conducted "in the sight but not within the hearing, either direct or indirect, of the staff of the Detention Unit". Besides, the general policy of the Registrar of the Tribunal has been that Defence legal assistants visiting the detainees under Rule 61, are not allowed *inter alia* to bring and use a portable computer and other equipment. (*Cf*. Status Conference, T. 7 April 2006, pp 10-12).

RECALLING that, as has been repeatedly reiterated in the present case,[7] pursuant to Rule 3 of the Detention Rules, the Commanding Officer of the UNDF has primary responsibility for all aspects of the daily management of the Detention Unit, including communications and visitations, and that, pursuant to Rules 82 and 83 of the Detention Rules, when a detainee is not satisfied with the response of the Commanding Officer to a specific request in that regard, he or she has the right to make a written complaint to the Registrar who shall forward it to the President of the Tribunal;

RECALLING that the Appeals Chamber has the statutory duty to ensure the fairness of the proceedings on appeal[8] and, thus, has jurisdiction to review decisions of the Tribunal's Registrar and President under the Detention Rules where they are closely related to issues involving the fairness of proceedings on appeal but that such review is ordinarily available only after a detainee has followed the requisite complaints procedure in the Detention Rules;[9]

NOTING that the Defence Counsel and Detention Management Section of the Tribunal have informed the pre-appeal Judge in the present case that, normally in appeal proceedings, the Defence teams are authorized to travel to Arusha on a limited number of occasions; however, the Registrar, mindful of the fact that the Appellant is not represented by the same Defence team as at trial, has already allowed frequent visits of the Appellant's Lead Counsel, Co-Counsel and Legal Assistant to the UNDF;[10]

NOTING that the briefing on the merits in the present case is complete;

NOTING that no oral hearing has been scheduled by the Appeals Chamber in the immediate future;

CONSIDERING that the Appellant has neither explained why his Legal Assistant needs to start working on the reference books from 19 August 2006 nor why his request would not be treated fairly or in a timely manner by the competent authorities of the Tribunal under the Detention Rules such that it must be considered now, as an urgent matter, by the Appeals Chamber contrary to established procedure;

CONSIDERING, consequently, that because the Appellant has not exhausted the procedure made available to him under the Detention Rules for consideration of his request, the Appeals Chamber will not consider the merits of that request;

FINDING, accordingly, that the Motion is frivolous and abusive in the sense of Article 73 (F) of the Rules of Procedure and Evidence of the Tribunal;

CONSIDERING that if, after having followed the established procedure, the Appellant considers that his right to fair proceedings has been infringed with regard to his request presented in the Motion at issue here, he can, at that time, raise the matter with the Appeals Chamber;

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[7] See, among the most recent decisions, Decision on Hassan Ngeze's Request for a Status Conference, 13 December 2005, p. 3; Decision on Hassan Ngeze's Request to Grant him Leave to Bring his Complaints to the Appeals Chamber, 12 December, p. 3; Decision on Hassan Ngeze's Motion for a Psychological Examination, 6 December 2005, p. 3; Decision on Hassan Ngeze's Motion to Set Aside President Møse's Decision and Request to Consummate his Marriage, 6 December 2005, pp 3-4.

[8] Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase, 3 May 2005, paras 4 and 7; Decision on "Appellant Hassan Ngeze's Motion for Leave to Permit his Defence Counsel to Communicate with him during Afternoon Friday, Saturday, Sunday and Public Holidays", 25 April, p. 3. See also, *Prosecutor v. Milan Milutinović et al.*, Case N°IT-99-37-AR.73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003 ("*Milutinović et al.* Decision of 13 November 2003"), para. 19.

[9] Decision on Hassan Ngeze's Motion to Set Aside President Møse's Decision and Request to Consummate his Marriage, 6 December 2005, p. 4; *Milutinović et al.* Decision of 13 November 2003, para. 20.

[10] Status Conference, T. 7 April 2006, pp 10-12.

FOR THE FOREGOING REASONS,

DISMISSES the Motion in its entirety;

DIRECTS the Registrar to withhold the payment of fees in relation to the Motion.

Done in English and French, the English text being authoritative.

Dated this 17th day of August 2006, At The Hague, The Netherlands.

[Signed] : Fausto Pocar

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Decision on Appellant Jean-Bosco Barayagwiza's Motions For Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief
17 August 2006 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron

Jean Bosco Barayagwiza – Jean-Paul Akayesu Case – Additional Grounds of Appeal, Variation of the grounds of appeal, Modification allowed only if they are minor and non-substantive modifications that would correct an ambiguity or error made by the counsel in the previous filings and would not unduly delay the appeal proceedings, No demonstration of good cause, Right to a fair appeal, Accused, should not be prejudiced because of any negligence or inadvertence by his Counsel, Issue of providing adequate and full grounds for judgement with respect to various findings of the Trial Chamber, Legal and factual findings on the Appellant's dolus specialis for the crime of genocide, Alleged error in Law and error in fact by admitting certain evidence or testimonies, Hearsay evidence, Lists of people indicating their ethnicity – Credibility of the witnesses, Alleged preconception due to their ethnicity, political and or ideological motives, Expert witness, Testimony heard in another trial – Amendment of the Defence Notice of Appeal – Lack of jurisdiction of the Tribunal to try non-natural persons – Correction of the Accused's Brief granted – Motion dismissed

International Instrument cited :

Rules of Procedure and Evidence, rules 46, 73 (F) and 108 ; Statute, art. 6 (3)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Jean-Paul Akayesu, Judgement, 1st June 2001 (ICTR-96-4) ; Appeals Chamber, The Prosecutor v. Ignace Bagilishema, Decision on Motion to Have the Prosecution's Notice of Appeal Declared Inadmissible, 26 October 2001 (ICTR-95-1A) ; Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Judgement and Sentence, 3 December 2003 (ICTR-99-52)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Decision Granting Leave to Dario Kordić to Amend His Grounds of Appeal, 9 May 2002 (IT-95-14/2) ;

Appeals Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Decision on Defence Motion for Extension of Time in Which to File the Defence Notice of Appeal, 15 February 2005 (IT-02-60) ; Appeals Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Decision on Prosecution's Request for Leave to Amend Notice of Appeal in Relation to Vidoje Blagojević, 20 July 2005 (IT-02-60); Appeals Chamber, The Prosecutor v. Željko Mejakić et al., Decision on Joint Defense Motion for Enlargement of Time to File Appellants' Brief, 30 August 2005 (IT-02-65) ; Appeals Chamber, The Prosecutor v. Mladen Naletilić and Vinko Martinović, Decision on Mladen Naletilić's Motion for Leave to File Pre-Submission Brief, 13 October 2005 (IT-98-34) ; Appeals Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Decision on Dragan Jokić's Request to Amend Notice of Appeal, 14 October 2005 (IT-02-60) ; Appeals Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Decision on Motions Related to the Pleadings in Dragan Jokić's Appeal, 24 November 2005 (IT-02-60) ; Appeals Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief, 26 June 2006 (IT-02-60)

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of "[t]he Appellant Jean-Bosco Barayagwiza's Motion for Leave to Submit Additional Grounds pursuant to Rule 108 of the I.C.T.R. Rules of Procedure and Evidence and for an Extension of Page Limits pursuant to the Decision of the Appeals Chamber of 14th November 2005" filed by Jean-Bosco Barayagwiza ("Appellant") on 6 March 2006 ("Motion of 6 March 2006"), in which he requests the Appeals Chamber to grant him leave to add seven new grounds of appeal to his Appellant's brief[1] and to amend the Notice of Appeal[2] accordingly.

2. The Prosecution responded to the Motion on 16 March 2006 requesting the Appeals Chamber to dismiss it in its entirety and expunge it from the record.[3] The Appellant filed his reply out of time on 24 March 2006[4] without providing any reasons for the late filing.[5] Accordingly, the Appeals Chamber finds the Reply to have been filed untimely and will not consider the submissions contained therein.

3. The Appeals Chamber is also seized of "The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Amend the Notice of Appeal in the Light of the Decision of the Appeals Chamber dated 14/11/2005" filed by the Appellant on 5 July 2006 ("Motion of 5 July 2006"), in which he seeks to have his Notice of Appeal amended by substituting it with the amended notice of appeal annexed to

[1] "Appellant's Appeal Brief", 12 October 2005 ("Appellant's Brief").
[2] "Amended Notice of Appeal", 12 October 2005 ("Notice of Appeal").
[3] "Prosecutor's Response to 'The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Submit Additional Grounds Pursuant to Rule 108 of the I.C.T.R. Rules of Procedure and Evidence and for an Extension of Page Limits pursuant to the Decision of the Appeals Chamber of 14th November 2005'", filed confidentially on 16 March 2006 ("Response to Motion of 6 March 2006"), para. 19. The Appeals Chamber notes that the Prosecution gives no reason as to why the Response to Motion of 6 March 2006 or the present decision need to be confidential and finds that there is no apparent reason for the confidential classification of the Response to Motion of 6 March 2006, since no protected witnesses or materials are involved. Consequently, both the Response to Motion of 6 March 2006 and the present decision should be public.
[4] "The Appellant Jean-Bosco Barayagwiza's Reply to The Prosecutor's Response to 'The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Submit Additional Grounds Pursuant to Rule 108 of the ICTR'", 24 March 2006 ("Reply").
[5] The Appeals Chamber notes that, pursuant to paragraph 12 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal of 16 September 2002, a reply to a motion submitted during the appeals from judgement must be filed "within four days of the filing of the response", which means that the Appellant's Reply should have been filed no later than 20 March 2006, unless good cause is shown for the delay.

the Motion of 5 July 2006.[6] The Prosecution filed its Response on 17 July 2006, requesting that the Motion of 5 July 2006 be dismissed and expunged from the record.[7] The Appellant did not file a reply.

4. Finally, the Appeals Chamber is seized of "The Appellant Jean-Bosco Barayagwiza's Corrigendum Motion Relating to the Appeal Brief of 12th October 2005" filed by the Appellant on 7 July 2006, in which he applies to bring corrections to the Appeal Brief of 12 October 2005 ("Motion of 7 July 2006"). The Prosecution did not file a response.

I. Procedural Background

5. Trial Chamber I rendered its Judgement in this case on 3 December 2003.[8] The Appellant filed a first notice of appeal on 22 April 2004,[9] which was amended on 27 April 2004.[10] His initial Appellant's brief was filed on 25 June 2004.[11]

6. The proceedings in relation to the Appellant were stayed from 19 May 2004[12] through 26 January 2005,[13] pending the assignment of a new lead counsel. The current Lead Counsel was assigned to the Appellant by the Registrar on 30 November 2004, and on 19 January 2005, the Appeals Chamber dismissed the Appellant's challenge to this assignment.[14] The Appellant's request for reconsideration of the Decision of 19 January 2005 was dismissed by the Appeals Chamber on 4 February 2005.[15]

7. Pursuant to the decisions of 17 May 2005[16] and 6 September 2005,[17] both his Notice of Appeal and Appellant's Brief were filed by the Appellant on 12 October 2005.

8. The Appeals Chamber recalls its Decision of 14 November 2005, by which it rejected the "Amended Notice of Appeal", "Corrections to Appeal Brief" and confidential "Appellant's Appeal Brief" filed on 7 November 2005, on the grounds that the Appellant had not properly sought leave to amend his grounds of appeal as prescribed by the Rules of Procedure and Evidence of the Tribunal ("Rules"), and thus had not demonstrated good cause for the Appeals Chamber to authorize such

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[6] Motion of 5 July 2006, para. 7.
[7] Prosecutor's Response to "the Appellant Jean-Bosco Barayagwiza's Motion for Leave to Amend the Notice of Appeal in the Light of the Decision of the Appeals Chamber dated 14/11/2005", 17 July 2006 ("Response to Motion of 5 July 2006"), para. 17.
[8] *The Prosecutor v. Ferdinand Nahimana et al.,* Case N°ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("Trial Judgement").
[9] « Notice d'Appel (conformément aux dispositions de l'article 24 du Statut et de l'article 108 du Règlement) », 22 April 2004.
[10] « Acte d'appel modifié aux fins d'annulation du Jugement rendu le 3 décembre 2003 par la Chambre I dans l'affaire 'Le Procureur contre Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze, ICTR-99-52-T' », 27 April 2004.
[11] « Mémoire d'Appel », 25 June 2004.
[12] Decision on Jean-Bosco Barayagwiza's Motion Appealing Refusal of Request for Legal Assistance, 19 May 2004.
[13] Order Lifting the Stay of Proceedings in Relation to Jean-Bosco Barayagwiza, 26 January 2005 ("Order of 26 January 2005"). In particular, the Appellant was initially ordered to file "any amended or new Notice of Appeal no later than 21 February 2005 (i.e., thirty days from the Decision of 19 January 2005)" and "any amended or new Appellant's Brief no later than 9 May 2005 (i.e., seventy-five days after the time limit for filing the Notice of Appeal)."
[14] Decision on Jean-Bosco Barayagwiza's Motion Concerning the Registrar's Decision to Appoint Counsel, 19 January 2005 ("Decision of 19 January 2005").
[15] Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005 ("Decision of 4 February 2005").
[16] Decision on "Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", 17 May 2005 ("Decision of 17 May 2005").
[17] Decision on Clarification of Time Limits and on Appellant Barayagwiza's Extremely Urgent Motion for Extension of Time to File his Notice of Appeal and his Appellant's Brief, 6 September 2005 ("Decision of 6 September 2005").

amendments.[18] In light of that decision, the Appeals Chamber will not consider any arguments of the parties in relation to the contents of the rejected filings.

II. Applicable Law

9. Pursuant to Rule 108 of the Rules, the Appeals Chamber "may, on good cause being shown by motion, authorise a variation of the grounds of appeal" contained in the notice of appeal. Such motions should be submitted "as soon as possible after identifying the new alleged error"[19] of the Trial Chamber to be included in the notice of appeal or after discovering any other basis for seeking a variation to the notice of appeal. Generally,

> "a request to amend a notice of appeal must, at least, explain precisely what amendments are sought and why, with respect to each such amendment, the 'good cause' requirement of Rule 108 is satisfied".[20]

10. It has been held that the concept of "good cause" under this provision encompasses both good reason for including the new or amended grounds of appeal sought and good reason showing why those grounds were not included (or were not correctly phrased) in the original notice of appeal.[21] In its cases, the Appeals Chamber has relied upon a variety of factors in determining whether "good cause" exists, including (i) the fact that the variation is so minor that it does not affect the content of the notice of appeal; (ii) the fact that the opposing party would not be prejudiced by the variation or has not objected to it; and (iii) the fact that the variation would bring the notice of appeal into conformity with the appeal brief.[22] Where an appellant seeks a substantive amendment broadening the scope of the appeal, "good cause" might also, under some circumstances, be established.[23] In such instances, each amendment is to be considered in light of the particular circumstances of the case.[24]

11. The jurisprudence of the Tribunal establishes that the "good cause" requirement must be interpreted restrictively at late stages in the appeal proceeding when amendments would necessitate a substantial slowdown in the progress of the appeal – for instance, when they would require briefs already filed to be revised and resubmitted.[25] To hold otherwise, would leave appellants free to change their appeal strategy and essentially restart the appeal process at will (including after they have had the advantage of reviewing the arguments in a response brief), interfering with the expeditious administration of justice and prejudicing the other parties to the case.[26]

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[18] Order Concerning Appellant Jean-Bosco Barayagwiza's Filings of 7 November 2005, 14 November 2005 ("Decision of 14 November 2005"), p. 3.
[19] *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case N°IT-98-34-A, Decision on Mladen Naletilić's Motion for Leave to File Pre-Submission Brief, 13 October 2005, pp. 2-3.
[20] *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case N°IT-02-60-A, Decision on Dragan Jokić's Motion to Amend Notice of Appeal, 14 October 2005 ("*Blagojević* Decision of 14 October 2005"), para. 7. See also Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005, paras 2-3.
[21] *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case N°IT-02-60-A, Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief, 26 June 2006 ("*Blagojević* Decision of 26 June 2006"), para. 7; See also, e.g., *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case N°IT-02-60-A, Decision on Motions Related to the Pleadings in Dragan Jokić's Appeal, 24 November 2005, para. 10 ("*Blagojević* Decision of 24 November 2005"); *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case N°IT-02-60-A, Decision on Defence Motion for Extension of Time in Which to File the Defence Notice of Appeal, 15 February 2005, pp. 2-3.
[22] *Blagojević* Decision of 26 June 2006, para. 7; See also *Blagojević* Decision of 24 November 2005, para. 7; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case N°IT-02-60-A, Decision on Prosecution's Request for Leave to Amend Notice of Appeal in Relation to Vidoje Blagojević, 20 July 2005 ("*Blagojević* Decision of 20 July 2005"), pp. 3-4.
[23] *Blagojević* Decision of 26 June 2006, para. 7; *Blagojević* Decision of 24 November 2005, para. 7; *Blagojević* Decision of 20 July 2005, p. 3.
[24] *Blagojević* Decision of 26 June 2006, para. 7; *Blagojević* Decision of 24 November 2005, para. 7.
[25] *Blagojević* Decision of 26 June 2006, para. 8.
[26] Id.

12. In the interest of protecting the right of convicted defendants to a fair appeal, the Appeals Chamber has, in limited circumstances, permitted amendments even where there was no good cause for failure to include the new or amended grounds in the original notice-that is, where the failure resulted solely from counsel negligence or inadvertence. In such instances, the Appeals Chamber has permitted amendments which are of substantial importance to the success of the appeal such as to lead to a miscarriage of justice if they were excluded.[27] In these exceptional cases, the Appeals Chamber has reasoned, the interests of justice require that an appellant not be held responsible for the failures of counsel.

13. In sum, variations to the notice of appeal will only be allowed (i) for good cause reasons within the meaning of Rule 108, as defined by the above-discussed principles; (ii) if they remedy the counsel's negligence or inadvertence and are of substantial importance to the success of the appeal; or (iii) if they otherwise correct ambiguity or error made by counsel and do not unduly delay the appeal proceedings, as, for example, in the case of minor and non-substantive modifications. With respect to the revisions to the appeal brief (or, in the alternative, supplemental briefing), they will be permitted only (i) as necessary to reflect the amendments to the notice of appeal; or (ii) as necessary to correct ambiguity or error in the counsel's filings, without unduly delaying the appeal proceedings.[28]

14. Finally, the Appeals Chamber notes that it is the Appellant's burden to demonstrate that each amendment should be permitted under the standards outlined above, including establishing lack of prejudice to the Prosecution.[29]

III. Discussion

A. Motion of 6 March 2006

Submissions of the Parties

15. The Appellant submits that the Motion of 6 March 2006 is filed in accordance with the Decision of 14 November 2005 and seeks leave to file new grounds of appeal in order to remedy "gaps identified in the manner in which the points of law and fact have been raised in the Appeals Brief".[30] He asserts that, after having conducted a review of all the material filed to date, it has become apparent to his Defence team that "there are new matters of law and fact that need to be covered in the new Grounds".[31] He further argues that it is

> "a matter of fairness that he be given the opportunity to address those questions in writing, at least in their broad terms, before going into more details during the oral hearing".[32]

He concludes that if his request to submit the additional grounds is denied, "a miscarriage of justice is likely to occur".[33]

16. The Appellant argues that if leave is granted to file the new grounds of appeal, it is unlikely that any prejudice will be caused to the Prosecution because the oral hearing is not scheduled for the immediate future. He adds that the additional grounds contained in the Motion of 6 March 2006 would

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[27] *Blagojević* Decision of 26 June 2006, para. 9; *Blagojević* Decision of 24 November 2005, para. 8; *Blagojević* Decision of 14 October 2005, para. 8. See also *Prosecutor v. Dario Kordić and Mario Čerkez,* Case N° IT-95-14/2-A, Decision Granting Leave to Dario Kordić to Amend His Grounds of Appeal, 9 May 2002 ("*Kordić* Decision of 9 May 2002"), para. 5.
[28] *Blagojević* Decision of 26 June 2006, para. 11.
[29] *Ibid*., para. 14.
[30] Motion of 6 March 2006, para. 1. The Appeals Chamber understands the Appellant to submit that the Decision of 14 November 2005 "left the door open to the Appellant to file a motion requesting leave to present" additional *grounds of appeal* and not "additional *evidence*" as stated in his Motion of 6 March 2006 (emphasis added).
[31] Id.
[32] Id.
[33] Id.

facilitate the understanding of his case for "each and every party".[34] In addition, the Appellant seeks leave to amend the Notice of Appeal accordingly.[35]

17. The Prosecution objects to the Motion of 6 March 2006 and submits that the Appellant continues to misapply Rule 108 of the Rules by submitting the additional grounds without having previously sought leave to amend the Notice of Appeal.[36]

18. The Prosecution argues that even if the Motion of 6 March 2006 was to be treated as requesting leave to amend the Notice of Appeal, it would not meet the "good cause" requirement under Rule 108.[37] In this respect, it contends that the Appellant (i) is merely repeating his arguments already contained in his Notice of Appeal; (ii) "is not correcting any minor errors or providing a precise formulation of any ground of appeal"; and (iii) "is not seeking to remedy any inadvertence or negligence of his counsel".[38] The Prosecution adds that denial of the Motion of 6 March 2006 would not lead to a miscarriage of justice since the newly submitted grounds of appeal would either have no bearing on the Trial Judgement or they are already developed in the Notice of Appeal and the Appellant's Brief.[39]

Analysis

19. The Appeals Chamber notes that the Appellant does not request to amend any of his grounds of appeal in the Notice of Appeal and Appellant's Brief, but simply submits that the seven additional grounds should be included anew. The Appeals Chamber further notes that instead of seeking to demonstrate "good cause" for submitting the additional grounds of appeal at this late stage of the proceedings on appeal, the Appellant simply attaches the new grounds of appeal that he seeks to have admitted as part of the briefing.[40] With regard to the general assertion that it has been only recently that the Defence team realized that new issues of law and fact need to be addressed,[41] it is obvious that any amendment sought to any notice of appeal is the result of further analysis having been undertaken over the course of time and that this fact, taken alone, cannot constitute "good cause" for an amendment.[42] The Appellant merely suggests that a denial of the Motion of 6 March 2006 would result in a miscarriage of justice, without illustrating why this would happen or why he failed to include these arguments in his Notice of Appeal several months earlier. Therefore, it is apparent that the Motion of 6 March 2006 is devoid of any arguments in relation to the requirements prescribed by Rule 108 of the Rules and the jurisprudence of the Appeals Chamber. In this respect, the Appeals Chamber finds that the Motion of 6 March 2006 is frivolous.

20. However, in fairness to the Appellant, who should not be prejudiced because of any negligence or inadvertence by his Counsel in failing to include the submitted additional grounds,[43] the Appeals Chamber will examine them in order to determine whether they should be included because they are of substantial importance to the success of the appeal or are likely to otherwise correct ambiguity or error in the previous filings without unduly delaying the appeal proceedings.

21. As a preliminary matter, the Appeals Chamber notes that the Appellant seeks to have his Notice of Appeal modified only as a consequence of including the newly submitted grounds of appeal

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[34] *Ibid*., para. 5.
[35] *Ibid*., p. 17.
[36] Response to Motion of 6 March 2006, paras 2-5, 10.
[37] *Ibid*., paras 6-8.
[38] *Ibid*., paras 9, 12-13.
[39] *Ibid*., paras 9, 14.
[40] Motion of 6 March 2006, paras 6-57.
[41] Motion of 6 March 2006, para. 1.
[42] *Blagojević* Decision of 24 November 2005, para. 10.
[43] *Kordić* Decision of 9 May 2002, paras 5, 7 stating, *inter alia*, that the inability of the counsel to articulate a ground of appeal properly should not exclude the appellant from raising that ground of appeal.

into his Appellant's Brief. Rule 108 of the Rules clearly applies to seeking a variation of the notice of appeal and, where leave is granted to amend the notice of appeal, the appellant may be granted leave to amend the appeals brief to reflect the amendment to the notice of appeal. Nevertheless, the Appeals Chamber will consider the Motion of 6 March 2006 as requesting the variation of grounds of appeal contained in both the Notice of Appeal and the Appellant's Brief simultaneously. Since the variations of the Appellant's Notice of Appeal sought by his Motion of 5 July 2006 are of a broader scope than the newly submitted grounds of appeal, the Appeals Chamber will address the former in a separate section of the present decision.[44]

Ground 1: Error in Law and Fact by Admitting Uncorroborated and/or Hearsay Evidence

22. The newly submitted Ground 1 refers to (i) allegedly erroneous admission of hearsay evidence not corroborated by direct evidence;[45] (ii) alleged "failure to be consistent in giving hearsay evidence more weight than direct testimonies in crucial areas of the evidence";[46] and (iii) allegedly erroneous admission of the testimony of a single un-corroborated witness.[47] The Prosecution responds that these issues are already dealt with in the Appellant's Brief.[48]

23. The Appeals Chamber notes that certain issues raised in the newly submitted Ground 1 are covered in the Appellant's Brief. For example, under his Grounds 8 and 9, the Appellant contests the Trial Chamber's reliance on the testimony of Witness AFX, including his evidence regarding a CDR meeting in 1993.[49] Ground 13 deals with the weight attached to the "single hearsay report" of the interview of Gaspard Gahigi conducted by Philippe Dahinden on the Appellant's role at the RTLM.[50] Ground 18 addresses the issue of reliance by the Trial Chamber on the "unsupported hearsay" "in the absence of any documentary evidence" with regard to the finding that the Appellant became President of the CDR without specifying the source of such hearsay evidence.[51] Ground 19 similarly contests the finding that the Appellant was President of CDR in Gisenyi prior to 1994 based "on nothing more than rumour and hearsay".[52] Under Ground 20, the Appellant argues that the finding of the Trial Chamber concerning the fact that the Appellant became "a member of the Executive Committee of CDR and more influential than President Bucyana" was based "entirely on rumour, or vague and unfounded information from dubious sources", including the testimony of Alison Des Forges, while the

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[44] See paras. 47- 53 *infra*.
[45] Motion of 6 March 2006, para. 6 with reference to the Trial Judgement, para. 97, notably with respect to testimonies of Alison Des Forges concerning the alleged Appellant's succession of Bucyana, the alleged Appellant's membership of the Executive Committee and the fact that the Appellant was President of the CDR before 1994; of Witnesses X and ABE concerning the fact that the Appellant evicted his wife as soon as he learnt that she was a Tutsi; of Witness AHB concerning the date of the alleged delivery of arms at Kabari and Mizingo; and of Witness MK concerning the secret meetings at the office of the Minister of Transport.
[46] Motion of 6 March 2006, para. 10 with reference to the Trial Judgement, paras 267, 276, 695, 875-878, notably with regard to failure to take into account the testimony of Hassan Ngeze and Ferdinand Nahimana on the fact that the Appellant did not succeed Bucyana as President of the CDR party or that the CDR party did not exclude Tutsi as members, as well as on the denunciation by the CDR party of the charges concerning the extermination of Tutsi, while admitting hearsay evidence on the same allegations from Alison Des Forges, Omar Serushago, Witnesses X, LAG, ABC and AHB.
[47] Motion of 6 March 2006, paras 13-14. As examples, the Appellant refers to the findings concerning the testimony of Witness ABC on supervision of barricades in Rugunga (Trial Judgement, paras 336, 341, 975); Witness AHB's testimony on delivery of arms to 3 sectors in Mutura (Trial Judgement, paras 727, 728, 730, 954, 975, 977, 1035, 1613, 1064-1067, 1081, 1106-1107); Witness AFX's testimony on CDR meetings organized by the Appellant in 1993 (Trial Judgement, paras 264, 704, 717, 967); testimony of Alison Des Forges on the alleged "shouting match" conversation between the Appellant and Ambassador Rawson (Trial Judgement, paras 314 and 336); Witness AGK's testimony concerning the demonstration of CDR youths at the Ministry of Foreign Affairs (Trial Judgement, paras 697-699, 714); and Witness FS' testimony on "Hutu Power" (Trial Judgement, paras 128, 890-895).
[48] Response to Motion of 6 March 2006, para. 14 with reference to the Appellant's Brief, paras 156, 184-185, 229 and 336-337.
[49] Appellant's Brief, paras 126, 130-131.
[50] *Ibid*., paras 155-156.
[51] *Ibid*., para. 184
[52] *Ibid*., para. 185.

authenticity of the only documentary evidence in this regard was not proved.[53] Further findings based on the testimony of Alison Des Forges are contested under Grounds 27 ("shouting match" with the US Ambassador Rawson) and 41 (the Appellant's role and influence within CDR).[54] Ground 23 includes arguments contesting the Trial Chamber's conclusion on the Appellant's participation in planning of the demonstration coordinated by the Ministry of Foreign Affairs based on the testimony of Witness AGK.[55] The reliance upon the uncorroborated testimony of Witness AHB with respect to the distribution of weapons in Mutura and Gisenyi is disputed under Ground 24.[56] The reliance on uncorroborated testimony of Witness ABC with regard to the Appellant's supervision of the roadblocks in Rugunga is argued under Ground 26.[57] Finally, with respect to the entire testimony of Witness FS, the Appellant generally suggests that it cannot be relied upon in determination of his guilt since this evidence was heard while the then Counsel did not engage in cross-examination or advance any submissions on his behalf.[58]

24. In this situation, where the newly submitted Ground 1 significantly overlaps with several existing grounds of appeal, the Appellant should have sought authorization to amend his existing grounds of appeal in order to specify or clarify them showing that previous pleadings failed to address these issues adequately and that correcting such failures will not unduly delay the proceedings on appeal or are necessary in order to avoid a miscarriage of justice.[59] In this respect, he should have identified with precision the new arguments that are of substantial importance to his appeal. The Appellant has not done so with respect to his allegedly new arguments as compared to the ones that are already before the Appeals Chamber. In looking at these arguments in the newly submitted Ground 1, which were already made in the Notice of Appeal and the Appellant's Brief, the Appeals Chamber does not conclude that there was any ambiguity or error, or otherwise negligence or inadvertence, in their original articulation.

25. Although the issue of the Trial Chamber's reliance on the testimony of Witnesses X, ABE, MK and AHB is not covered by the Appellant's Brief with respect to the certain specific findings referred to in the Motion of 6 March 2006, the Appeals Chamber does not consider that the addition of the newly submitted Ground 1 is of any substantial importance to the present appeal in this respect. In fact, without passing on the merits of the alleged error, which must be assumed for this purpose,[60] the newly submitted Ground 1 with regard to these witnesses, if successful, would not lead to reversal of the Appellant's convictions. Thus, failure to include this new ground in the Notice of Appeal and Appellant's Brief would not result in a miscarriage of justice for the Appellant. More specifically, the factual findings of the Trial Chamber on Barayagwiza having taken part in CDR meetings and demonstrations and supervised roadblocks,[61] which is the basis of its legal findings on genocide[62] and on direct and public incitement to commit genocide,[63] do not rely on the testimony of Witnesses X[64] and ABE with regard to the fact that the Appellant "sent away his wife" when he "learnt that she was of Tutsi ethnicity."[65] Rather, the Trial Chamber refers to the more relevant evidence of Witnesses AGK, AHI, AAM, AFX, and ABC.[66] Likewise, the factual finding of the Trial Chamber that the Appellant worked closely together with Ferdinand Nahimana and Hassan Ngeze in the management of

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[53] *Ibid*., paras 186-189.
[54] *Ibid*., paras 229 and 336-337.
[55] *Ibid*., paras 200-201.
[56] *Ibid*., paras 208-217.
[57] *Ibid*., para. 220.
[58] *Ibid*., para. 83.
[59] *Cf. Blagojević* Decision of 26 June 2006, para. 23.
[60] *Cf. Ibid*., paras 21 and 31.
[61] Trial Judgment, para. 719.
[62] *Ibid*., paras 946-977.
[63] *Ibid*., paras 978-1039 and specifically para. 1035.
[64] The Appeals Chamber also notes that Witness X's testimony was found "generally credible" (Trial Judgement, para. 547).
[65] Trial Judgment, paras 703, 717.
[66] *Ibid*., paras 714-719.

RTLM and in the CDR, respectively,[67] which is the basis of its legal finding on conspiracy to commit genocide,[68] does not rely solely on the testimony of Witness MK, but also on the evidence of Witnesses AGK and AHA, the testimony of the latter having been considered more significant.[69] Finally, with regard to Witness AHB's testimony concerning the date of the alleged delivery of arms at Kabari and Mizingo,[70] the respective factual finding of the Trial Chamber refers to the distribution of weapons in Gisenyi and, as noted above, is already dealt with in the Appellant's Brief.[71]

26. In light of the findings above, the request for leave to include the newly submitted Ground 1 in the Appellant's Brief and Notice of Appeal is denied.

Ground 2: Error in Failing to consider the Question of Credibility of Witnesses as Being Likely to be Affected by their Ethnicity, Political and or Ideological Motives

27. Under the newly submitted Ground 2, the Appellant submits that the Trial Chamber erred

> "in rejecting the arguments put forward by the accused that some witnesses gave biased evidence, and depositions and submitted partial expert reports because of their ethnic, political and/or […] ideological affiliations".[72]

The Prosecution responds that these issues are covered by the Appellant's Brief.[73]

28. Similar to the newly submitted Ground 1, the Appeals Chamber notes that, although the Notice of Appeal does not contain a ground that specifically bears on this issue, the newly submitted Ground 2 covers certain issues already argued in the Appellant's Brief. For instance, the Appeals Chamber notes that the fact that the majority of the members of the Ministry of Justice were Tutsi and/or closely allied to the RPF, including Witness François-Xavier Nsanzuwera, is argued under Ground 7 as undermining his credibility.[74] Ground 30 contains the general allegation that

> "[t]he evidence was largely from a category of witnesses who sought to criminalize legitimate political aspirations of the Hutu"

and thus cannot be deemed reliable.[75] The overall issue of the integrity and credibility of Prosecution witnesses (including a motivation to lie), notably ABE, EB, AEU, AGX, GO and François-Xavier Nsanzuwera, is addressed under Ground 40 in connection with the application of the burden of proof by the Trial Chamber.[76] The admission into evidence of "partisan and opinion evidence" of Alison Des Forges, Jean-Pierre Chrétien and Marcel Kabanda is contested under Ground 41.[77] The Appeals Chamber does not find, in the absence of any arguments from the Appellant to the contrary, that there was any ambiguity or error, or otherwise negligence or inadvertence, in the original articulation of these errors in the Notice of Appeal and the Appellant's Brief.

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[67] *Ibid*., para. 889.
[68] *Ibid*., paras 1040-1055 and specifically para. 1049.
[69] *Ibid*., para. 887.
[70] *Ibid*., paras 721-722.
[71] See *supra*, footnote 56.
[72] Motion of 6 March 2006, para. 15 with reference to the Trial Judgement, para. 73. The Appellant provides a number of examples of such allegedly biased witnesses, including the Expert Witnesses Marcel Kabanda and Alison Des Forges, Witnesses Jean-Pierre Chrétien, Philippe Dahinden, GO, FS, FX, Nsanzuwera, ABE, AFX, WD, AAJ, AAM, MK, AGR, A. Rangira, AEU, AGX, AES, BU, Th. Kamilindi, DM, AHB, EB, FY, A. Murebwayire, J. Kagabo (Motion of 6 March 2006, paras 15-17 with references to the Trial Judgement, paras 332, 712, 913).
[73] Response to Motion of 6 March 2006, para. 14 with reference to the Appellant's Brief, paras. 209-227, 246 and 322.
[74] Appellant's Brief, para. 124.
[75] *Ibid*., para. 246.
[76] *Ibid*., paras 322-326.
[77] *Ibid*., paras 327-338.

29. Although the issue of the potential bias of Witnesses AAJ, AFX, WD, MK, WD, AGR, ABE, A. Rangira, AES, BU, Thomas Kamilindi, DM, AHB, FY, A. Murebwayire and J. Kagabo on the basis that they belong to the Tutsi ethnic group is not covered by the Appellant's Brief, the Appeals Chamber notes that the Motion of 6 March 2006 contains no arguments supporting this general assertion any further, since the Appellant merely states that these witnesses "were likely to be biased" and that the Trial Chamber

> "should have been cautious because of the possible desire for vengeance against Hutu leaders instilled inside the Tutsi community by the present RPF regime [and] propaganda disseminated through organisations of Tutsi survivals, notably IBUKA and AVEGA".[78]

In any case, the Appeals Chamber recalls that Witnesses AAJ, WD, and DM were found not credible by the Trial Chamber.[79] Accordingly, any challenge with respect to their potential bias is moot. The Appeals Chamber concludes that the addition of this issue under the newly submitted Ground 2 would not be of substantial importance for the present appeal. Moreover, the Appeals Chamber notes that no specific relief is sought under this new ground.

30. Consequently, the request for leave to include the newly submitted Ground 2 in the Appellant's Brief and Notice of Appeal is denied.

Ground 3: Error in Admitting, without Permitting any Challenge, the Interpretation of the History of Rwanda Made by Alison Des Forges in the *Akayesu* Case

31. The newly submitted Ground 3 refers to the allegedly erroneous admission of and reliance upon the "version of the History of Rwanda retained in the *Akayesu* case […] without subjecting it to any adversarial trial", which constitutes a violation of the Appellant's right to a fair trial and caused him "irreparable prejudice" in that it was "used as a basis for the determination of [his] culpability".[80] The Appellant further argues that the Trial Chamber also erred in "ignoring the fact that Mrs. Navanethem Pillay sat in the Chamber which rendered the Akayesu judgement" and would thus be biased in her judgement with regard to the Appellant.[81] The Prosecution contends that these issues are raised in the Appellant's Brief.[82]

32. The Appeals Chamber notes that the issues raised in the newly submitted Ground 3 simply reiterate the arguments already contained in the Appellant's Brief: the admission into evidence of Alison Des Forges's interpretation of the history of Rwanda in the *Akayesu* case is generally contested under Ground 41,[83] while the alleged bias and impartiality of Judge Pillay in connection with the fact that she "had previously sat in the determination of the Akayesu's trial", is argued specifically and at length in Ground 1.[84] In the view of the Appeals Chamber, these two grounds read together reveal the same issues as those contained in the newly submitted Ground 3. The Appeals Chamber finds that the newly submitted Ground 3 does not reveal any ambiguity or error, or otherwise negligence or inadvertence, in the articulation of these issues in the Notice of Appeal and the Appellant's Brief. The Appeals Chamber further notes that no specific relief is sought under this new ground.

33. Therefore, the Appellant's request for leave to include the proposed Ground 3 in the Appellant's Brief and Notice of Appeal is denied.

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[78] Motion of 6 March 2006, para. 16.
[79] Trial Judgement, paras 713, 912 and 776 respectively.
[80] Motion of 6 March 2006, paras 17 and 19 with reference to the Trial Judgement, paras 105-109.
[81] Motion of 6 March 2006, para. 18. The Appellant also refers to the fact that he filed a motion of recusal against Judge Pillay.
[82] Response to Motion of 6 March 2006, para. 14 with reference to the Appellant's Brief, paras 327-332 and 335-337.
[83] Appellant's Brief, paras 327-338.
[84] *Ibid*., para. 33.

Ground 4: Error in Admitting that the CDR and the RTLM Issued or Broadcast Lists of People Suspected of Collaborations with the RPF on an Ethnic Basis

34. Under the newly submitted Ground 4, the Appellant argues that the Trial Chamber erred in concluding that the CDR and the RTLM distributed lists of people indicating their ethnicity, which led to their death.[85] According to the Appellant, the Trial Chamber erred in holding that

> "the only common feature of persons appearing on those lists was their Tutsi ethnicity; and that the RTLM, Kangura and the CDR in its press releases, published those lists solely on that basis without any other substantive reason relating to the RPF or its supporters".[86]

he Appellant further contests both the authenticity and the contents of "*Communiqué special N°5*" presented at trial by the Prosecution, as well as the consequences of its release at the time of the events.[87] The Prosecution asserts that this issue is dealt with in the Appellant's Brief.[88]

35. The Appeal Chamber notes that most of these arguments are already addressed in the Appellant's Brief, in particular the Appellant's responsibility for the acts of the CDR and RTLM, as well the causal link between the RTLM broadcasts and/or the CDR activities and the extermination of the Tutsi before or after 6 April 1994. The Appellant's responsibility for RTLM broadcasts is extensively addressed in paragraph 107 and under Grounds 6 through 15, and his involvement in the CDR activities under Grounds 16 through 29.[89] Ground 33 is entirely devoted to the allegation that the broadcasts before or after 6 April did not encourage ethnic hatred.[90] The Appellant does not seek to establish that there was any ambiguity or error, or otherwise negligence or inadvertence, in previously articulating these arguments in the Notice of Appeal and the Appellant's Brief. In any event, the Appeals Chamber does not find this to be the case.

36. While it is true that the Appellant does not specifically refer to the issue of the lists in his Notice of Appeal and Appellant's Brief, and in particular the ones contained in the CDR Special Communiqué N°5 dated 22 September 1992, the Appeals Chamber considers that, in light of the issues already covered by the Appellant's Brief, the newly submitted Ground 4, which is in fact rather an amendment to the existing grounds, is not of such substantial importance to the present appeal that it would, if successful, require reversal of the Appellant's convictions. In this regard, the Appeals Chamber notes that the Trial Chamber found the Appellant criminally responsible for various activities of the RTLM and the CDR to conclude on his guilt for direct and public incitement to commit genocide pursuant to Article 6 (3) of the Statute.[91] The factual conclusion that these institutions "named and listed individuals suspected of being RPF or RPF accomplices"[92] is only one of those underlying the finding of guilt. At the same time, the CDR Special Communiqué N°5 of 22 September 1992[93] was not the only evidence considered by the Trial Chamber when it specifically concluded on "a pattern of naming people" by the RTLM and CDR.[94] The newly submitted Ground 4

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[85] Motion of 6 March 2006, para. 20.
[86] *Id*., with reference to the Trial Judgement, para. 1026.
[87] *Ibid*., para. 21.
[88] Response to Motion of 6 March 2006, para. 14, with reference to the Appellant's Brief, para. 107.
[89] Appellant's Brief, paras 107-240. More specifically, the Appellant argues that "[t]here was no basis for evidence for the interference that the Appellant was able to control the content of broadcasts" and that the Trial Chamber erred in concluding that "the killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and sufficiently disseminated through RTLM, *Kangura* and CDR, before and after 6th April 1994" (*Ibid*., paras 167-168). He further asserts that what is required to have been proven, but has not, is "a direct link between specific speeches, writings and partly political policy and the killings" (*Ibid*., para. 195).
[90] *Ibid*., paras 262-270.
[91] Trial Judgement, paras 1034-1035.
[92] *Ibid*., para. 1026.
[93] *Ibid*., paras 286 and 297.
[94] *Ibid*., para. 1026. The Appeals Chamber notes that in the context of the CDR policy, the Trial Chamber has *inter alia* considered such evidence as: Prosecution Expert Witness Alison Des Forges' testimony notably with respect to the

is wholly unsubstantiated as to such other evidence taken into account by the Trial Chamber in reaching its respective conclusion. Moreover, since, as explained above, the Appellant already generally argues under his existing grounds of appeal that he was not in control of the RTLM and CDR activities and that, in any case, the killings that followed did not result from such messages, the Appellant's failure to include this new ground in the Notice of Appeal and Appellant's Brief would not result in a miscarriage of justice. In addition, as it is the case for the newly submitted Grounds 2 and 3, the new Ground 4 does not contain any explicitly formulated relief sought by the Appellant.

37. In light of the foregoing, the Appeals Chamber rejects the request for leave to include the newly submitted Ground 4 in the Appellant's Brief and Notice of Appeal.

Ground 5: Failure to Give Adequate and Full Grounds as a Basis for the Judgment

38. The Appellant asserts that the Trial Chamber

> "erred in basing its judgement on many findings which are not founded or insufficiently founded, thus violating the Appellant's right to a fair trial and undermining his ability to adequately prepare his appeal".[95]

According to the Prosecution, this issue is dealt with in the Appellant's Brief.[96]

39. Indeed, the issue of providing adequate and full grounds for judgement with respect to various findings of the Trial Chamber has been previously addressed by the Appellant. In particular, under his newly submitted Ground 5 (a) he refers to the

> "absence of evidential grounds for finding that the Appellant supervised and controlled members of the CDR".[97]

The Appeals Chamber notes that this argument is discussed at length under Grounds 18 through 24 dealing with the issue of the Appellant's superior responsibility in the context of CDR activities, including the alleged error of fact with regard to the distribution of arms.[98] With respect to the newly submitted Ground 5 (b) alleging the

> "absence of evidential grounds that the Appellant perpetrated acts with the intention of destroying, in all or in part, the Tutsi ethnic group"[99]

and the alleged "failure to specify which precise acts or omission proved that the Appellant acted 'ruthlessly' towards the Tutsi" addressed under the newly submitted Ground 5 (c),[100] the Appeals Chamber notes that the existing Grounds 6 through 11 dealing, in particular, with the Trial Chamber's

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Appellant's letter of 11 July 1992 and *Kangura* publications (paras 278-282); an undated Special Communiqué of the CDR (paras 283-285) and several other CDR communiqués commented by Alison Des Forges (paras 286-292).

[95] Motion of 6 March 2006, para. 26.

[96] Response to Motion of 6 March 2006, para. 14 with reference to the Appellant's Brief, paras 351-352.

[97] Motion of 6 March 2006, para. 27 with reference to the Trial Judgement, para. 954. The Appellant argues, without further substantiation, that, on one hand, the question of supervision and control of the CDR members and Impuzamugambi "was not set out clearly against the counts of the indictment that he was convicted of", and, on the other hand, that the Trial Chamber failed to determine the elements of the Appellant's superior responsibility, notably erring in finding, in the absence of any direct evidence", that he played the "leadership role" by distributing the weapons.

[98] Appellant's Brief, paras 178-217. See, in particular, Ground 21 entitled "Finding of Superior Responsibility not Supported by Evidence – Error of Fact and Law" (paras 190-193).

[99] Motion of 6 March 2006, paras 28-29 with reference to the Trial Judgement, paras 969 and 1053-1054. The Appellant also mentions the fact that the issues raised in the Trial Chamber's respective findings were not "introduced by the Prosecution and thus was not the subject of adversarial debate at the time of the trial", but does not substantiate his claim any further concentrating this sub-ground of appeal on the absence of evidence.

[100] Motion of 6 March 2006, paras. 30-37 with reference to the Trial Judgement, paras 345-348, 736-742, 967.

legal and factual findings on the Appellant's *dolus specialis* for the crime of genocide, cover the same allegations.[101] The issue of the alleged failure to make

> "any specific ground for the finding that the Appellant acted as the 'lynchpin' for conspiracy between the three co-accused",[102]

raised in the newly submitted Ground 5 (d), is expressly addressed under the existing Ground 30.[103] Similarly, the newly submitted Ground 5 (e) regarding the alleged failure

> "to set out the constituent elements of the crimes of extermination and persecution against the Appellant",[104]

is already dealt with, in much greater detail, under existing Grounds 34 through 38.[105] Finally, the alleged failure "to provide [g]rounds for the sentence imposed",[106] raised in the newly submitted Ground 5 (f), is substantiated under existing Grounds 45 through 50.[107]

40. The Appeals Chamber finds that the issues raised under the newly submitted Ground 5 are already dealt with in greater detail and with more precision under the above-mentioned existing grounds. Therefore, in the absence of any arguments to the contrary, it cannot conclude that there is any ambiguity or error, or otherwise negligence or inadvertence, in the Notice of Appeal and the Appellant's Brief with respect to these issues. The request for leave to include the newly submitted Ground 5 in the Appellant's Brief and Notice of Appeal is consequently denied in its entirety.

Ground 6: Error in Law by Judging Non-Physical Persons

41. Under the newly submitted Ground 6, the Appellant amalgamates his statement that the Trial Chamber exercised its power *ultra vires* in extending its jurisdiction to legal persons with his previous arguments concerning the lack of challenge with regard to the findings of fact in the *Akayesu* case.[108] He claims that, as a consequence, "[t]he findings and the convictions relating to the CDR policy" as well as the "findings attributable to the Appellant based on the culpability of the CDR as a party should be quashed" and that he "should be acquitted of those matters".[109] While the Prosecution concedes that this issue "is not dealt with in the Appellant's Brief, in the same way as it is now being presented in the Motion", it submits that "the substantive argument, in relation to the Appellant's role and responsibility in RTLM and CDR has already been made" by the Appellant.[110] The Prosecution further argues that the matter of the Tribunal's jurisdiction *ratione personae* is irrelevant for the purposes of the present appeal.[111]

42. The Appeal Chamber notes that the lack of jurisdiction of the Tribunal to try non-natural persons is not explicitly raised in the Appellant's Brief, except under the existing Ground 35 with regard to "[e]rrors of fact and law concerning the existence of large scale massacre" attributable to the Appellant[112]. However, in light of the absence of any substantiation of such arguments in the Motion of

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[101] Appellant's Brief, paras 108-139.
[102] Motion of 6 March 2006, paras 38-46 with reference to the Trial Judgement, paras 1049-1055. The Appellant argues that the Trial Chamber's respective conclusions were not based on any evidential basis and the issues addressed therein were "not even part of the [P]rosecution case and did not appear in the Prosecution's indictment of October 23, 1997 as modified on April 11, 2000" (Motion of 6 March 2006, para. 40).
[103] Appellant's Brief, paras 243-249.
[104] Motion of 6 March 2006, para. 47.
[105] Appellant's Brief, paras 275-312.
[106] Motion of 6 March 2006, para. 48.
[107] Appellant's Brief, paras 351-376.
[108] Motion of 6 March 2006, para. 50.
[109] *Ibid*., para. 51.
[110] Response to Motion of 6 March 2006, para. 15 with reference to the Appellant's Brief, paras 150-170.
[111] Id.
[112] Appellant's Brief, para. 289.

6 March 2006, notably with respect to any findings of the Trial Chamber that allegedly "judg[e] the CDR policy and that of the RTLM broadcasts",[113] the Appeals Chamber fails to see how the omission of this ground of appeal would result in a miscarriage of justice for the Appellant. Consequently the request for leave to include the newly submitted Ground 6 in the Appellant's Brief and Notice of Appeal is denied.

Ground 7: Error in Considering as Aggravating Factors the Positions Held by the Appellant in the CDR and the RTLM

43. Under the newly submitted Ground 7, the Appellant contends that the Trial Chamber

> "erred in determining [his] sentence […] on the basis of positions which he allegedly held within the CDR and the RTLM whereas the Prosecution did not provide the evidence beyond reasonable doubt that the Appellant actually held those positions attributed to him".[114]

The Appellant further reiterates his challenge to the Trial Chamber's finding that he was the "lynchpin" between the three co-accused and concludes that, having held him responsible for both his own acts and omissions as well as those of his subordinates, the Trial Chamber "exposed him to double jeopardy" by considering "merely occupying such positions as an aggravating factor".[115] In addition, the Appellant argues that the Trial Chamber erred "by declaring that there were no mitigating circumstances"[116] and by imposing a "disproportionate" sentence.[117] The Prosecution submits that these issues are "dealt with at length" in the Appellant's Brief.[118]

44. The Appeals Chamber notes that existing Grounds 42 through 51 already cover the issues of sentencing, including the alleged error of the Trial Chamber in finding no mitigating circumstances in the Appellant's case,[119] as well as the argument that the "pronounced sentence is excessive and disproportionate".[120] The Appeals Chamber does not find, in the absence of any submissions from the Appellant to the contrary, that there was any ambiguity or error, or otherwise negligence or inadvertence, in raising them previously in the Notice of Appeal and the Appellant's Brief.

45. As for the allegation of "double jeopardy", the Appellant seems to reiterate his arguments with respect to the Trial Chamber's findings on his superior responsibility under Article 6 (3) of the Statute of the Tribunal addressed above[121] instead of addressing its specific considerations relevant to the aggravating factors in terms of sentencing.[122] There are no substantiated arguments with references to the Trial Chamber's findings concerning the Trial Chamber's alleged double-counting of the Appellant's command role in the crimes when considering his sentencing in addition to its evaluation

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[113] Motion of 6 March 2006, para. 50.
[114] *Ibid*., para. 53.
[115] *Ibid*., paras 54-55.
[116] Motion of 6 March 2006, para. 56. In particular, he maintains that the Trial Chamber should have taken into account "the absence of any evidence of [his] direct participation in any murder." He requests that, if he is not acquitted, "the Appeal Chambers should consider a significant reduction of the sentence […] and have regard to the significant discrepancy in the sentences imposed against Appellants in similar circumstances."
[117] Motion of 6 March 2006, para. 57.
[118] Response to Motion of 6 March 2006, para. 14 with reference to the Appellant's Brief, para. 339.
[119] Appellant's Brief, paras 339-342. See also, Ground 46 in which he argues the alleged error of failing to take into account "the excessive delay in bringing the Appellant to trial" as a mitigating circumstance for the reduction of the sentence (*Ibid*., paras 353-357); and Grounds 47 and 49 on "inadequate remedy for the violations of the fundamental rights" of the Appellant (*Ibid*., paras 358-360 and 362-366).
[120] *Ibid*., paras 347 and 361. See also Ground 46, under which he argues that the "sentence must be reduced", because of judgment with an "excessive delay", which is a "mitigating circumstance" (*Ibid*., paras 353-357). Similarly, under the Ground 51, he maintains that his sentence was unfair in comparison with the sentence of Georges Ruggiu (*Ibid*., paras 377-379).
[121] *Cf*. para. 39 *supra*.
[122] Trial Judgement, paras 1100, 1102-1103.

of the form and degree of his participation in the crimes. Therefore, the Appeals Chamber does not find that inclusion of this argument would be of substantial importance to the success of this appeal.

46. In light of the foregoing, the Appeals Chamber denies the Appellant's request to include the proposed Ground 7 in the Notice of Appeal and the Appellant's Brief.

B. MOTION OF 5 JULY 2006

Submissions of the Parties

47. The Appellant submits that good cause for amending his Notice of Appeal exists[123] since the proposed amendments (i) do not involve any substantive change to the grounds of appeal set out in the Appellant's Brief and in the Motion of 6 March 2006;[124] (ii) are designed to ensure that the Notice of Appeal complies with the requirements of Rule 108 of the Rules,[125] and thus (iii) "are intended to facilitate the work of the Appeals Chamber".[126] He explains that his Notice of Appeal did not indicate the substance of the alleged errors due to significant time pressure and constraints.[127] Finally, he maintains that the amendments will not prejudice the Prosecution or the co-Appellants.[128]

48. In its Response to Motion of 5 July 2006, the Prosecution objects to the proposed amendments and argues that the Appellant has failed to demonstrate any good cause, pursuant to Rule 108, justifying his request at this late stage of the proceedings, or to show that the denial thereof would lead to a miscarriage of justice.[129] More specifically, the Prosecution notes that the proposed amendments basically, with the exception of Ground 4, consist in merely cutting certain paragraphs from the Appellant's Brief and pasting them into his proposed new notice of appeal.[130] With respect to the newly amended Ground 4, the Prosecution underlines that the Appellant's assertion concerning the Judges' alleged bias and promise "to the highest Rwandan authorities that there would be no more incidents such as the release of Jean-Bosco Barayagwiza" is not pleaded in the Appellant's Brief, amounts to a significant variation of this ground and would thus prejudice the Prosecution in having had no opportunity to respond to these allegations.[131]

49. Furthermore, the Prosecution notes that neither the Appeals Chamber nor the Prosecution itself made any remark or complaint with regard to the existing Notice of Appeal.[132] At the same time, it submits that the notice of appeal annexed to the Motion of 5 July 2006 does not satisfy the requirements of Rules 108 and of paragraph 1.c) of the Practice Direction on Formal Requirements for Appeal from Judgements of 16 September 2002 ("Practice Direction"), since it still fails to identify, for each ground of appeal, the alleged errors of law or facts and the precise references to the challenged findings.[133] The Prosecution finally prays the Appeals Chamber to formally sanction the Appellant's Counsel, pursuant to Rules 46 and 73 (F) of the Rules for this frivolous filing.[134]

Analysis

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[123] Motion of 5 July 2006, paras 8, 11.
[124] *Ibid*., paras 2, 11.
[125] *Ibid*., paras 3, 8, 11.
[126] *Ibid*., para. 11.
[127] *Ibid*., paras 5, 10.
[128] *Ibid*., para. 13.
[129] Response to Motion of 5 July 2006, paras 2-3, 8, 13, 18.
[130] *Ibid*., para. 10.
[131] *Ibid*., para. 12.
[132] *Ibid*., paras 5, 7.
[133] *Ibid*., paras 14-16.
[134] *Ibid*., para. 19.

50. The Appeals Chamber recalls that both the Notice of Appeal and the Appellant's Brief were filed by the Appellant on the same date, almost ten months ago, after he had benefited from generous extensions of time granted by the Appeals Chamber following the change to his Defence team,[135] but notes that he is still complaining about "significant pressure of time"[136] and has repeatedly tried to obtain additional time for his filings on the same grounds.[137] Despite the fact that the Notice of Appeal clearly did not conform to the criteria established for such filings under the provisions of Rule 108 and the Practice Direction,[138] the Appeals Chamber accepted that Notice of Appeal as validly filed in the particular circumstances of the case. The Appeals Chamber was mindful of significant delays and multiple previous filings in this case, as well as of the fact that the Prosecution had not opposed the filing in question. In this respect, the Appeals Chamber adds that the purpose for setting forth the grounds, as provided for under Rule 108 of the Rules, is, *inter alia*,

> "to focus the mind of the Respondent, right from the day the notice of appeal is filed, on the arguments which will be developed subsequently in the Appeal brief"

and "to give details of the arguments the parties intend to raise in support of the grounds of appeal".[139] The Notice of Appeal and the Appellant's Brief, having been filed simultaneously, allow for the Prosecution to sufficiently understand the Appellant's grounds of appeal and thus, the Appeals Chamber considered that it was in the interests of judicial economy to accept the deficient Notice of Appeal.[140]

51. The Appeals Chamber also wishes to emphasize that it strongly disagrees with the Appellant's claim that his full notice of appeal "could only be completed once the Appeals Brief itself was in its final form".[141] This assertion goes against the logical order of the appeal procedure before the Tribunal, where a notice of appeal is filed shortly after the impugned judgement, while the Appellant's brief is to be filed within seventy-five days *after* the notice of appeal. The Appeals Chamber reiterates that unjustified amendments would result in appellants being free to change their appeal strategy after they have had the advantage of reviewing the arguments in a response brief, interfering with the expeditious administration of justice and prejudicing the other parties to the case,[142] which is unacceptable. In this sense, the Appeals Chamber finds the Motion of 5 July 2006 frivolous.

52. As explained above,[143] variations to a notice of appeal can be allowed if they are minor and non-substantive modifications that would correct an ambiguity or error made by the counsel in the previous filings and would not unduly delay the appeal proceedings. However, the Appeals Chamber finds that the newly submitted notice of appeal does not correct any such ambiguity or error since, save for Ground 4,[144] it merely reiterates the arguments already developed in the Appellant's Brief.[145]

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[135] Decision of 17 May 2005, p. 4; Decision of 2 September 2005, p. 3.
[136] Motion of 5 July 2006, para. 5.
[137] See, e.g., Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006, paras 22-26. The Appeals Chambers also notes that the same argument is raised by the Appellant in his several pending motions.
[138] The Notice Appeal consists of a simple list of grounds of appeal and indicates neither the relief sought nor the challenged findings of the Trial Chamber.
[139] *The Prosecutor v. Ignace Bagilishema,* Case N°ICTR-95-1A-A, Decision on Motion to Have the Prosecution's Notice of Appeal Declared Inadmissible, 26 October 2001, p. 3.
[140] This approach is not inconsistent with the Appeals Chamber's findings in para. 46 of *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case N°ICTR-95-1-A, Judgement (Reasons), 1 June 2001, stating that "an appeal, which consists of a Notice of Appeal that lists the grounds of Appeal but is not supported by an Appellant's brief, is rendered devoid of all the arguments and authorities". As the Appeals Chamber found in the cited judgement, this would only be the case if the deficient notice of appeal is not followed by a comprehensive Appellant's brief providing detailed arguments. This is clearly not the case in the present appeal.
[141] Motion of 5 July 2006, para. 10.
[142] See *supra*, para. 11.
[143] See *supra*, para. 13.
[144] With regard to the newly proposed Ground 4, the Appeals Chamber notes that the first eight lines of the amended wording contain new allegations, which the Prosecution has not had the opportunity to respond to. Their inclusion at the present stage

The Appeals Chamber further finds that the newly submitted notice of appeal does not fully conform to the provisions of Rule 108 and the Practice Direction in the sense that, for most Grounds, it still fails to identify with precision the nature of alleged errors, any references to the challenged findings or the relief sought. In addition, in the Annexed Notice of Appeal, the Appellant adds, in certain Grounds, some elements that were specified in the Appellant's Brief under different grounds,[146] which might be even more confusing. It would thus not be in the interests of justice to allow for these amendments, and the denial thereof will not result in a miscarriage of justice for the Appellant.

53. For the foregoing reasons, the Appellant's request to amend the Notice of Appeal is denied. At the same time, the Appeals Chamber notes that Ground 46 is absent from the Notice of Appeal, while Ground 45 is entitled "Lack of the Grounds Founding the Sentence because of Judgment with an Excessive Delay" and is followed by Ground 47. The Appellant's Brief has both Ground 45 "Lack of the Grounds Founding the Sentence" and Ground 46 "Reduction of the Sentence because of Judgment with an Excessive Delay". The same structure is presented in the Motion of 5 July 2006. The Appeals Chamber *proprio motu* considers that Ground 46 was inadvertently omitted in the Notice of Appeal and that it should be understood as a technically separate ground of appeal.

C. MOTION OF 7 JULY 2006

54. The Appellant also seized the Appeals Chamber with a request to make corrections of "typing error[s] or obvious error(s) of grammar" into his Appellant's Brief that would not amount to any substantial amendments thereto.[147] The Appeals Chamber recalls that

> "a party may, without requesting leave from the Appeals Chamber, file a corrigendum to their previously filed brief or motion whenever a minor or clerical error in said brief or motion is subsequently discovered and where correction of the error is necessary in order to provide clarification".[148]

Consequently, while the Appeals Chamber is cognizant of the lateness of such filing, there was no need for the Appellant to seize it with a Motion in this respect.

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of proceedings might thus prejudice the responding party, unless additional filings further delaying the advancement of the case are allowed. Moreover, the Appeals Chamber notes that the Appellant has not sought leave for this more significant variation of his respective ground of appeal generally arguing that none of the proposed amendments involve any substantive change to the grounds of appeal fully argued in the Appeal Brief. Subsequently, the Appeals Chamber cannot allow for this variation.

[145] For example, para. 9 of the newly submitted notice of appeal largely corresponds to para. 46 of the Appellant's Brief; para. 10 of the newly submitted notice of appeal corresponds to para. 67 of the Appellant's Brief; para. 11, with the exception of lines 2-8, of the newly submitted notice of appeal corresponds to para. 99, lines 3-7 of the Appellant's Brief; para. 12, lines 2-5 of the newly submitted notice of appeal corresponds to para. 101, lines 11-12 of the Appellant's Brief; para. 13 of the newly submitted notice of appeal corresponds to paras 109-110 of the Appellant's Brief; para. 14, lines 3-5 of the newly submitted notice of appeal corresponds to para. 124, lines 1-3 of the Appellant's Brief; para. 18, lines 1-4 of the newly submitted notice of appeal corresponds to para. 134, lines 1-4 of the Appellant's Brief; para. 21, lines 1-4 and 6-10 of the newly submitted notice of appeal corresponds to para. 67, lines 1-5 and 10-13 of the Appellant's Brief; para. 22 of the newly submitted notice of appeal corresponds to paras 168, lines 1-2, and 169 of the Appellant's Brief; para. 23 of the newly submitted notice of appeal corresponds to paras 171, lines 1-6, and 172 of the Appellant's Brief; para. 29, lines 5-10 of the newly submitted notice of appeal corresponds to para. 195 of the Appellant's Brief; paras 40-41 of the newly submitted notice of appeal corresponds to paras 263 and 279 of the Appellant's Brief; 46 of the newly submitted notice of appeal corresponds to para. 313 of the Appellant's Brief.

[146] For example, the "blatant political interference" and the "lack of impartiality" of Judges Pillay and Møse alleged under Ground 4, para. 11, of the newly submitted notice of appeal, are not evoked under Ground 4 of the Appellant's Brief but under Ground 1, at paras 22-41. The lack of "effective representation" alleged under ground 5, para. 12 of the newly submitted notice of appeal, does not appear under Ground 5 of the Appellant's Brief but under Ground 4, at paras 68-99. Under Ground 44, para. 51 of the newly submitted notice of appeal, the Appellant argues that "[t]he Trial Chamber failed to give precise and details grounds to explain its decision to sentence the Appellant to 35 years", whereas this allegation is made under Ground 45 of the Appellant's Brief.

[147] Motion of 7 July 2006, para. 3.

[148] *The Prosecutor v. Željko Mejakić et al.*, Case N°IT-02-65-AR11*bis*.1 Decision on Joint Defense Motion for Enlargement of Time to File Appellants' Brief, 30 August 2005, p. 3.

55. Having reviewed the proposed corrections, the Appeals Chamber notes that most of the submitted amendments indeed correct grammatical or typing errors, or inaccurate references. While corrections 5, 11, 15, 29, 54, 65, 66, 76 seem to go slightly beyond clerical corrections, the Appeals Chamber considers that they, while usefully providing clarifications to the respective sentences, do not amount to any substantial changes of the Appellant's Brief and can thus be equally permitted.

IV. Disposition

56. For the foregoing reasons, the Appeals Chamber DISMISSES the Motion of 6 March 2006 and Motion of 5 July 2006 in their entirety, FINDS both Motions to be frivolous[149] and imposes sanctions against the Appellant's Counsel, pursuant to Rule 73 (F), in the form of non-payment of fees associated with both Motions; and GRANTS the Motion of 7 July 2006.

Done in English and French, the English text being authoritative.

Dated this 17th day of August 2006

At The Hague, The Netherlands.

[Signed] : Fausto Pocar

[149] See *supra,* paras 19 and 51.

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Decision on the Appellant Jean-Bosco Barayagwiza's Corrigendum Motions of 5 July 2006
30 October 2006 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Andrésia Vaz, Pre-Appeal Judge

Jean Bosco Barayagwiza – Corrigendum, Typing errors or obvious errors of grammar, The party may without requesting leave from the Appeals Chamber file a corrigendum to their previously filed brief – Translation errors, Specific relief through a motion – Motion partially granted

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana, Decision on Defence Motion to Strike Annex B from the Prosecution Response Brief and for Re-Certification of the Record, 24 June 2004 (ICTR-96-10 and ICTR-96-17) ; Appeals Chamber, Ferdinand Nahimana et al. v. The Prosecutor, Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005 (ICTR-99-52) ; Appeals Chamber, Ferdinand Nahimana et al. v. The Prosecutor, Corrigendum to the Order of the Presiding Judge Designating the Pre-Appeal Judge, 25 August 2005 (ICTR-99-52) ; Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief, 17 August 2006 (ICTR-99-52)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Željko Mejakić et al., Decision on Joint Defense Motion for Enlargement of Time to File Appellants' Brief, 30 August 2005 (IT-02-65)

I, ANDRÉSIA VAZ, Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) and Pre-Appeal Judge in this case;[1]

BEING SEIZED OF the "*Corrigendum* Motion Relating to the Appellant Jean Bosco Barayagwiza's Reply to the Consolidated Respondents Brief" filed by Jean-Bosco Barayagwiza ("Appellant") on 5 July 2006 ("First Motion"), by which the Appellant seeks to amend "The Appellant Jean-Bosco Barayagwiza's Reply to the Consolidated Respondent's Brief" filed on 12 December 2005 ("Reply Brief");

NOTING that the Prosecution has not filed a response to the First Motion;

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[1] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005; *Ferdinand Nahimana et al. v. The Prosecutor,* ICTR-99-52-A, Corrigendum to the Order of the Presiding Judge Designating the Pre-Appeal Judge, 25 August 2005.

NOTING that the Appellant submits that the proposed corrections are meant to correct typing errors or obvious errors of grammar "making a factual correction not amounting to a substantial amendment of the [Reply Brief]";[2]

RECALLING that

> "a party may, *without requesting leave* from the Appeals Chamber, file a *corrigendum* to their previously filed brief or motion whenever a minor or clerical error in said brief or motion is subsequently discovered and where correction of the error is necessary in order to provide clarification";[3]

CONSIDERING, consequently, there was no need for the Appellant to seize it with a Motion in this respect;[4]

FINDING that the submitted amendments indeed correct grammatical or typing errors, or inaccurate references, and do not amount to any substantial changes of the Reply Brief;

FINDING, therefore, that the Reply Brief should be read in accordance with the amendments proposed by the First Motion and allowed by the present decision;

BEING ALSO SEIZED OF "The Appellant Jean Bosco Barayagwiza's *Corrigendum* Motion Concerning the French Translation of the Appellant's Reply to the Respondent's Consolidated Brief" filed by the Appellant on 5 July 2006 ("Second Motion"), proposing corrections to be made in the French translation of the Reply Brief;[5]

NOTING that the Prosecution has not filed a response to the Second Motion;

NOTING that the Appellant submits that the proposed corrections should be made in order to avoid a miscarriage of justice and that

> "the benefit of any doubt ought to be given to the party who submitted the original in English as to the choice of words that are provided in translation where there is text of questionable accuracy";[6]

CONSIDERING that the translation of the Reply Brief was certified by the Language Services Section of the Tribunal;

CONSIDERING that in these circumstances requesting specific relief through a motion, rather than merely filing a corrigendum, is warranted;

NOTING the "Registrar's Submission under Rule 33 (B) of the Rules of Procedure and Evidence with Respect to the Appellant Jean Bosco Barayagwiza's *Corrigendum* Motion Concerning the French Translation of the Appellant's Reply to the Respondent's consolidated Brief Dated 5 July 2006" filed on 19 October 2006 and the Report of the Language Services Section of the Tribunal appended thereto ("Registrar's Submission" collectively);

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[2] First Motion, para. 3.
[3] *The Prosecutor v. Željko Mejakić et al.*, Case N°IT-02-65-AR11*bis*.1 Decision on Joint Defense Motion for Enlargement of Time to File Appellants' Brief, 30 August 2005, p. 3 [emphasis added].
[4] See Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief, 17 August 2006, para. 54.
[5] Réplique de l'Appelant Jean-Bosco Barayagwiza au Mémoire unique de l'Intimé, 12 avril 2006.
[6] Second Motion, para. 3.

CONSIDERING that, in light of the remarks and explanations contained in the Registrar's Submission, the Appellant's submissions do not raise doubt as to the accuracy of the translation,[7] save for his objection 1 and, partly, objection 6;[8]

FINDING, consequently, that the title of paragraph 5 of the French Translation of the Reply Brief should read "*Critères généraux de l'impartialité judiciaire (par. 17 à 20)*", and that the third sentence of paragraph 28 of the same document should read as follows:

> "Cet article n'était pas appliqué au TPIR, mais celui-ci n'était pas fondé en droit à juger un accusé en son absence, et ce, jusqu'à l'adoption de l'article 82 bis du Règlement à la session plénière des 26 et 27 mai 2003."

FINDING that the rest of the corrections proposed by the Appellant is not warranted;

FOR THE FOREGOING REASONS,

GRANT the First Motion;

GRANT the Second Motion IN PART as specified above and DISMISS the Second Motion in all other respects.

Done in English and French, the English text being authoritative.

Dated this 30th day of October 2006, At The Hague, The Netherlands.

[Signed] : Andrésia Vaz

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[7] See, *Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana*, Case N°ICTR-96-10-A and ICTR-96-17-A, Decision on Defence Motion to Strike Annex B from the Prosecution Response Brief and for Re-Certification of the Record, 24 June 2004, p. 3.
[8] Second Motion, paras 1 and 6.

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Decision on Jean-Bosco Barayagwiza's Motion for Extension of the Page Limit to File a Motion Seeking the Admission of Additional Evidence 30 October 2006 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Andrésia Vaz, Pre-Appeal Judge

Jean Bosco Barayagwiza – Extension of page limit of the Motion for admission of additional evidence, Newly discovered material, No clear specification of the nature and amount of material of the additional evidence, Choice of the Accused of a piece-meal approach, Effectiveness of a submission does not depend on its length – Motion dismissed

International Instrument cited :

Practice Direction on the Length of Briefs and Motions on Appeal, para. 3 and 5

International Cases cited :

I.C.T.R. : Appeals Chamber, Ferdinand Nahimana et al. v. The Prosecutor, Decision on Ferdinand Nahimana's Motion for an Extension of Page Limits for Appellant's Brief and on Prosecution's Motion Objecting to Nahimana's Appellant's Brief, 24 June 2004 (ICTR-99-52) ; Appeals Chamber, Ferdinand Nahimana et al. v. The Prosecutor, Decision on Ferdinand Nahimana's Second Motion for an Extension of Page Limits for Appellant's Brief, 31 August 2004 (ICTR-99-52) ; Appeals Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on 'Appellant Jean-Bosco Baraygwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", 17 May 2005 (ICTR-99-52) ; Appeals Chamber, Ferdinand Nahimana et al. v. The Prosecutor, Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005 (ICTR-99-52) ; Appeals Chamber, Ferdinand Nahimana et al. v. The Prosecutor, Corrigendum to the Order of the Presiding Judge Designating the Pre-Appeal Judge, 25 August 2005 (ICTR-99-52) ; Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza et al., Decision on Jean-Bosco Barayagwiza's and Hassan Ngeze's Urgent Motions for Extension of Page and Time Limits for their Replies to the Consolidated Prosecution Response, 6 December 2005 (ICTR-99-52) ; Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza et al., Decision on Jean-Bosco Barayagwiza's Motion for Extension of the Page Limits to File a Motion for Additional Evidence, 26 May 2006 (ICTR-99-52)

I, ANDRÉSIA VAZ, Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) and Pre-Appeal Judge in this case;[1]

BEING SEIZED OF "The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Permit an Extension of Page Limits to the Pending Motion for Additional Evidence pursuant to the ICTR Rules of Procedure and Evidence and the Practice Directions of 16th September 2002, and Paragraph 1 C 5 of

[1] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005; *Ferdinand Nahimana et al. v. The Prosecutor,* ICTR-99-52-A, Corrigendum to the Order of the Presiding Judge Designating the Pre-Appeal Judge, 25 August 2005.

15 May 2006 [*sic*]" filed by Jean-Bosco Barayagwiza on 27 September 2006 ("Appellant" and "Motion", respectively), seeking "[a]n extension of pages for the Appellant's Motion for Additional Evidence relating to the evidence of witness AGK to 30 pages";[2]

NOTING that the Prosecutor has not filed a response to the Motion;

NOTING that the Appellant specifies that the Motion

> "is made in light of the pending Motion for Additional [Evidence] which involves the newly discovered material from the Alchemy file relating to notes and *memorandums* concerning Ambassador Rawson",

i.e. the material which allegedly calls into question the testimony and credibility of Witness AGK "concerning a demonstration where he attributes a significant role to the Appellant";[3]

NOTING that the Appellant states that he "will in due course request the admission of these newly discovered pieces of evidence" in order to impugn the findings of the Trial Chamber;[4]

NOTING that in his Motion of 8 September 2006, currently pending before the Appeals Chamber, the Appellant applied for leave to submit two notes of Ambassador Rawson as additional evidence on appeal;[5]

NOTING that the Appellant appears to submit in the present Motion that the extension of page limit for his contemplated motion would be warranted on the grounds that it will have to show that Ambassador Rawson's messages undermine Witness AGK's credibility and could have been a decisive factor at trial, and also examine the evidence of other witnesses having testified as to personal activities of the Appellant;[6]

NOTING that the Appellant adds that he cannot analyze each of those testimonies in order to show that they are not credible, based on facts beyond the Tribunal's jurisdiction or not mentioned in the indictments, within the prescribed page limit;[7]

NOTING finally that the Appellant asserts that his request should be granted in the interest of judicial economy because otherwise he would be forced to file several motions which would duplicate the work of the Appeals Chamber and be a wasteful use of resources of the Tribunal;[8]

CONSIDERING that, in accordance with paragraph 3 of the Practice Direction on the Length of Briefs and Motions on Appeal,[9] motions filed before the Appeals Chamber shall not exceed ten pages or 3,000 words, whichever is greater;

CONSIDERING that, in conformity with paragraph 5 of the Practice Direction, a party seeking authorization to exceed the page limit "must provide an explanation of the exceptional circumstances that necessitate the oversized filing";

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[2] Motion, para. 8, p. 6 (i).
[3] Motion, paras 3-6.
[4] Motion, para. 3.
[5] The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115), 8 September 2006 ("Motion of 8 September 2006"), paras 8-11 and 15.
[6] Motion, paras 5, 7, 9.
[7] Motion, para. 8.
[8] Motion, para. 2.
[9] Practice Direction on the Length of Briefs and Motions on Appeal, 16 September 2002, as amended ("Practice Direction").

FINDING that the present Motion does not clearly specify the nature and amount of material that the Appellant plans to submit as additional evidence, especially in light of the pending Motion of 8 September 2006, and that it could be dismissed on this basis alone;[10]

CONSIDERING that the Appellant's contemplated motion for leave to submit additional evidence pertaining to Witness AGK would be a second motion submitting documents from the same sources, allegedly discovered by the Appellant in July and August 2006 upon receipt of the electronic file "Alchemy" and/or through the Electronic Disclosure Suite;

CONSIDERING therefore that the Appellant has already opted for the piece-meal approach that he purportedly tried to avoid by requesting the extension of the page limit;

CONSIDERING that the Appellant has not shown that the prescribed page limit is insufficient to argue issues pertaining to the credibility of one witness, even if analyzed in the context of other witnesses' testimonies;

FINDING consequently that the Appellant has not demonstrated the existence of exceptional circumstances that would justify an oversized filing;

EMPHASIZING that the effectiveness of a submission does not depend on its length but on the clarity and persuasiveness of the arguments;[11]

FOR THE FOREGOING REASONS,

DISMISSES the Motion in its entirety.

Done in English and French, the English text being authoritative.

Dated this 30th day of October 2006, At The Hague, The Netherlands.

[Signed] : Andrésia Vaz

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[10] See Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, 16 September 2002, as amended, para. 19.

[11] Decision on Jean-Bosco Barayagwiza's Motion for Extension of the Page Limits to File a Motion for Additional Evidence, 26 May 2006, p. 4; Decision on Jean-Bosco Barayagwiza's and Hassan Ngeze's Urgent Motions for Extension of Page and Time Limits for their Replies to the Consolidated Prosecution Response, 6 December 2005, p. 5; Decision on "Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", 17 May 2005, p. 3; Decision on Ferdinand Nahimana's Second Motion for an Extension of Page Limits for Appellant's Brief, 31 August 2004, p. 3; Decision on Ferdinand Nahimana's Motion for an Extension of Page Limits for Appellant's Brief and on Prosecution's Motion Objecting to Nahimana's Appellant's Brief, 24 June 2004, p. 3.

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Decision on Appellant Jean-Bosco Barayagiwza's Motion Requesting that the Prosecution disclosure of the interview of Michel Bagaragaza be expunged from the record
30 October 2006 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron

Jean Bosco Barayagwiza – Michel Bagaragaza – Zigiranyirazo Case – Obligation of Disclosure of the Prosecutor, Positive and continuous obligation, Determination of the material to disclose is primarily a fact-based judgement made by and under the responsibility of the Prosecution – Motion dismissed

International Instrument cited :

Rules of Procedure and Evidence, rules 46 (A), 68, 75 (F), 75 (F) (ii) and 115

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Alfred Musema, "Décision sur la « Confidential Motion (i) to File Two Witness Statements Served by the Prosecutor on 18 May 2001 Under Rule 68 Disclosure to the Defence, and (ii) to File the Statement of Witness II Served by the Prosecutor on 18 April 2001 and (iii) to File a Supplemental Ground of Appeal » ; et Ordonnance portant calendrier", 28 September 2001 (ICTR-96-13) ; Appeals Chamber, The Prosecutor v. Georges Rutaganda, Decision on the Urgent Defence Motion for Disclosure and Admisssion of Additionnal Evidence and Scheduling Order, 12 December 2002 (ICTR-96-3) ; Appeals Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006 (ICTR-98-44) ; Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006 (ICTR-98-44)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Decision on Prosecution's Application to Seek Guidance from the Appeals Chamber regarding Redaction of the Statement of "Witness Two" for the purposes of Disclosure to Dario Kordić under Rule 68, 4 March 2004 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Miroslav Kvočka et al., Decision, 22 March 2004 (IT-98-30/1) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, [confidential] Decision on Prosecution's Application to Seek Guidance from the Appeals Chamber regarding Redaction of the Statement of "Witness Two" for the purposes of Disclosure to Paško Ljubičić under Rule 68, 30 March 2004 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Judgement, 29 July 2004 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Radoslav Brđanin, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004 (IT-99-36) ; Appeals Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Judgement, 17 December 2004 (IT-95-14/2) ; Appeals Chamber, The Prosecutor v. Miroslav Bralo, Decision on Motions for Access to Ex Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006 (IT-95-17)

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations Committed in the Territory of Neighboring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of "The Appellant Jean-Bosco Barayagwiza's Motion Requesting that the Prosecution Disclosure of the Interview of Michel Bagaragaza Be Expunged from the Record" filed by Jean-Bosco Barayagwiza ("Appellant") on 5 July 2006 ("Motion"). The Prosecution filed its response on 17 July 2006.[1] The Appellant has not filed a reply.

2. On 4 April 2006, the Prosecution disclosed to the Appellant extracts from the statement provided by Michel Bagaragaza interviewed by the Tribunal's investigators for the purposes of the *Prosecutor v. Protais Zigiranyarazo* Case N°ICTR-2001-73-I ("*Zigiranyarazo* case").[2]

A. Submissions of the Parties

3. In the Motion, the Appellant submits that the Impugned Disclosure represents a misuse of the procedures provided for by Rules 68 and Rules 75 of the Rules of Procedure and Evidence of the Tribunal ("Rules") because (i) while Rule 68 imposes a duty on the Prosecutor to disclose exculpatory material, the Impugned Disclosure was not sought by the Appellant and contains "little or no exculpatory material, but instead contains considerable additional evidence in support of the Prosecution case";[3] and (ii) the Rule 75 (F) requirement, under which

> "the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures in the first proceedings",

has not been met.[4] The Appellant argues that the sole purpose of the Impugned Disclosure was to undermine the Appellant's case on appeal, since the disclosed interview

> "represented a sustained attempt by the Prosecution to obtain evidence in support of various [contested] aspects of the case"

and to place

> "incriminating evidence before the Appeals Chamber, without affording the Appellant an opportunity to test or challenge the evidence".[5]

4. The Appellant claims that the Impugned Disclosure does not contain any exculpatory material[6] and argues that the filing of the Impugned Disclosure with the Registry is calculated to influence the Appeals Judges' assessment of the Appellant's political beliefs and activities.[7] He concludes that such conduct by the Prosecution is contrary to the interests of justice and would deserve sanctioning under Rule 46 (A) of the Rules.[8]

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[1] "Prosecutor's Response to 'The Appellant Jean-Bosco Barayagwiza's Motion Requesting that the Prosecution Disclosure of the Interview of Michel Bagaragaza be Expunged from the Record'" filed by the Prosecution on 17 July 2006 ("Response").
[2] The "Prosecutor's Disclosure Pursuant to Rule 75 (F) of the Rules, of the Relevant Parts of the Interview with Witness Michel Bagaragaza Conducted by ICTR Investigators between 29 September 2004 and 06 January 2005" filed confidentially by the Office of the Prosecutor ("Prosecution") on 4 April 2006 ("Impugned Disclosure").
[3] Motion, paras 4-5, 13. The Appellant's arguments in paras 6 through 12 of the Motion relate to the merits of the present appeal. In light of the reasoning provided hereinafter, the Appeals Chamber does not need to address these arguments in the present decision.
[4] *Ibid*., para. 3.
[5] *Ibid*., paras 5, 16.
[6] *Ibid*., paras 14-16.
[7] *Ibid*., para. 16.
[8] *Ibid*., paras 16-17.

5. The Prosecution does not oppose the Appellant's request to have the Impugned Disclosure expunged from the record in the present case but submits that the allegation of misconduct and bad faith should be dismissed by the Appeals Chamber and the Appellant's request for sanctions rejected.[9] It contends that the Impugned Disclosure was made because it appeared to be, on its face, material subject to disclosure pursuant to Rule 68 of the Rules.[10] It adds that the reference therein to Rule 75 (F) is meant to provide the Appellant with the requisite warning to maintain the confidentiality of the communicated documents pertaining to the then protected witness Michel Bagaragaza.[11] The Prosecution further avers that the content of the disclosed interview was considered by the Prosecution as relevant, since the answers to questions 93 and 231 specifically pertain to the Appellant's case, while the rest of the references "provide the overall context within which the witness referred to the Appellant".[12] It finally points out that the Impugned Disclosure is neither a Prosecution submission, nor additional evidence.[13]

B. Discussion

6. The Appeals Chamber recalls that the Prosecution's obligation under Rule 68 of the Rules is positive and continuous,[14] and that the determination of what material meets Rule 68 disclosure requirements is primarily a fact-based judgement made by and under the responsibility of the Prosecution.[15] The Prosecution

> "is under no legal obligation to consult with an accused to reach a decision on what material suggests the innocence or mitigates the guilt of an accused or affects the credibility of the Prosecution's evidence".[16]

Therefore, the Appeals Chamber would not intervene in the exercise of the Prosecution's discretion, unless it is shown that the Prosecution abused it and, where there is no evidence to the contrary, will assume that the Prosecution is acting in good faith.[17]

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[9] Response, para. 2.
[10] *Ibid*., para. 8.
[11] *Ibid*., paras 3-6. The Prosecution specifies that the issue of confidentiality is currently moot "since the witness subsequently waived his right to the witness protection order on 13 June 2006, and testified, on his own name, in *Prosecutor v. Zigiranyarazo*".
[12] *Ibid*., para. 8.
[13] *Ibid*., paras 8-9.
[14] *Prosecutor v. Miroslav Bralo*, Case N°IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006 ("*Bralo* Decision"), para. 29; *Prosecutor v. Théoneste Bagosora et al.,* Case N°ICTR-98-41-AR73, ITCR-98-41-AR73(B), Decision on Interlocutory Appeals on Witness Protection Orders, 6 October 2005, para. 44; *Prosecutor v. Tihomir Blaškić,* Case N°IT-95-14-A, [confidential] Decision on Prosecution's Application to Seek Guidance from the Appeals Chamber regarding Redaction of the Statement of "Witness Two" for the purposes of Disclosure to Paško Ljubičić under Rule 68, 30 March 2004 ("*Blaškić* 30 March 2004 Decision"), para. 32; *Prosecutor v. Tihomir Blaškić,* Case N°IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000 ("*Blaškić* 26 September 2000 Decision"), paras 29-32.
[15] *Prosecutor v. Edouard Karemera et al*., Case N°ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 16; *Prosecutor v. Radoslav Brđanin,* Case N°IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004 ("*Brđanin* 7 December 2004 Decision"), p. 3; *Prosecutor v. Tihomir Blaškić,* Case N°IT-95-14-A, Appeal Judgement, 29 July 2004 ("*Blaškić* Appeals Judgement"), para. 264; *Prosecutor v. Tihomir Blaškić,* Case N°IT-95-14-A, Decision on Prosecution's Application to Seek Guidance from the Appeals Chamber regarding Redaction of the Statement of "Witness Two" for the purposes of Disclosure to Dario Kordić under Rule 68, 4 March 2004, ("*Blaškić* 4 March 2004 Decision"), para. 44; *Blaškić* 30 March 2004 Decision, paras 31-32; *Blaškić* 26 September 2000 Decision, paras 38, 45.
[16] *Kordić and Čerkez*, Case N°IT-95-14/2-A, Judgement, 17 December 2004, para. 183; *Blaškić* Appeals Judgement, para. 264; *Blaškić* 4 March 2004 Decision, para. 44.
[17] *Bralo* Decision, para. 31; *Brđanin* 7 December 2004 Decision, p. 3; *Prosecutor v. Miroslav Kvočka et al.,* Case N°IT-98-30/1-A, Decision, 22 March 2004, p. 3; *Georges Rutaganda v. Prosecutor*, Case N°ICTR-96-3-A, Decision on Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, 12 December 2002, pp 4-5; *Alfred Musema v. Prosecutor*, Case N°ICTR-96-13-A, Decision on the Appellant's Motions for the Production of Material,

7. The Impugned Disclosure has not been admitted by the Appeals Chamber as additional evidence under Rule 115 of the Rules, and is thus not part of the case record pending before the Appeals Chamber. Therefore, the Appeals Chamber will not consider the contents of the Impugned Disclosure absent its formal admittance into the appeal record. For the foregoing reasons, the Appeals Chamber sees no need to declare it invalid or, *a fortiori*, to expunge it from the record.

8. The Appeals Chamber also notes that it was unnecessary for the Prosecution to file the Impugned Disclosure before the Appeals Chamber. The appropriate procedure for disclosure of materials under Rule 68 of the Rules when a case is before the Appeals Chamber is to serve the Defence with such material.[18] Where the Prosecution files its disclosure with the Registry for purposes of keeping it in the Registry archives, the Prosecution shall do so without copying the Appeals Chamber. Where the Prosecution considers it necessary to advise the Appeals Chamber of its further disclosures of Rule 68 material to the Defence, it may file a status report before the Appeals Chamber informing them of the fact and date but not the nature of that disclosure or the communicated material.

9. Finally, with respect to the Appellant's submission that the Impugned Disclosure was done in violation of Rule 75 (F) of the Rules, the Appeals Chamber recalls that under Rule 75 (F) (ii), the Prosecution, in discharge of its disclosure obligations, should notify the Defence to whom the disclosure is being made of the nature of the applicable protective measures. The Appeals Chamber notes that such notification was included by the Prosecution in the Impugned Disclosure.[19] Consequently, the Appeals Chamber finds the Appellant's contention that the Prosecution failed to meet its Rule 75 (F) obligation irrelevant and in any case moot in light of Michel Bagaragaza's open session testimony in the *Zigiranyirazo* case on 13 June 2006.

10. In light of the above findings, the Appeals Chamber need not address the Appellant's request to impose sanctions under Rule 46 (A) of the Rules.

C. Disposition

11. For the foregoing reasons, the Appeals Chamber DISMISSES the Motion in its entirety.

12. The Appeals Chamber hereby INSTRUCTS the Prosecution to follow the procedure described in paragraph eight above for its future disclosures under Rule 68 of the Rules. The Appeals Chamber also INSTRUCTS the Registry to ensure that any copies of disclosures filed with it by the Prosecution are to be kept in its records without communicating the disclosed material to the Appeals Chamber.

Done in English and French, the English text being authoritative.

Suspension of Extension of the Briefing Schedule, and Additional Filings, 18 May 2001, p. 4; *Blaškić* 26 September 2000 Decision, para. 39.

[18] In this respect, the Appeals Chamber recalls its recent decision, in which it held that the Prosecution's obligation under Rule 68 (A) of the Rules "extends beyond simply making available its entire evidence collection in a searchable format", since it "cannot serve as a surrogate for the Prosecution's individualized consideration of the material in its possession". (*Prosecutor v. Édouard Karemera et al.,* Case N°ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, para. 10). The Appeals Chamber also found that the EDS does not make documents "reasonably accessible as a general matter", nor does it allow to assume that the Defence knows about all material included therein, to the extent that the Prosecution could be relieved of its Rule 68 obligation. (*Ibid.,* para. 15). In this sense, it has been suggested that the Prosecution should either "separate[] a special file for Rule 68 material or draw[] the attention of the Defence to such material in writing and permanently update[] the special file or the written notice". (*Id.*) See also *Bralo* Decision, para. 35.

[19] Impugned Disclosure, para. 3: "Mr. Jean-Bosco Barayagwiza is therefore reminded of his obligation to maintain the strict confidentiality of the disclosed statements. Mr. Michel Bagaragaza is a protected witness as exemplified in the attached Trial Chamber decisions in *The Prosecutor v. Protais Zigiranyirazo*".

Dated this 30th day of October 2006, At The Hague, The Netherlands.

[Signed] : Fausto Pocar

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Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel 23 November 2006 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron

Jean Bosco Barayagwiza – Inherent power of the Appeals Chamber to review decisions of the Tribunal's President, Nature of the power to review decisions, Judicial review of an administrative decision concerns the regularity of the procedure by which the Registrar and/or the President reached the impugned decision, Right to legal assistance financed by the Tribunal does not confer the right to counsel of one's choosing, No right of the indigent Accused to a co-counsel, Withdrawal of the Counsel only under exceptional circumstances, Alleged conflict between the Accused and his Co-Counsel on issues of legal strategy does not constitute an exceptional circumstance, Accused's refusal to cooperate with his lawyers does not constitute an exceptional circumstance, No right of the Accused to unilaterally destroy the trust between himself and his counsel, Factors directly relevant to the decision of the withdrawal : misconduct or manifest professional negligence, Request for withdrawal of Co-Counsel at a late stage of the proceedings, No prejudice to the Accused, Right of the Accused to be tried fairly and expeditiously – Motion dismissed

International Instrument cited :

Directive on the Assignment of Defence Counsel, art. 19 and 19 (A) (ii)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Jean-Paul Akayesu, Decision on the Request of the Accused for the Replacement of Assigned Counsel, 20 November 1996 (ICTR-96-4) ; Trial Chamber, The Prosecutor v. Gérard Ntakirutimana, Decision on the Motions of the Accused for Replacement of Assigned Counsel/Corr., 18 June 1997 (ICTR-96-10 and ICTR-96-17) ; Trial Chamber, The Prosecutor v. Theoneste Bagosora, Decision on the Request by the Accused for Change of Assigned Counsel, 26 June 1997 (ICTR-96-7) ; Trial Chamber, Jean-Bosco Barayagwiza v. The Prosecutor, Decision (Request of Withdrawal of Defence Counsel), 2 February 2000 (ICTR-97-19) ; Appeals Chamber, The Prosecutor v. Jean Kambanda, Judgement, 19 October 2000 (ICTR-97-23) ; Appeals Chamber, The Prosecutor v. Jean-Paul Akayesu, Judgement, 1st June 2001 (ICTR-96-4) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali, Decision on Ntahobali's Motion for Withdrawal of Counsel, 22 June 2001 (ICTR-97-21) ; Trial Chamber, The Prosecutor v. Tharcisse Muvunyi et al., Decision on the Accused's Request to Instruct the Registrar to Replace Assigned Lead Counsel, Article 20 (4) (d) of the Statute and Rules 45 and 73 of the Rules of Procedure and Evidence, 18 November 2003 (ICTR-2000-55) ; Trial Chamber, The Prosecutor v. Aloys Simba, Décision portant report de la date d'ouverture du procès, 18 august 2004 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana et al., Decision on Defence Oral Motion for Adjournment of the Proceedings, 8 October 2004 (ICTR-2000-56) ; Trial Chamber, The

Prosecutor v. Théoneste Bagosora et al., Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi, 19 January 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Jean Bosco Barayagwiza, Decision on Jean Bosco Barayagwiza's Motion Concerning the Registrar's Decision to Appoint Counsel, 19 January 2005 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Maitre Paul Skolnik's Application for Reconsideration of the Chamber's Decision to Instruct the Registrar to Assign him as Lead Counsel for Gratien Kabiligi, 24 March 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Hassan Ngeze, Decision on "Appellant Hassan Ngeze's Motion for Leave to Permit his Defence Counsel to Communicate with him during Afternoon Friday, Saturday, Sunday and Public Holidays", 25 April 2005 (ICTR-97-27) ; Appeals Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on Appellant Ferdinand Nahimana's Motion for Assistance From the Registrar in the Appeals Phase, 3 May 2005 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. Athanase Seromba, Decision by the Registrar of Withdrawal of Mr. Alfred Pognon, Lead Counsel for Athanase Seromba, 10 May 2005 (ICTR-2001-66) ; Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana et al., Decision by the Registrar of Withdrawal of Mrs. Danielle Girard as Co-Counsel for the Accused François-Xavier Nzuwonemeye, 13 October 2005 (ICTR-2000-56)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Zejnil Delalić et al., Decision on Request by Accused Mucić for Assignment of New Counsel, 24 June 1996 (IT-96-21) ; Appeals Chamber, The Prosecutor v. Duško Tadić, Registrar's Decision on Withdrawal of Co-Counsel, 2 September 1997 (IT-94-1) ; Trial Chamber, The Prosecutor v. Duško Knežević, Decision on Accused's Request for Review of Registrar's Decision as to Assignment of Counsel, 6 September 2002 (IT-95-4) ; Appeals Chamber, The Prosecutor v. Miroslav Kvočka et al., Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003 (IT-98-30/1) ; Trial Chamber, The Prosecutor v. Radislav Brđanin, Decision on Defence Motion for Adjournment, 10 March 2003 (IT-99-36) ; Trial Chamber, The Prosecutor v. Radislav Brđanin, Confidential Order Relating to Lead Counsel's Appeal from Registrar's Confidential Decision of 7 March 2003, 1 April 2003 ((IT-99-36) ; Appeals Chamber, The Prosecutor v. Vinko Martinović, Decision by the Registrar re: Assignment of Counsel to Vinko Martinović, 19 May 2003 (IT-98-34) ; Trial Chamber, The Prosecutor v. Vidoje Blagojević & Dragan Jokić, Decision on Independent Counsel for Vidoje Blagojević's Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003 (IT-02-60) ; Appeals Chamber, The Prosecutor v. Vidoje Blagojević, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team, 7 November 2003 (IT-02-60) ; Appeals Chamber, The Prosecutor v. Milan Milutinović et al., Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003 (IT-05-87) ; Appeals Chamber; The Prosecutor v. Zeljko Mejakić et al., Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić, 6 October 2004 (IT-02-65) ; Appeals Chamber, The Prosecutor v. Jadranko Prlić et al., *Decision on Appeal by Bruno Stojic Against Trial Chamber's Decision on Request for Appointment of Counsel*, 24 November 2004 (IT-04-74) ; Trial Chamber, The Prosecutor v. Slobodan Milošević, Decision on Assigned Counsel's Motion for Withdrawal, 7 December 2004 (IT-02-54) ; ICTY President, The Prosecutor v. Slobodan Milošević, Decision Affirming the Registrar's Denial of Assigned Counsel's Application to Withdraw (President), 7 February 2005 (IT-02-54)

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of "The Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President of 24th August 2006 Refusing to Review and Reverse the Decision of the Registrar Dated 27th March 2006 Relating to the Withdrawal of Co-Counsel" filed by Lead Counsel for Jean-Bosco Barayagwiza ("Lead Counsel" and "Appellant", respectively) on 22 September 2006 ("Motion"), requesting the Appeals Chamber to

reverse the Decision of the President of the Tribunal,[1] order the Registrar to withdraw Co-Counsel, Ms. Tanoo Mylvaganam, from the present case, and appoint a new Co-Counsel.[2]

2. The Prosecution responded to the Motion on 22 September 2006.[3] The Appellant replied on 26 September 2006.[4]

I. Procedural Background

3. Trial Chamber I rendered its Judgement in this case on 3 December 2003.[5] The Appellant filed his notice of appeal on 22 April 2004,[6] which was amended on 27 April 2004.[7] His Appellant's brief was filed on 25 June 2004.[8] Pursuant to the Decisions of 17 May 2005[9] and 6 September 2005,[10] the Appellant filed a revised Notice of Appeal and a revised Appellant's Brief on 12 October 2005 ("Notice of Appeal" and "Appellant's Brief", respectively). The filings of written briefs on appeal with respect to the Appellant's appeal were completed on 12 December 2005.[11]

4. The Appeals Chamber recalls that, following a request for withdrawal of counsel,[12] the appellate proceedings in relation to the Appellant were stayed from 19 May 2004[13] through 26 January 2005,[14] pending the assignment of a new counsel. The current Lead Counsel was assigned to the Appellant by the Registrar on 30 November 2004, and on 19 January 2005, the Appeals Chamber dismissed the Appellant's challenge to this assignment.[15] The Appellant's request for reconsideration of the Decision of 19 January 2005 was dismissed by the Appeals Chamber on 4 February 2005.[16] On 23 May 2005, following Lead Counsel's request, Ms. Tanoo Mylvaganam was assigned as Co-Counsel.[17]

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[1] Review of the Registrar's Decision Denying Request for Withdrawal of Co-Counsel, 29 August 2006 ("President's Decision").
[2] Motion, para. 1, p. 9 (i), (iii).
[3] The Prosecutor's Response to "The Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President of 24th August 2006 Refusing to Review and Reverse the Decision of the Registrar Dated 27th March 2006 Relating to the Withdrawal of Co-Counsel", 22 September 2006 ("Response").
[4] The Appellant Jean-Bosco Barayagwiza's Reply to The Prosecutor's Response to The Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President of 24th August 2006 Refusing to Review and Reverse the Decision of the Registrar Dated 27th March 2006 Relating to the Withdrawal of Co-Counsel, 26 September 2006 ("Reply").
[5] *The Prosecutor v. Ferdinand Nahimana et al.,* Case N°ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("Trial Judgement").
[6] Notice d'Appel (conformément aux dispositions de l'article 24 du Statut et de l'article 108 du Règlement), 22 April 2004.
[7] Acte d'appel modifié aux fins d'annulation du Jugement rendu le 03 décembre 2003 par la Chambre I dans l'affaire « Le Procureur contre Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze, ICTR-99-52-T », 27 April 2004.
[8] Mémoire d'Appel, 25 June 2004.
[9] Decision on "Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", 17 May 2005 ("Decision of 17 May 2005").
[10] Decision on Clarification of Time Limits and on Appellant Barayagwiza's Extremely Urgent Motion for Extension of Time to File his Notice of Appeal and his Appellant's Brief, 6 September 2005.
[11] The Appellant Jean-Bosco Barayagwiza's Reply to the Consolidated Respondent's Brief, 12 December 2005 ("Reply Brief").
[12] The Very Urgent Motion to Appeal Refusal of Request for Legal Assistance, 8 April 2004.
[13] Decision on Jean-Bosco Barayagwiza's Motion Appealing Refusal of Request for Legal Assistance, 19 May 2004.
[14] Order Lifting the Stay of Proceedings in Relation to Jean-Bosco Barayagwiza, 26 January 2005. In particular, the Appellant was initially ordered to file "any amended or new Notice of Appeal no later than 21 February 2005 (i.e., thirty days from the Decision of 19 January 2005)" and "any amended or new Appellant's Brief no later than 9 May 2005 (i.e., seventy-five days after the time limit for filing the Notice of Appeal)."
[15] Decision on Jean-Bosco Barayagwiza's Motion Concerning the Registrar's Decision to Appoint Counsel, 19 January 2005 ("*Barayagwiza* Decision").
[16] Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005.
[17] Letter from the Registrar to Ms. Mylvaganam, Dated 23 May 2005. Ref: ICTR/JUD-11-5-2-1593.

5. On 17 February 2006, the Appellant's Lead Counsel requested the Registrar to terminate the assignment of Ms. Mylvaganam.[18] Following a request from the Registrar,[19] Ms. Mylvaganam communicated her position on the matter confirming the existence of a difference in legal reasoning and strategy and thus not opposing her withdrawal.[20] On 27 March 2006, the Registrar dismissed the Request for Withdrawal on the grounds that Lead Counsel had neither demonstrated the existence of exceptional circumstances nor submitted any specific allegations, referring simply to differences in views that resulted in the breach of trust between the Appellant and his Co-Counsel.[21]

6. On 4 May 2006, the Appellant requested the President to review the Registrar's decision.[22] On 17 May 2006, the Registrar filed related submissions pursuant to Rule 33 (B) of the Tribunal's Rules of Procedure and Evidence ("Rules").[23] On 29 August 2006, the President dismissed the Motion for Review on the ground that the Appellant had not shown that the exercise of discretion by the Registrar was unfair or unreasonable.[24]

II. Discussion

A. Submissions of the Parties

7. The Appellant requests the Appeals Chamber to reverse both the Registrar's Decision and the President's Decision, and to order the Registrar to remove the current Co-Counsel from the case and to appoint a new co-counsel in accordance with the wishes of the Appellant and the agreement of Lead Counsel and Co-Counsel.[25] First, he alleges irreconcilable differences in approach in legal strategy between himself and his Co-Counsel, and contends that the Registrar's order to his Counsel to ensure resolution of the conflict is "unrealistic" and "impossible".[26] Second, to counter the Registrar's argument relating to the paucity of information concerning the breakdown of trust with Co-Counsel, the Appellant argues that he should not be expected to provide more details in this respect because (a) this is privileged information and (b) the proof of this breakdown "can be presumed from the joint expert view of both lead and co-counsel."[27] He submits that the breakdown of trust is both a subjective and an objective matter to assess, and that the consensus on this matter within the Defence team should exclude all "speculation" from the Registrar and the President.[28] Third, the Appellant contends that it is contrary to both common sense and Article 19 of the Directive on the Assignment of Defence

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[18] *Confidential* Letter from Mr. Peter Herbert to the Registry, "Re: Termination of mandate of Co-Counsel Ms Mylvaganam re Appeal of Jean Bosco Barayagwiza (ICTR-99-52-A)", 16 February 2006 ("Request for Withdrawal").
[19] Urgent and Confidential Facsimile Transmission from Aminata L.R. N'gum, Deputy Chief and OIC, 17 February 2006.
[20] *Confidential* Letter from Ms. Tanoo Mylvaganam to the Registrar "Re: Termination of my Mandate as Requested by Lead-Counsel re Appeal of Jean Bosco Barayagwiza (ICTR-99-52-A)", 22 February 2006.
[21] Decision of the Registrar Denying the Request of the Lead Counsel Mr. Peter Herbert to Terminate the Assignment of Co-Counsel Ms. Tanoo Mylvaganam Representing the Appellant Mr. Jean-Bosco Barayagwiza, 27 March 2006 ("Registrar's Decision"), p. 2.
[22] The Appellant Jean-Bosco Barayagwiza's Urgent Motion for the President of the ICTR to Review the Decision of the Registrar Relating to the Continuing Involvement of Co-Counsel, filed confidentially on 4 May 2006 ("Motion for Review").
[23] [Confidential] Registrar's Submission under Rule 33 (B) in Respect of the Appellant Jean-Bosco Barayagwiza's Urgent Motion for the President of the ICTR to Review the Decision of the Registrar Relating to the Continuing Involvement of Co-Counsel, 17 May 2005 ("Registrar's Submissions"). The Registrar submitted *inter alia* that « a difference of opinion that leads to a breakdown of trust and confidence between the Appellant and Co-Counsel at the late stage of Appellate proceedings that has been reached in this case d[id] not constitute exceptional circumstances" (para. 6) and thus did not justify the withdrawal of the Co-Counsel. The Registrar also referred to such factors as quality and importance of the Co-Counsel's work, costs implied by the nomination of a new Co-Counsel, the Registrar's discretionary powers, etc. (paras 5, 7, 9-12).
[24] President's Decision, para. 9.
[25] Motion, paras 1-2, 14, p. 9.
[26] *Ibid*., paras 4, 8. At paragraph 17, the Appellant submits that even if there was some doubt concerning an eventual reconciliation at the time of the Registrar's Decision, the passage of time clearly demonstrates that such reconciliation is not possible anymore.
[27] *Ibid*., para. 5.
[28] *Ibid*., para. 14.

Counsel[29] to maintain Ms. Mylvaganam as Co-Counsel in his case because she is not receiving his instructions, does not carry his trust and confidence, and has not been allowed to play any part in the conduct of the defence since January 2006.[30] Fourth, he asserts that any reliance on budgetary constraints should be dismissed,

> "as being contrary to the principle of ensuring a fair appeal and providing for adequate representation of the Appellant."[31]

Fifth, the Appellant argues that the President's reference to the risk of delaying the proceedings is flawed, maintaining that the withdrawal will have no impact if a new Co-Counsel is appointed without further delay.[32] Finally, the Appellant maintains that the President's Decision and the Registrar's Decision are contrary to the jurisprudence of both this Tribunal and that of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), including previous decisions of the Registrar allowing the withdrawal of counsel in cases of a breakdown of trust.[33]

8. In its Response, the Prosecution submits "that no change in the Appellant's legal representation for the appeal should be permitted to be used as a reason to cause any delay to the scheduling of the oral hearing in this case."[34] In his Reply, the Appellant reiterates that the withdrawal of Co-Counsel will not cause any delay in the appellate proceedings and that "the appointment of a new co-counsel would enable the timetable to be adhered to far more easily."[35]

B. Discussion

9. The Appeals Chamber has inherent power to review decisions of the Tribunal's President concerning withdrawal of counsel where such decisions are closely related to issues involving the fairness of proceedings on appeal and if the procedure provided by Article 19 of the Directive has been followed.[36] However, such review is neither a rehearing, nor an appeal, nor is it in any way similar to the review which a Chamber may undertake of its own judgement in accordance with Rule 119 of the Rules.[37] The Appeals Chamber recalls that judicial review of an administrative decision in relation to legal aid under the Directive is primarily concerned with the regularity of the procedure by which the Registrar and/or the President reached the impugned decision.[38] The decision will be quashed if the Registrar or the President:

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[29] Document prepared by the Registrar and approved by the Tribunal on 9 January 1996 as amended 6 June 1997, 8 June 1998, 1 July 1999, 27 May 2003 and 15 May 2004 ("Directive").
[30] Motion, paras 6, 17-18.
[31] *Ibid*., p. 9 (ii). See also paras 6 and 20, referring to the President's Decision, para. 8.
[32] *Ibid*., para. 22, p. 9 (iv).
[33] *Ibid*., paras 9-16, 19.
[34] Response, para. 2. The Prosecution recognizes that normally, it does not address this matter since it lies in the discretion of the Registry, the President of the Tribunal, and ultimately, the Appeals Chamber (para. 2.).
[35] Reply, para. 1.
[36] Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase, 3 May 2005, paras 4 and 7; Decision on "Appellant Hassan Ngeze's Motion for Leave to Permit his Defence Counsel to Communicate with him during Afternoon Friday, Saturday, Sunday and Public Holidays", 25 April 2005, p. 3; *Prosecutor v. Vidoje Blagojević*, Case N°IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team, 7 November 2003 ("*Blagojević* Appeal Decision"), para. 7. See also, *Prosecutor v. Milan Milutinović et al*., Case N°IT-99-37-AR.73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003 ("*Milutinović et al*. Decision"), para. 19; *Jean-Bosco Barayagwiza v. The Prosecutor*, Case N°ICTR-97-19-AR72, Decision (Request of Withdrawal of Defence Counsel), 2 February 2000, p. 2.
[37] *Prosecutor v. Miroslav Kvočka et al*., Case N°IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003 ("*Kvočka* Decision"), para. 13. See also *The Prosecutor v. Théoneste Bagosora et al*., Case N°ICTR-98-41-T, Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi, 19 January 2005 ("*Bagosora* Decision of 19 January 2005"), para. 37; *Prosecutor v. Slobodan Milošević*, Case N°IT-02-54-T, Decision [of the President] Affirming the Registrar's Denial of Assigned Counsel's Application to Withdraw, 7 February 2005, para. 4; *The Prosecutor v. Vesselin Šljivančanin*, Case N°IT-95-13/1-PT, Decision [of the President] on Assignment of Defence Counsel, 20 August 2003, para. 22 ("*Šljivančanin* Decision").
[38] *Kvočka* Decision, para. 13. See also *Bagosora* Decision of 19 January 2005, para. 37; *Šljivančanin* Decision, para. 22.

(a) failed to comply with the legal requirements of the Directive, or
(b) failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision, or
(c) took into account irrelevant material or failed to take into account relevant material, or
(d) reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the "unreasonableness" test).[39]

The Appeals Chamber also specified that

> "[t]hese issues may in the particular case involve, at least in part, a consideration of the sufficiency of the material before the Registrar [or President], but (in the absence of established unreasonableness) there can be no interference with the margin of appreciation of the facts or merits of that case to which the maker of such an administrative decision is entitled".[40]

Finally, in the review, the party contesting the administrative decision bears the onus of persuasion and must show that (a) an error of the nature described has occurred, and (b) that such error has significantly affected the impugned decision to his detriment.[41]

10. It has been repeatedly emphasized that the right to legal assistance financed by the Tribunal does not confer the right to counsel of one's choosing.[42] When deciding on the assignment of counsel, some weight is accorded to the accused's preference, but such preference may be overridden if it is in the interests of justice to do so.[43] The Appeals Chamber further recalls that an indigent accused does not have a right to a co-counsel, but, where appropriate and at the request of the lead counsel, the Registrar *may* appoint a co-counsel to assist the assigned lead counsel.[44] Accordingly, where co-counsel has been appointed and subsequently withdrawn, there is no guarantee that the co-counsel will be replaced.[45] Finally, the Appellant's personal preferences are irrelevant to assignment or withdrawal of co-counsel.[46]

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[39] *Id*.
[40] *Kvočka* Decision, para. 13.
[41] *Kvočka* Decision, para. 14; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case N°IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević's Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003 ("*Blagojević* Trial Decision"), para. 116.
[42] *Blagojević* Appeal Decision, para. 22 and footnote 54; *Prosecutor v. Željko Mejakić et al.,* Case N°IT-02-65-AR73.1, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić, 6 October 2004, para. 8; *The Prosecutor v. Jean-Paul Akayesu,* Case N°ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement"), para. 61; *Jean Kambanda v. The Prosecutor*, Case N°ICTR 97-23-A, Judgement, 19 October 2000, para. 33. See also *The Prosecutor v. Théoneste Bagosora et al*., Case N°ICTR-98-41-T, Decision on Maitre Paul Skolnik's Application for Reconsideration of the Chamber's Decision to Instruct the Registrar to Assign him as Lead Counsel for Gratien Kabiligi, 24 March 2005 ("*Bagosora* Decision of 24 March 2005"), para. 21; *Bagosora* Decision of 19 January 2005, para. 45; *The Prosecutor v. Tharcisse Muvunyi et al.,* Case N°ICTR-2000-55-I , Decision on the Accused's Request to Instruct the Registrar to Replace Assigned Lead Counsel, *Article 20 (4) (d) of the Statute and Rules 45 and 73 of the Rules of Procedure and Evidence,* 18 November 2003, para. 6.
[43] *Barayagwiza* Decision, p. 3; *Prosecutor v. Jadranko Prlić et al.,* Case N°IT-04-74-AR73.1, Decision on Appeal by Bruno Stojjić Against Trial Chamber Decision on Request for Appointment of Counsel, 24 November 2004, para. 19; *Blagojević* Appeal Decision, para. 22; *Akayesu* Appeal Judgement, para. 62. See also *Bagosora* Decision of 24 March 2005, para. 21; *Blagojević* Trial Decision, paras 86, 117; *Prosecutor v. Duško Knežević*, Case N°IT-95-4-PT, Decision on Accused's Request for Review of Registrar's Decision as to Assignment of Counsel, 6 September 2002, p. 3; *The Prosecutor v. Gérard Ntakirutimana,* Case N°ICTR-96-10-T and ICTR-96-17-T, Decision on the Motions of the Accused for Replacement of Assigned Counsel/Corr., 18 June 1997, p. 5.
[44] Directive, Article 15(C) and (E). See *The Prosecutor v. Augustin Ndindiliyimana et al.,* Case N°ICTR-2000-56-T, Decision on Defence Oral Motion for Adjournment of the Proceedings, 8 October 2004, para. 6 ; *Le Procureur c. Aloys Simba, Affaire n°ICTR-01-76-I, Décision portant report de la date d'ouverture du procès, 18 août 2004*, para. 24 ; *Blagojević* Trial Decision, paras 77, 79, 118; *Prosecutor v. Radislav Brđanin,* Case N°IT-99-36-T, Confidential Order Relating to Lead Counsel's Appeal from Registrar's Confidential Decision of 7 March 2003, 1 April 2003, p. 7.
[45] *Blagojević* Trial Decision, para. 79.
[46] *Cf. Blagojević* Appeal Decision, para. 54.

11. Under Article 19 (A) (ii) of the Directive the Registrar may, in exceptional circumstances and at the request of lead counsel, withdraw the assignment of co-counsel.[47] The burden of proof of existence of such circumstances squarely lies on lead counsel.[48] The Appeals Chamber emphasizes that each case must be considered on its own and that what constitutes exceptional circumstances justifying a request for withdrawal may vary from one case to another. In addition, exceptional circumstances justifying withdrawal of a co-counsel might be substantially different from those applicable to withdrawal of a lead counsel.

12. The Appeals Chamber considers that the alleged conflict between the Appellant and his Co-Counsel on issues of legal strategy does not constitute an exceptional circumstance justifying a withdrawal of Co-Counsel. The Appeals Chamber notes that, in most decisions holding that a breakdown of trust between the accused and his legal representatives constituted an exceptional circumstance justifying the withdrawal of assignment, the breach of trust was attributable to one or more of the following circumstances: alleged incompetence or lack of knowledge of the Rwandan context and history; a lack of initiative in the defence of the accused; an exceptional workload incompatible with other professional commitments; a breach of professional responsibilities, including the obligation to communicate with the client; and misconduct or manifest negligence.[49] No allegations of this kind were made against Co-Counsel in the present case. Therefore, the Appeals Chamber is not convinced that the Registrar's Decision and the President's Decision contradict the Tribunal's jurisprudence.

13. The Appeals Chamber recalls that, according to the jurisprudence of both the Tribunal and the ICTY, an accused's refusal to cooperate with his lawyers does not constitute an exceptional circumstance warranting the Registrar's withdrawal of assigned counsel.[50] More precisely, an accused does not have the right to unilaterally destroy the trust between himself and his counsel, or to claim a breakdown in communication through unilateral actions, in the hope that such actions will result in the withdrawal of his counsel by the Registrar.[51] A lack of trust in counsel based on disagreements in approach to one's defence strategy is distinguishable from a lack of trust due to a breach by counsel in fulfilling his professional and ethical responsibilities in the course of representation.[52] Thus, a divergence of opinion as to the defence strategy cannot in itself justify that there is a loss of trust in the counsel's abilities or commitment to the case. It is even more so when the divergence is between an appellant and a co-counsel, whose mandate is to assist the lead counsel.[53]

14. In the present case, Lead Counsel did not provide the Registrar with any specific complaints regarding the performance of Co-Counsel that may have warranted her disqualification on the grounds of ineffective assistance or breach of professional duties. The Appeals Chamber rejects the Appellant's

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[47] The Appeals Chamber notes that Article 20 (A) of the ICTY Directive on the Assignment of Defence Counsel N°1/94, IT/73/REV.11 does not contain the requirement of "exceptional circumstances" and instead refers to "the interests of justice". This difference should be born in mind when making parallels between the jurisprudence of the two Tribunals.

[48] See *Blagojević* Trial Decision, para. 116.

[49] See *The Prosecutor v. Ndindiliyimana et al.*, Case N°ICTR-00-56-T, Decision by the Registrar of Withdrawal of Mrs. Danielle Girard as Co-Counsel for the Accused François-Xavier Nzuwonemeye, 13 October 2005, p. 3; *Prosecutor v. Athanase Seromba*, Case N°ICTR-2001-66-T, Decision by the Registrar of Withdrawal of Mr. Alfred Pognon, Lead Counsel for Athanase Seromba, 10 May 2005, p. 3; *Blagojević* Trial Decision, para. 119; *The Prosecutor v. Theoneste Bagosora,* Case No. ICTR-96-7-T, Decision on the Request by the Accused for Change of Assigned Counsel, 26 June 1997; *Prosecutor v. Duško Tadić,* Case N°IT-94-1-A, Registrar's Decision on Withdrawal of Co-Counsel, 2 September 1997, p. 1; *The Prosecutor v. Jean-Paul Akayesu,* Case N°ICTR-96-4-T, Decision on the Request of the Accused for the Replacement of Assigned Counsel, 20 November 1996, pp. 2-3.

[50] See *Prosecutor v. Slobodan Milošević*, Case N°IT-02-54-T, Decision Affirming the Registrar's Denial of Assigned Counsel's Application to Withdraw, 7 February 2005 ("*Milošević* Decision of 2005"), para. 9.

[51] *Blagojević* Appeal Decision, para. 51. See also *Bagosora* Decision of 24 March 2005, paras 21, 30; *The Prosecutor v. Slobodan Milošević*, Case N°IT-02-54-T, Decision on Assigned Counsel's Motion for Withdrawal, 7 December 2004 *(*"*Milošević* Decision of 2004"), para. 18; *Blagojević* Trial Decision, para. 100.

[52] *Blagojević* Trial Decision, paras 106, 120.

[53] See *supra,* para. 10.

argument that it is sufficient "to state in broad terms" that the trust and confidence have broken down[54] and, consequently, finds that it was open to the Registrar and the President to conclude that the Appellant's request for withdrawal was not justified.[55]

15. Moreover, the Appeals Chamber is satisfied that the Registrar and the President properly took into account other particular circumstances of the case, such as the potential delay in the proceedings as well as the proper use of the Tribunal's resources.[56] Indeed, in the circumstances where no misconduct or manifest professional negligence on the part of the counsel is established, factors such as the efficient management of resources are directly relevant to the decision not to permit withdrawal of counsel.[57] The Registrar noted that

> "Ms. Mylvaganam submitted claims for 346.43 hours of work [during the months of May, June and July 2005], which were approved and duly paid",[58]

and she

> "has claimed an additional 395.26 hours for the months of August-December 2005. These hours will be paid up to a maximum of 350 hours, making a total of hours paid to Co-Counsel 700 hours."[59]

The Registrar submitted that if Ms. Mylvaganam was withdrawn and a new co-counsel appointed,

> "this would require additional hours over the 700 hours already committed, and […] this may be a precedent that will have substantial implications for the Legal Aid Programme".[60]

The Appeals Chamber notes that Lead Counsel has explained that the remaining work on appeal will amount to at least 150 additional hours.[61]

16. Furthermore, the Appeals Chamber notes that proceedings in this appeal have been delayed for a significant time,[62] notably as a result of changes in the representation of the Appellant.[63] The Appeals Chamber also notes that the request for withdrawal of Co-Counsel came at a late stage of the proceedings, after the Appellant has filed his Reply Brief. At this stage, the introduction of a new co-counsel, unfamiliar with the case, will inevitably result in undue delay,[64] given that this person will require some time to get familiar with the case and its documents.[65] An unnecessary replacement of the current Co-Counsel who is thoroughly familiar with the case and who has already dedicated hundreds of hours to the Appellant's appeal would be detrimental to the Appellant's right to be tried fairly and

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[54] Motion, para. 5.
[55] *Cf. Blagojević* Trial Decision, para. 90 confirmed by *Blagojević* Appeal Decision.
[56] See *Akayesu* Appeal Judgement, para. 60; *Prosecutor v. Vinko Martinović*, Case N°IT-98-34-A, Decision by the Registrar re: Assignment of Counsel to Vinko Martinović, 19 May 2003, p. 2; *Prosecutor v. Sefer Halilović*, Case N°IT-01-48-PT, Decision by the Registrar to Withdraw the Assignment of Mr. Caglar as Counsel to the Accused and to Assign Mr. Hodžić, 18 February 2003, p. 2; *Prosecutor v. Ranko Česić*, Case N°IT-95-10/1-PT, and *Prosecutor v. Milorad Krnojelac*, Case N°IT-97-25-A, Decision by the Registrar, 6 January 2003, p. 2; *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case N°ICTR-97-21-T, Decision on Ntahobali's Motion for Withdrawal of Counsel, 22 June 2001, paras 17-19; *Prosecutor v. Zejnil Delalić et al.*, Case N°IT-96-21-T, Decision on Request by Accused Mucić for Assignment of New Counsel, 24 June 1996, para. 5.
[57] *Blagojević* Appeal Decision, para. 32.
[58] Registrar's Submissions, para. 3 (i).
[59] *Ibid.*, para. 3 (iii).
[60] *Ibid.*, para. 7.
[61] Motion, para. 7; see the President's Decision, para. 8.
[62] Decision on Jean Bosco Barayagwiza's Motion Concerning the Registrar's Decision to Appoint Counsel, 19 January 2005, p. 3.
[63] See *supra,* paras 3-4. As a result of the change of Lead Counsel as well as the appointment of a new Defence team, including the current Co-Counsel, the current versions of the Appellant's Notice of Appeal and Appellant's Brief were filed as late as 12 October 2005, *i.e.* almost two years after the Trial Judgement.
[64] See *Bagosora* Decision, para. 22; *Blagojević* Trial Decision, para. 119.
[65] *Prosecutor v. Radislav Brđanin*, Case N°IT-99-36-T, Decision on Defence Motion for Adjournment, 10 March 2003, p. 2.

expeditiously.[66] The Appeals Chamber thus finds that the Registrar and the President did not err in taking these factors into account.[67]

17. The Appeals Chamber is satisfied that the Appellant suffered no prejudice as a result of the Registrar's and the President's Decisions.[68] The Appellant is a long-time beneficiary of the Tribunal's legal aid system. As noted above, the Appellant appears to have received substantial assistance from the current Co-Counsel throughout the appellate proceedings. The alleged breakdown in trust dates to 16 February 2006,[69] that is, after the filing of the Appellant's Brief and the Reply Brief. The Appeals Chamber reiterates that no allegations of incompetence, negligence or any other breach of professional conduct were made against Co-Counsel and Lead Counsel has been fully satisfied with her performance.[70] In addition, the retention of the Co-Counsel would protect the Appellant's right to be tried fairly and expeditiously.[71] It was thus reasonable for the Registrar and the President to find that there was no basis for Lead Counsel, and *a fortiori* for the Appellant, to be dissatisfied with the quality of legal representation afforded by the Co-Counsel, and that there is no basis for the lack of trust in those abilities.[72] The Appeals Chamber finally notes that Co-Counsel's professional obligations to represent the Appellant remain.[73]

18. In light of the findings above, the Appeals Chamber concludes that there is no reason to quash either the Registrar's Decision or the President's Decision.

III. Disposition

19. For the foregoing reasons, the Appeals Chamber DISMISSES the Motion in its entirety.

Done in English and French, the English text being authoritative.

Dated this 23rd day of November 2006, At The Hague, The Netherlands.

[Signed] : Fausto Pocar

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[66] *Cf. Blagojević* Appeal Decision, para. 50.
[67] Registrar's Submissions, para. 12; President's Decision, paras 6 and 8.
[68] See *Akayesu* Appeal Judgement, para. 64.
[69] Request for Withdrawal.
[70] See Registrar's Decision, p. 2; Request for Withdrawal, p. 2;
[71] See *Blagojević* Appeal Decision, para. 50.
[72] *Cf. Ibid*., para. 17.
[73] *Ibid*., para. 54. See also *Bagosora* Decision, para. 26; *Milošević* Decision of 2005, para. 9; *Milošević* Decision of 2004, para. 17.

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Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecution's Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EB
27 November 2006 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron

Hassan Ngeze – Omar Serushago – Théoneste Bagosora et al. Case – Positive and continuous obligation of disclosure on the Prosecutor, Determining material subject to disclosure falls within the Prosecution's discretion and its initial assessment of such exculpatory material must be done in good faith, No obligation on the Prosecution to search for material which it does not have knowledge of, Conditions to comply with to request the search of evidence, No disclosure by the Prosecutor of confidential information unless it obtains the consent of the person or entity providing such information, Confidential testimony, Witness under Measures of protection, Distinctions to be made between witness statements and internal documents, No indication by the Defence of any failure of the Prosecution to comply with its disclosure obligation – Additional evidence, Good cause for the late filing of the Motion : Witness's testimony made in closed session in another case, Appellant failed to exercise the due diligence required for the evidence to be admissible on appeal, Prima facie requirements for additional evidence met : relevance on the credibility of the witnesses, factual findings with respect to the Appellant's participation to the alleged crimes, Determine by the Appeals Chamber whether the non-admission of the additional evidence would amount to a miscarriage of justice, Motions for additional evidence on appeal must be directed towards the contested specific finding of fact made by the Trial Chamber, Interests of justice to examine proprio motu whether the material can be admitted as rebuttal evidence on appeal, Highly desirable to have the originals – Motion partially granted

International Instruments cited :

Rules of Procedure and Evidence, rules 66, 66 (B), 66 (C), 67, 68, 68 (A), 70, 70 (A), 70 (B), 75 (F) (ii), 98, 107 and 115 ; Statute, art. 24 ; Statute of the ICTY, art. 25

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Jean-Paul Akayesu, Judgement, 1st June 2001 (ICTR-96-4) ; Appeals Chamber, The Prosecutor v. Georges Rutaganda, Judgement, 26 May 2003 (ICTR-96-3) ; ; Appeals Chamber, The Prosecutor v. Eliezer Niyitegeka, Judgement, 9 July 2004 (ICTR-96-14) ;

Trial Chamber, The Prosecutor v. André Ntagerura et al., Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004 (ICTR-99-46) ; Appeals Chamber, The Prosecutor v. Emmanuel Ndindabahizi, Decision on the Admission of Additional Evidence, 14 April 2005 (ICTR-2001-71) ; Appeals Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, 3 May 2005 (ICTR-99-52) ; Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgement, 23 May 2005 (ICTR-98-44A) ; Appeals Chamber, The Prosecutor v. Jean de Dieu Kamuhanda, Judgement, 19 September 2005 (ICTR-99-54A) ; Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza, Decision on Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator, 4 October 2005 (ICTR-99-52) ; Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza et al., Decision on Appellant Hassan Ngeze's Six Motions for Admission of Additional

Evidence on Appeal and /or Further Investigation, 23 February 2006 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. Hassan Ngeze, Decision on Appellant Hassan Ngeze's Motions for Approval of Further Investigations on Specific Information Relating to the Additional Evidence of Potential Witnesses, 20 June 2006 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. Jean Bosco Barayagwiza, Decision on Appellant Jean-Bosco Barayagwiza's Motion Requesting That the Prosecution Disclosure of the Interview of Michel Bagaragaza Be Expunged from the Record, 30 October 2006 (ICTR-99-52)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Zoran Kupreškić et al., Decision on Motions for the Admission of Additional Evidence filed by the Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić, 26 February 2001 (IT-95-16) ; Appeals Chamber, The Prosecutor v. Zoran Kupreškić et al., Decision on the Motions of Drago Josipovic, Zoran Kupreškić and Vlatko Kupreškić to admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken pursuant to Rule 94 (B), 8 May 2001 (IT-95-16) ; Appeals Chamber, The Prosecutor v. Radislav Krstić, Confidential Decision on the Prosecution's Motion to Be Relieved of Obligation to Disclose Sensitive Information Pursuant to Rule 66 (C), 27 March 2003 (IT-98-33 Appeals Chamber, The Prosecutor v. Radislav Krstić, Decision on Application for subpoenas, 1 July 2003 (IT-98-33) ; Trial Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Decision on Vidoje Blagojević's Expedited Motion to Compel the Prosecution to Disclose its Notes from Plea Discussions with the Accused Nikolić & Request for an Expedited Open Session Hearing, 13 June 2003 (IT-02-60) ; Appeals Chamber, The Prosecutor v. Radislav Krstić, Decision on Applications for Admission of Additional Evidence on Appeal, 5 August 2003 (IT-98-33) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Decision on Evidence, 31 October 2003 (ICTR-95-14) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Decision on Prosecution's Application to Seek Guidance from the Appeals Chamber regarding Redaction of the Statement of "Witness Two" for the purposes of Disclosure to Dario Kordić under Rule 68, 4 March 2004 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Miroslav Kvočka et al., Decision on Prosecution's Motion to Adduce Rebuttal material, 12 March 2004 (IT-98-30/1) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, [confidential] Decision on Prosecution's Application to Seek Guidance from the Appeals Chamber regarding Redaction of the Statement of "Witness Two" for the purposes of Disclosure to Paško Ljubičić under Rule 68, 30 March 2004 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Radislav Krstić, Judgement, 19 April 2004 (IT-98-33) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Judgement, 29 July 2004 (IT-95-14) ; ; Appeals Chamber, The Prosecutor v. Jovica Stanišić and Franko Simatović, Decision on Stanišić's Application under Rule 115 to Present Additional Evidence in his Response to the Prosecution's Appeal, *3 December 2004 (*IT-03-69) ; Appeals Chamber, The Prosecutor v. Radoslav Brđanin, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004 (IT-99-36) ; Appeals Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Judgement, 17 December 2004 (IT-95-14/2) ; Appeals Chamber, The Prosecutor v. Stanislav Galić, Decision on the First and Third Rule 115 Defence Motions to Present Additional Evidence Before the Appeals Chamber, 30 June 2005 (IT-98-29) ; Appeals Chamber, The Prosecutor v. Ramush Haradinaj et al., Decision on Lahi Brahimaj's Request to Present Additional Evidence under Rule 115, 3 March 2006 (IT-04-84) ; Appeals Chamber, The Prosecutor v. Mladen Naletilić and Vinko Martinović, Judgement, 3 May 2006 (IT-98-34) ; Appeals Chamber, The Prosecutor v. Miroslav Bralo, Decision on Motions for Access to Ex Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006 (IT-95-17)

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of:

- "Appellant Hassan Ngeze's Motion to Order The Prosecutor to Disclose Material and/or Statement/s of Witness EB Which Might Have Come in his Possession Subsequent to the Presentation of Forensic Expert's Report on Witness EB's Recanted Statement [*sic*]", filed confidentially by Hassan Ngeze ("Appellant") on 19 June 2006 ("Motion of 19 June 2006"), in which the Appellant requests the Appeals Chamber to order the Prosecutor to disclose material connected with the investigations conducted by the Special Counsel to the Prosecutor in relation with the alleged perjury committed by Witness EB;[1]

- "Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness ABC1 as per Prosecutor's Disclosure of Transcript of Defence Witness ABC1's Testimony in *The Prosecutor v. Bagosora et al*. Filed on 22nd June 2006 Pursuant to Rule 75 (F) (ii) and Rule 68 of the Rules of Procedure and Evidence", filed confidentially by the Appellant on 4 July 2006 ("Motion of 4 July 2006"), in which he requests the Appeals Chamber to admit into evidence the testimony of Defense Witness ABC1 given before the Tribunal on 13 June 2006 in *The Prosecutor v. Bagosora et al.,* Case N°ICTR-98-41-T ("*Bagosora et al*. case") and to call [the witness] to testify in the present case;[2]

- "Appellant Hassan Ngeze's in Person Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB as per Prosecutor's Disclosure Filed on 20th June 2006 of the Relevant Pages of the Gacaca Records Book Given Before the Gacaca on [REDACTED]", filed confidentially by the Appellant on 14 July 2006 ("Motion of 14 July 2006"),[3] in which he seeks admission into evidence of the testimony of Witness EB given before the Gacaca on [REDACTED];

- "Appellant Hassan Ngeze's Urgent Motion for Leave to Present *Further* Additional Evidence (Rule 115) of Witness EB", filed confidentially by the Appellant on 28 August 2006 ("Motion of 28 August 2006"), in which he requests the Appeals Chamber to admit into evidence "the additional exculpatory statement of witness EB […] affirming his recanted statement of 5th April 2005";[4]

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[1] See also Prosecutor's Response to "Appellant Hassan Ngeze's Motion to Order The Prosecutor to Disclose Material and/or Statement/s of Witness EB Which Might Have Come in his Possession Subsequent to the Presentation of Forensic Expert's Report on Witness EB's Recanted Statement", 26 June 2006 ("Response to the Motion of 19 June 2006") and Appellant Hassan Ngeze's Reply to the Prosecutor's Response to "Appellant Hassan Ngeze's Motion to Order The Prosecutor to Disclose Material and/or Statements of Witness EB Which Might Have Come in his Possession Subsequent to the Presentation of Forensic Expert's Report on Witness EB's Recanted Statement", 30 June 2006 ("Reply to the Response to the Motion of 19 June 2006").

[2] See also Prosecutor's Response to "Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness ABC1 as per Prosecutor's Disclosure of Transcript of Defence Witness ABC1's Testimony in *The Prosecutor v. Bagosora et al*. Filed on 22nd June 2006 Pursuant to Rule 75 (F) (ii) and Rule 68 of the Rules of Procedure and Evidence", filed confidentially on 13 July 2006 ("Response to the Motion of 4 July 2006") and Reply to the Prosecutor's Response to "the Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness ABC1 as per Prosecutor's Disclosure of Transcript of Defence Witness ABC1's Testimony in *The Prosecutor v. Bagosora et al*. Filed on 22nd June 2006 Pursuant to Rule 75 (F) (ii) and Rule 68 of the Rules of Procedure and Evidence", filed confidentially on 20 July 2006 ("Reply to the Response to the Motion of 4 July 2006"). The Appeals Chamber notes that the Response to the Motion of 4 July 2006 was served on the Appellant's Counsel by hand-delivery on 17 July 2006. Therefore, the Appeals Chamber considers the Reply to the Response to the Motion of 4 July 2006 to be filed timely.

[3] This Motion had initially been filed by the Appellant in person on 3 July 2006 but was returned to him as deficiently filed in light of the Order Concerning Filings by Hassan Ngeze dated 24 May 2004 and Order to the Registrar dated 26 November 2004. On 14 July 2006, the said Motion was forwarded to the Appeals Chamber by the Appellant's Counsel. On 21 September 2006, following the Appeals Chamber's Decision on Hassan Ngeze's Motions Concerning Restrictive Measures of Detention of 20 September 2006, the Appellant's Counsel requested the Registrar (with copy to the Presiding Judge in the present case) to "treat all filings of Hassan Ngeze's Motion in person and forwarded by [Counsel] as having been withdrawn". On 25 September 2006, the Registrar requested the Appellant's Counsel to address to the Registrar and the Appeals Chamber a precise list of motions that he wishes to withdraw. Up to date, no communication in this regard has been received from the Appellant's Counsel. In these circumstances and in light of the Practice Direction on Withdrawal of Pleadings, the Appeals Chamber considers the Motion of 14 July 2006 withdrawn. (See *Prosecutor v. Edouard Karemera et al*., Case N°ICTR-98-44-AR72.7, Decision on Prosecution Motion to Withdraw Appeal Regarding the Pleading of Joint Criminal Enterprise in a Count of Complicity in Genocide, 25 August 2006, para. 4, and *Prosecutor v. Aloys Simba,* Case N°ICTR-01-76-A, Notice on Prosecutor's Motion Withdrawing Motion Regarding Confidential Filings, 17 May 2006, p. 2).

[4] See Prosecutor's Response to "Appellant Hassan Ngeze's Urgent Motion for Leave to Present *Further* Additional Evidence (Rule 115) of Witness EB", filed confidentially on 7 September 2006 ("Response to the Motion of 28 August 2006"). The Appellant has not filed a reply to the Response to the Motion of 28 August 2006.

- "Prosecutor's Motion Pursuant to Rule 115 to Admit the Envelopes in Which Copies of the Letter Purporting to Be a Statement From Witness EB Were Received", filed confidentially by the Prosecutor on 7 September 2006 ("Motion of 7 September 2006"), in which the Prosecution seeks admission of the envelopes in which copies of the alleged recantation statement of Witness EB were received by the Office of the Prosecutor as additional evidence.

I. Procedural background

2. Trial Chamber I of the Tribunal ("Trial Chamber") rendered its Judgement in this case on 3 December 2003.[5] The Appellant filed his Notice of Appeal on 9 February 2004,[6] amended on 9 May 2005,[7] and the Appellant's Brief on 2 May 2005.[8] The Prosecution filed its Respondent's Brief on 22 November 2005.[9] The Appellant replied on 15 December 2005.[10]

3. By its Decision of 23 February 2006,[11] the Appeals Chamber admitted as additional evidence on appeal handwritten and typed copies of Witness EB's purported recantation statement dated April 2005 ("Recantation Statement")[12] and the Forensic Report of Mr. Antipas Nyanjwa, an expert in handwriting, who assessed the authenticity of Witness EB's statement,[13] pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), and ordered that Witness EB be heard by the Appeals Chamber, pursuant to Rules 98 and 107 of the Rules.[14]

4. On 14 June 2006, the Appeals Chamber dismissed the Prosecution's request for an order to the Appellant to produce the original handwritten and typed versions of Witness EB's purported Recantation Statement, and ordered Witness EB to appear, as a witness of the Appeals Chamber, at an evidentiary hearing, pursuant to Rule 115 of the Rules.[15] By the same decision, the Appeals Chamber modified the protective measures applicable to Witness EB and prohibited the parties, their agents or any person acting on their behalf from contacting Witness EB, unless expressly authorized by the Appeals Chamber.[16]

5. On 20 June 2006, the Prosecution disclosed extracts from the [REDACTED] Gacaca Record Book, dated [REDACTED], which it asserts to be relevant to Witness EB's testimony.[17] The Appeals Chamber recalls that this material cannot currently be considered as tendered into evidence and will therefore not address its contents at the present stage.[18] On 22 June 2006, pursuant to Rules 75 (F) (ii)

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[5] *The Prosecutor v. Ferdinand Nahimana et al.,* Case N°ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("Trial Judgement").
[6] Defence Notice of Appeal (Pursuant to 108 of the Rules of Procedure and Evidence), 9 February 2004.
[7] *Confidential* Amended Notice of Appeal, 9 May 2005.
[8] *Confidential* Appellant's Brief (Pursuant to Rule 111 of the Rules of Procedure and Evidence), 2 May 2005.
[9] Consolidated Respondent's Brief, 22 November 2005.
[10] Appellant Hassan Ngeze's Reply Brief (Article 113 of the Rules of Procedures and Evidence), 15 December 2005.
[11] *Confidential* Decision on Appellant Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage, 23 February 2006 ("*Ngeze* Decision on Additional Evidence").
[12] *Ngeze* Decision on Additional Evidence, para. 29; *Confidential* Decision on the Prosecutor's Motion for an Order and Directives in Relation to Evidentiary Hearing on Appeal Pursuant to Rule 115, 14 June 2006 ("Decision of 14 June 2006"), p. 3.
[13] Report of the Forensic Document Examiner, Inspector Antipas Nyanjwa, dated 20 June 2005, Annex 4 to the "Prosecutor's Additional Submissions In Response to 'Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB'", filed confidentially on 7 July 2005 ("Forensic Report"). See *Ngeze* Decision on Additional Evidence, para. 41.
[14] *Ngeze* Decision on Additional Evidence, para. 81.
[15] Decision of 14 June 2006, p. 5.
[16] *Ibid.,* p. 6.
[17] [REDACTED].
[18] See *supra,* at footnote 3.

and 68 of the Rules, the Prosecution disclosed the transcript of Witness ABC1's testimony in the *Bagosora et al*. case dated 13 June 2006.[19]

6. On 3 August 2006, the Prosecution informed the Appellant and the Appeals Chamber that it received, on 6 July 2006, a copy of the statement purportedly written by Witness EB dated 15 or 16 December [year illegible] "affirming his earlier recanted statement" ("Additional Statement").[20] The copy of the said document (in Kinyarwanda with a translation into French) was transmitted by the Prosecution to the Appellant on 17 August 2006.[21] The English translation was transmitted to the Appellant on 22 August 2006.[22]

7. On 13 September 2006, the Appellant requested the Prosecution to transmit to him the transcript of Witness WFP10 [DW20] testimony in *The Prosecutor v. Casimir Bizimungu et al*., Case No. ICTR-99-50-T ("*Bizimungu et al*. case") dated 1 through 4 September 2006, partly given in closed session, which, in the Appellant's belief,

> "contains exculpatory evidence and is relevant to the evidentiary hearing of the witness EB before the Appeals Chamber".[23]

On 4 October 2006, the Prosecution responded that it was not in a position to accommodate this request because it is too general.[24] The Prosecution also affirmed that, upon review of both the closed and open session transcripts of Witness WFP10's testimony in the *Bizimungu et al*. case, it "has not found any exculpatory material within the meaning of Rule 68 (A) of the Rules", specifying that the only mention of Witness EB was made in open session and is thus available to the Appellant.[25]

II. Motion of 19 June 1999

8. The Appellant requests the Appeals Chamber to order the Prosecution to disclose material related to investigations into the alleged perjury committed by Witness EB which may have come into its possession after the filing of the Forensic Report.[26] The Appellant submits that such material is necessary for the preparation of his defence and cross-examination of Witness EB during the evidentiary hearing.[27] He suggests that the Appeals Chamber can order the production of additional evidence from either party under Rule 98 of the Rules.[28]

9. The Prosecution responds that the Motion of 19 June 2006 should be dismissed. First, the Prosecution contends that it is well aware of its ongoing obligations under Rule 68 of the Rules and has acted in full compliance with them, notably by making its Disclosures of 20 and 22 June 2006, and

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[19] Disclosure of Transcript of Defence Witness ABC1's Testimony in the *Prosecutor v. Bagosora et al*. Pursuant to Rule 75 (F) (ii) and Rule 68 of the Rules of Procedure and Evidence, filed confidentially on 22 June 2006 ("Disclosure of 22 June 2006").
[20] Request for a Further Extension of the Urgent Restrictive Measures in the Case Prosecutor v. Hassan Ngeze, pursuant to Rule 64 [of the] Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, filed confidentially on 3 August 2006.
[21] Id.
[22] Follow up to Prosecutor's Response to […] Correspondence Dated 15 August 2006 Regarding "Request for Supply of Copy of the Statement of Witness EB Dated 15th December 2005", filed confidentially on 22 August 2006.
[23] Request for the Supply of the Court Testimony of Witness Testifying under the Pseudo Name WFP10 [DW20] in Government 1 Case N°ICTR-99-50-T, Bizimungu et al. Given during 1st September to 4th September 2006, as provided under Rule 68 (A) and (E) of the Rules of Procedure and Evidence, filed confidentially on 13 September 2006.
[24] Response to […] "Request for the Supply of the Court Testimony of Witness Testifying under the Pseudo Name WFP10 [DW20] in Government 1 Case N°ICTR-99-50-T, Bizimungu et al. Given during 1st September to 4th September 2006, as provided under Rule 68 (A) and (E) of the Rules of Procedure and Evidence", 4 October 2006, para. 2.
[25] *Ibid*., para. 4.
[26] Motion of 19 June 2006, paras 1, 3.
[27] *Ibid*., para. 4.
[28] *Ibid*., para. 6.

will continue to do so.[29] Second, it maintains that since the Motion of 19 June 2006 does not refer to any specific document, it amounts to a "fishing expedition".[30] Third, the Prosecution submits that any material uncovered by the Special Counsel during her investigation is privileged and protected by the provisions of Rule 70 (A) of the Rules and thus, will not be disclosed, except if it falls within the scope of Rule 68.[31]

10. The Appellant replies that he is not asking for any material relating to the Special Counsel's report, but for "the material or statement related to the witness EB only",[32] and notes that "it is not clear from the Prosecutor's response as to whether the Prosecutor has got any further statement from the witness EB or not".[33] He assumes that investigators, who were in contact with Witness EB after the filing of the Forensic Report and before the Appeals Chamber's prohibition of contact, might have received further material from Witness EB.[34] Finally, he affirms that, given the circumstances, he is unable to give further description of the materiel required.[35]

11. The Appeals Chamber recalls that the Prosecution has a positive and continuous obligation[36] under Rule 68 of the Rules to,

> "as soon as practicable, disclose to the Defence any material which in [its] actual knowledge […] may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence".

Determining what material is subject to disclosure under Rule 68 falls within the Prosecution's discretion and its initial assessment of such exculpatory material must be done in good faith.[37] However, Rule 68 (A) does not impose an obligation on the Prosecution to search for material which it does not have knowledge of, nor does it entitle the Defence to embark on a "fishing expedition".[38] Indeed, when an accused requests a Chamber to order the production of material, the accused's request

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[29] Response to the Motion of 19 June 2006, para. 3.
[30] *Ibid*., paras 2, 4.
[31] *Ibid*., para. 6.
[32] Reply to the Response to the Motion of 19 June 2006, paras 1-2.
[33] *Ibid*., para. 5.
[34] *Ibid*., para. 3
[35] *Ibid*., para. 6.
[36] Decision on Appellant Jean-Bosco Barayagwiza's Motion Requesting That the Prosecution Disclosure of the Interview of Michel Bagaragaza Be Expunged from the Record, 30 October 2006 ("*Barayagwiza* Decision on Prosecution Disclosure"), para. 6; *The Prosecutor v. Miroslav Bralo*, Case N°IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006 ("*Bralo* 30 August 2006 Decision"), para. 29; *Prosecutor v. Edouard Karemera et al.,* Case N°ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006 ("*Karemera* 30 June 2006 Decision"), para. 9; *Prosecutor v. Théoneste Bagosora et al.,* Case N°ICTR-98-41-AR73 and ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005 ("*Bagosora et al*. 6 October 2005 Decision"), para. 44; *Prosecutor v. Tihomir Blaškić,* Case N°IT-95-14-A, *Confidential* Decision on Prosecution's Application to Seek Guidance from the Appeals Chamber regarding Redaction of the Statement of "Witness Two" for the Purposes of Disclosure to Paško Ljubičić under Rule 68, 30 March 2004 ("*Blaškić* 30 March 2004 Decision"), para. 32; *Prosecutor v. Tihomir Blaškić,* Case N°IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000 ("*Blaškić* 26 September 2000 Decision"), paras 29-32.
[37] Barayagwiza Decision on Prosecution Disclosure, para. 6; *Bralo* 30 August 2006 Decision, para. 30; *Prosecutor v. Juvénal Kajelijeli,* Case N°ICTR-98-44A-A, Judgement, 23 May 2005 ("*Kajelijeli* Appeal Judgement"), para. 262; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case N°IT-95-14/2-A, Appeal Judgement, 17 December 2004 ("*Kordić* Appeal Judgement"), para. 183; *Prosecutor v. Radoslav Brđanin,* Case N°IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004 ("*Brđanin* 7 December 2004 Decision"), p. 3; *Prosecutor v. Tihomir Blaškić,* Case N°IT-95-14-A, Appeal Judgement, 29 July 2004, para. 264; *Prosecutor v. Radislac Krstić*, Case N°IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement"), para. 190; *Blaškić* 4 March 2004 Decision, para. 44; *Blaškić* 30 March 2004 Decision, paras 31-32; *Blaškić* 26 September 2000 Decision, para. 45.
[38] *Bralo* 30 August 2006 Decision, para. 30; *Kajelijeli* Appeal Judgement, paras 262-263; *Blaškić* Appeal Judgement, para. 268; *Prosecutor v. Enver Hadžihasanović et al.,* Case N°IT-01-47-AR73, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002 ("*Hadžihasanović* 23 April 2002 Decision"), p. 3. See also

> "has to be sufficiently specific as to the nature of the evidence sought and its being in the possession of the addressee of the request".[39]

At the same time, such request is not required to be "as specific as to precisely identify which documents should be disclosed".[40] Finally, if an accused wishes to show that the Prosecution is in breach of these obligations, he/she must identify the material sought, present a *prima facie* showing as to its probable exculpatory nature, and prove the Prosecution's custody or control thereof.[41] Even when the Defence satisfies the Chamber that the Prosecution has failed to comply with its Rule 68 obligations, the Chamber will examine whether the Defence has actually been prejudiced by such failure before considering whether a remedy is appropriate.[42]

12. Under Rule 70 (A) of the Rules,

> "reports, *memoranda*, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification"

under Rules 66 and 67. Pursuant to Rule 70 (B), with respect to information provided to the Prosecution on a confidential basis and used "solely for the purpose of generating new evidence", the Prosecution shall not disclose it to the Defence unless it obtains the consent of the person or entity providing such information and, in any event, cannot tender it into evidence without prior disclosure to the Defence.

13. The Appeals Chamber recalls that on 7 July 2005, the Prosecution confidentially filed the "Prosecutor's Additional Submissions in Response to 'Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB'", in which it disclosed certain results of the investigations with respect to Witness EB.[43] These submissions were taken into account by the Appeals Chamber when assessing the *prima facie* credibility of Witness EB's additional evidence.[44] On 7 April 2006, the Prosecution specified that, although it was not in the position to provide a date for conclusion of the investigations, it was taking the necessary measures in order to ensure the communication of the results as soon as possible.[45] The Appeals Chamber notes that the Prosecution continually refers to issues related to Witness EB in its submissions concerning the restrictive measures applicable to the Appellant, notably "in the context of the ongoing investigations, led by the Special Counsel to the Prosecutor".[46] It notes, *inter alia*, that such measures are still necessary,

> "including in light of the recent letter, purportedly written by witness EB, with multiple copies mailed, from both Rwanda and Tanzania, to three Prosecution's Investigators".[47]

Further, on 4 September 2006, the Prosecution claimed that the Additional Statement

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Prosecutor v. Casimir Bizimungu et al., Case N°ICTR-99-50-T, Decision on Bicamumpaka's Motion for Disclosure of Exculpatory Evidence (MDR Files), 17 November 2004, paras 11-14; *Prosecutor v. Casimir Bizimungu et al.,* Case N°ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI (TC), 14 September 2004, paras 8-12.

[39] *Bralo* 30 August 2006 Decision, para. 30; *Blaškić* 26 September 2000 Decision, para. 40; *Blaškić* 29 October 1997 Decision, para. 32.

[40] *Bralo* 30 August 2006 Decision, para. 30; *Blaškić* 26 September 2000 Decision, para. 40.

[41] *Bralo* 30 August 2006 Decision, para. 31; *Kajelijeli* Appeal Judgement, para. 262; *Brđanin* 7 December 2004 Decision, p. 3.

[42] *Bralo* 30 August 2006 Decision, para. 31; *Kajelijeli* Appeal Judgement, para. 262; *Krstić* Appeal Judgement, para. 153; see also *Prosecutor v. Edouard Karemera et al.,* Case N°ICTR-98-44-T, Oral Decision on Stay of Proceedings, 16 February 2006, pp 4 and 8-9.

[43] [REDACTED].

[44] *Ngeze* Decision on Additional Evidence, para. 20.

[45] Status Conference, T. 7 April 2006, pp 19-20.

[46] [REDACTED].

[47] [REDACTED].

"can only be construed as further evidence that the restrictive measures are appropriate and should even be strengthened, particularly in light of the upcoming Rule 115 evidentiary hearing".[48]

In a *Memorandum* dated 11 September 2006, the Prosecution reasserted that there was a continuing campaign, involving the Appellant, to interfere with Witness EB.[49]

14. With respect to the Special Counsel's investigations, the Appeals Chamber has already stated that (i) the material produced in the course of these investigations is likely to fall under the scope of Rule 70 (A) of the Rules, and (ii) no existing orders or decisions obliged the Prosecution to communicate to the Appellant a report that could be prepared by the Special Counsel following her investigations.[50] At the same time, the Appeals Chamber specifically recalls its jurisprudence on distinctions to be made between witness statements and internal documents falling under Rule 70 (A).[51] In any event, neither Rule 70 nor the Decision on Special Counsel should in any way be interpreted as lessening the scope of the Prosecution's Rule 68 obligations described above.[52]

15. The Appeals Chamber takes note of the Prosecution's statement that it is "is well aware of its ongoing disclosure obligations, particularly through Rule 68" and "will continue […] to honour its disclosure obligations."[53] It also notes that, according to the Prosecution, the Disclosures of 20 and 22 June 2006 were not made in response to the Motion of 19 June 2006, but rather as part of its obligations to disclose exculpatory or other relevant material.[54] Finally, the Prosecution has specified that it did not provide copies of the Additional Statement to the Appellant prior to his request of 15 August 2006, since the document was at the same time addressed to the Appellant and his Counsel.[55] In these circumstances, although the Appeals Chamber accepts the Appellant's argument that in the present circumstances he cannot identify with more precision the nature of the material to which he seeks access, it finds that the Appellant has provided no indication of any failure of the Prosecution to comply with its disclosure obligation. Therefore, for lack of evidence to the contrary, the Appeals

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[48] [REDACTED].

[49] [REDACTED]. In its last Memorandum dated 16 November 2006, the Prosecution makes a request for strengthening the restrictive measures in light of the upcoming appeals hearing "in order to safeguard, as much as possible, the integrity and fair outcome of the whole proceedings, as well as the rights to privacy and security of protected witnesses, including Witness EB" [REDACTED].

[50] Décision relative à la Requête de l'Appelant Hassan Ngeze concernant la communication du rapport de l'Avocat général chargé de l'enquête sur les allégations d'entrave au cours de la justice, 23 fêvrier 2006 ("Decision on Special Counsel's Report"), paras 15-16 and 19.

[51] *Eliézer Niyitegeka v. Prosecutor*, Case N°ICTR-96-14-A, Judgement, 9 July 2004 ("*Niyitegeka* Appeals Judgement"), paras 30-36. The Appeals Chamber specified the following:

"34. Questions that were put to a witness – thus being part of the witness statement – have to be distinguished from "internal documents prepared by a party", which are not subject to disclosure under Rule 70 (A) of the Rules, as an exception to the general disclosure obligation pursuant to Rule 66 (A) (ii) of the Rules. A question once put to a witness is not an internal note any more; it does not fall within the ambit and thereby under the protection of Rule 70 (A) of the Rules. If, however, counsel or another staff member of the Prosecution notes down a question prior to the interrogation, without putting this question to the witness, such a question is not subject to disclosure. Similarly, any note made by counsel or another staff member of the Prosecution in relation to the questioning of the witness is not subject to disclosure, unless it has been put to the witness.

35. […] The Prosecution is obliged to make the witness statement available to the Defence in the form in which it has been recorded. However, something which is not in the possession of or accessible to the Prosecution cannot be subject to disclosure: *nemo tenetur ad impossibile* (no one is bound to an impossibility)." [footnotes omitted].

See also *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case N°IT-02-60-T, Decision on Vidoje Blagojević's Expedited Motion to Compel the Prosecution to Disclose its Notes from Plea Discussions with the Accused Nikolić and Request for an Expedited Open Session Hearing, 13 June 2003, p. 6: "Rule 70 (A) aims to protect work product from disclosure, as it is in the public interest that information related to the internal preparation of a case, including legal theories, strategies and investigations, shall be privileged and not subject to disclosure to the opposing party".

[52] See *supra,* at para. 0. See also *Niyitegeka* Appeals Judgement, para. 30 and footnote 2.

[53] Response to the Motion of 19 June 2006, para. 3.

[54] Disclosure of 20 June 2006, para. 4 (the Appeals Chamber notes that the Prosecution did not specify whether this disclosure was made under Rule 68 of the Rules); Disclosure of 22 June 2006. para. 2 (it is mentioned in para. 1 that the disclosure is made pursuant to Rules 68 and 75 (F) (ii)).

[55] Motion of 7 September 2006, para. 13.

Chamber considers that the Prosecution is acting in good faith.[56] In light of the above, there is no need for the Appeals Chamber to order the Prosecution to comply with its Rule 68 obligations, since

> "[o]nly where the Defence can satisfy a Chamber that the Prosecution has failed to discharge its obligations should an order of the type sought […] to be contemplated".[57]

16. In addition, while the parties do not refer to Rule 66 (B) of the Rules, the Appeals Chamber notes that the Appellant's request appears to fall under this provision since he is seeking access to documents that would be material to the preparation of his defence with respect to the cross-examination of Witness EB at the evidentiary hearing or might be intended for use by the Prosecution as evidence on that occasion. It has already been clarified that Rule 66 (B) applies to appellate proceedings and that, consequently, the Prosecution, on request of the Defence, "has to permit the inspection of any material which is capable of being admitted on appeal or which may lead to the discovery of material which is capable of being admitted on appeal".[58] In this respect, the Appeals Chamber recalls that "purely inculpatory material is not necessarily immaterial for the preparation of the Defence" and that the Prosecution should instead consider "(a) whether the issues to which the material relates are subject of a ground of appeal" or

> "(b) whether the material could reasonably lead to further investigation by the Defence and the discovery of additional evidence admissible under Rule 115 of the Rules".[59]

Therefore, the Appeals Chamber *proprio motu* directs the Prosecution to apply the above-mentioned criteria in order to determine whether it is in possession of any documents that are material to the preparation of the Defence, with the exception of Rule 70 material as discussed above, and then return, if necessary, to the Appeals Chamber for permission to withhold any information provided by these sources under Rule 66 (C) of the Rules.

17. Finally, the Appeals Chamber reiterates that, in compliance with its Decision of 14 June 2006, not only the parties, but also their agents or any other persons on their behalf, are prohibited from contacting or interfering with Witness EB.

III. Additional evidence

A. Applicable Law

18. The Appeals Chamber recalls that according to the jurisprudence of the Tribunal and that of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), an appeal pursuant to Article 24 of the Statute of the Tribunal (Article 25 of the Statute of the ICTY) is not a trial *de novo* and is not an opportunity to remedy any "failures or oversights" by a party during the pre-trial and trial phases.[60]

19. Rule 115 of the Rules provides for a corrective measure on appeal, and its purpose is to deal

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[56] *Barayagwiza* Decision on Prosecution Disclosure, para. 6; *Bralo* 30 August 2006 Decision, para. 34; *Brđanin* 7 December 2004 Decision, p. 3; *Blaškić* 26 September 2000 Decision, para. 45.
[57] *Bralo* 30 August 2006 Decision, para. 31; *Blaškić* 26 September 2000 Decision, para. 45.
[58] *Prosecutor v. Radislav Krstić,* Case N°IT-98-33-A, *Confidential* Decision on the Prosecution's Motion to Be Relieved of Obligation to Disclose Sensitive Information Pursuant to Rule 66 (C), 27 March 2003, p. 4.
[59] Id.
[60] *Prosecutor v. Jean-Paul Akayesu,* Case N°ICTR-96-4-A, Judgement, 1 June 2001, para. 177; Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, Case N°ICTR-99-52-A, 3 May 2005 ("Decision on Investigation"), p. 3; Decision on Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator, Case N°ICTR-99-52-A, 4 October 2005 ("Barayagwiza Decision of 4 October 2005"), p. 3; *Ngeze* Decision on Additional Evidence, para. 5; Decision on Appellant Hassan Ngeze's Motion for Approval of Further Investigations on Specific Information Relating to the Additional Evidence of Potential Witnesses, Case N°ICTR-99-52-A, 20 June 2006 ("*Ngeze* Decision on Further Investigations"), para. 4.

> "with the situation where a party is in possession of material that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial".[61]

According to this provision, for additional evidence to be admissible on appeal, the following requirements must be met. First, the motion to present additional evidence should be filed

> "not later than thirty days from the date for filing of the brief in reply, unless good cause or, after the appeal hearing, cogent reasons are shown for further delay".[62]

Second, the Appeals Chamber must find "that the additional evidence was not available at trial and is relevant and credible." When determining the availability at trial, the Appeals Chamber is mindful of the following principles:

> [T]he party in question must show that it sought to make "appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence […] before the Trial Chamber." In this connection, Counsel is expected to apprise the Trial Chamber of all the difficulties he or she encounters in obtaining the evidence in question, including any problems of intimidation, and his or her inability to locate certain witnesses. The obligation to apprise the Trial Chamber constitutes not only a first step in exercising due diligence but also a means of self-protection in that non-cooperation of the prospective witness is recorded contemporaneously.[63]

With regards to relevance, the Appeals Chamber will consider whether the proposed evidence sought to be admitted relates to a material issue. As to credibility, the Appeals Chamber will only refuse to admit evidence at this stage if "it is devoid of *any* probative value in relation to a decision pursuant to Rule 115"[64], without prejudice to a determination of the weight to be afforded.[65]

20. Once it has been determined that the additional evidence meets these conditions, the Appeals Chamber will determine whether the evidence "could have been a decisive factor in reaching the decision at trial."[66] To satisfy this, the evidence must be such that it *could* have had an impact on the verdict, *i.e.* it *could* have shown that a conviction was unsafe.[67] Accordingly, the additional evidence must be directed at a specific finding of fact related to a conviction or to the sentence.

21. Although Rule 115 of the Rules does not explicitly provide for this, the Appeals Chamber has considered that, where the evidence is relevant and credible, but was available at trial, or could have

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[61] *Prosecutor v. Zoran Kupreškić et al.*, Case N°IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94 (B), 8 May 2001 ("*Kupreškić et al.* Decision of 8 May 2001"), para. 5; Barayagwiza Decision of 4 October 2005, p. 4; *Ngeze* Decision on Additional Evidence, para. 6.

[62] Rule 115 (A) of the Rules as amended on 10 November 2006.

[63] *Prosecutor v. André Ntagerura, et al.*, ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004 ("*Ntagerura et al.* Decision of 10 December 2004"), para. 9. [internal references omitted].

[64] *Prosecutor v. Stanislav Galić*, Case N°IT-98-29-A, Decision on the First and Third Rule 115 Motions to Present Additional Evidence Before the Appeals Chamber, 30 June 2005 ("*Galić* 30 June 2005 Decision"), para. 95; *Emmanuel Ndindabahizi v. The Prosecutor*, Case N°ICTR-01-71-A, Decision on the Admission of Additional Evidence, 14 April 2005, p. 6; See also *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case N°IT-98-34-A, Judgement, 3 May 2006, para. 402; *The Prosecutor v. André Ntagerura et al.,* Case N°ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 22; *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor,* Case N°ICTR-96-3-A, Judgement, 23 May 2003, para. 266.

[65] *Prosecutor v. Zoran Kupreškić et al.*, Case N°IT-95-16-A, Decision on Motions for the Admission of Additional Evidence filed by the Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić, 26 February 2001, para. 28; *Kupreškić* Appeal Judgement, para. 63; *Prosecutor v. Blaškić*, Case N°IT-95-14-A, Decision on Evidence, 31 October 2003 ("*Blaškić* Decision of 31 October 2003"), p. 3; *Ngeze* Decision on Additional Evidence, para. 7; *Ngeze* Decision on Further Investigations, para. 5.

[66] Rule 115 (B) of the Rules.

[67] *Kupreškić* Appeal Judgement, para. 68; *Prosecutor v. Radislav Krstić*, Case N°IT-98-33-A, Decision on Application for Admission of Additional Evidence on Appeal, 5 August 2003 ("*Krstić* Decision of 5 August 2003"), p. 3; *Blaškić* Decision of 31 October 2003, p. 3; *Ngeze* Decision on Additional Evidence, para. 8; *Ngeze* Decision on Further Investigations, para. 6.

been discovered through the exercise of due diligence, the additional evidence may still be admitted if the moving party establishes that the exclusion of the additional evidence *would* amount to a miscarriage of justice inasmuch as, had it been adduced at trial, it *would* have had an impact on the verdict.[68]

22. Finally, the Appeals Chamber recalls that, whether the evidence was available at trial or not, the additional evidence must always be assessed in the context of the evidence presented at trial, and not in isolation.[69]

B. MOTION OF 4 JULY 2006

Submissions of the Parties

23. In his Motion of 4 July 2006, the Appellant seeks the admission of evidence from Witness ABC1 which, he contends, shows that (i) testimony provided by other Prosecution Witnesses was false;[70] and (ii) the Appellant was not a party to the killings which occurred on 7 April 1994 in Gisenyi.[71] The proffered evidence consists of transcripts of Witness ABC1's testimony on 13 June 2006 in the *Bagosora et al*. case, including testimony given in closed session.[72] The Appellant also prays the Appeals Chamber to call the witness to testify in the present case.[73]

24. The Appellant submits that this evidence became available to him only after the Disclosure of 22 June 2006,[74] despite the exercise of due diligence.[75] He submits that it is relevant to the issue relating to his innocence,[76] since it does not implicate him in the killings of 7 April 1994 in Gisenyi, which is in "complete contradiction" with Witness EB's testimony of 15-17 May 2001.[77] In consequence, according to the Appellant, if accepted, this new evidence will "belie the prosecution's story narrated by PWs [*sic*] AGX, Serushago, and AHI" and overturn the Trial Chamber's factual findings at paragraphs 812, 836 and 837 of the Trial Judgement,[78] thus affecting the verdict.[79] Stressing that the finding of credibility of Witness EB was "based upon false evidence", the Appellant avers that the non-admission of Witness ABC1's testimony will result in a miscarriage of justice.[80]

25. The Prosecution opposes the Motion of 4 July 2006 and submits that it does not meet the threshold criteria for admission of additional evidence pursuant to Rule 115 of the Rules.[81] First, the Prosecution argues that the Appellant has not shown that the material was unavailable at trial. It contends that Witness ABC1 and the Appellant knew each other and the Appellant thus could have

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[68] *Kajelijeli v. Prosecutor*, Case N°ICTR-98-44A-A, Decision on Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 28 October 2004 ("*Kajelijeli* Decision of 28 October 2004"), para. 11; *Ntagerura et al*. Decision of 10 December 2004, para 11; *Ngeze* Decision on Additional Evidence, para. 9; *Ngeze* Decision on Further Investigations, para. 7.
[69] *Juvénal Kajelijeli* Decision of 28 October 2004, para. 12; *Ntagerura et al*. Decision of 10 December 2004, para. 12; *Ngeze* Decision on Additional Evidence, para. 10; *Ngeze* Decision on Further Investigations, para. See also *Blaškić* Decision of 31 October 2003, p. 3; *Momir Nikolić v. Prosecutor*, Case N°IT-02-60/1-A, Decision on Motion to Admit Additional Evidence, 9 December 2004, para. 25.
[70] Motion of 4 July 2006, para. 5a.
[71] *Ibid*., paras 2, 4. [REDACTED]
[72] Motion of 4 July 2006, preliminary para. a.
[73] *Ibid*., preambulary para. c.
[74] *Ibid*., paras 1, 3.
[75] *Ibid*., para. 10.
[76] *Ibid*., paras 10-11.
[77] *Ibid*., paras 2, 4, footnote 1, with reference to the *Bagosora et al. case*, T. 13 June 2006, pp 9-14, 16.
[78] *Ibid*., para. 5.
[79] *Ibid*., para. 10.
[80] *Ibid*., para. 6.
[81] Response to the Motion of 4 July 2006, paras 2-3.

sought to contact [this person] as a potentially useful witness in support of his alibi defence.[82] Second, the Prosecution maintains that the evidence is not relevant to a material issue, since Witness ABC1 only testified [as to not having seen] the Appellant at [Barnabé Samvura's] house on the morning of 7 April 1994, and not about the Appellant's activities outside that house on that day, in and around Gisenyi.[83] The Prosecution adds that "whether or not a meeting actually took place is not materially relevant to the facts underpinning the Appellant's conviction",[84] the material issue, as presented by Witness EB, being the fact that the Appellant spoke through a loudspeaker, in the street, inciting *Interahamwe* to kill Tutsis.[85] Third, the Prosecution contests the credibility of Witness ABC1 and submits that there is evidence in the *Bagosora et al*. case that contradicts [the] testimony [provided by this witness].[86] Finally, the Prosecution submits that, in any event, the Appellant does not demonstrate that the evidence would or even could have affected the verdict at trial.[87] It points out that the Appellant does not explain why the Trial Chamber would have preferred Witness ABC1's evidence to that of Witness EB[88] or to that of other witnesses concerning his participation in the genocide.[89]

26. In his Reply to the Response to the Motion of 4 July 2006, the Appellant underlines that the Prosecution's contention that the proffered evidence is irrelevant contradicts the fact that it was disclosed to him under Rule 68 as exculpatory and relevant.[90] He maintains that there is no reason to doubt Witness ABC1's credibility, who is an eyewitness and the "most natural witness to describe the true facts which occurred on 7th April, 1994, at [Samvura's] house".[91] He adds that any reference to the evidence of Witness EB is not appropriate at this stage in light of the upcoming evidentiary hearing.[92] Finally, the Appellant concludes that even if another eyewitness' (Witness EB) testimony gave a different version of the incidents of 7 April 1994, Witness ABC1's evidence "is relevant as in that situation according to the principle of evidence neither of the version[s] could be accepted as true".[93]

Discussion

27. As a preliminary matter, the Appeals Chamber considers that there is good cause for the late filing of the Motion of 4 July 2006. Witness ABC1's testimony in the *Bagosora et al*. case, dated 13 June 2006, was made, in the relevant parts, in closed session. The Prosecution disclosed the corresponding transcript on 22 June 2006 and the Motion of 4 July 2006 was filed soon thereafter. The Appeals Chamber therefore recognizes the Motion of 4 July 2006 as timely.

28. However, with respect to the availability of the proffered evidence at trial, the Appeals Chamber agrees with the Prosecution that the Appellant failed to exercise the due diligence required for the evidence to be admissible on appeal. The Appeals Chamber recalls that

> "the mere fact that [a witness] gave evidence in another case and that the Appellant was not aware that [the witness was] in possession of this information until then does not in itself suffice to demonstrate unavailability of the evidence at trial."[94]

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[82] *Ibid*., paras 4-6.
[83] *Ibid*., paras 7-8. According to the Prosecution, the Appellant's interpretation of the scope of Witness ABC1's testimony is grossly exaggerated and can only stand for the proposition that she did not see the Appellant at [Samvura's] house that morning, a fact that has no relevance to the Appellant's conviction.
[84] Response to the Motion of 4 July 2006, para. 9.
[85] *Ibid*., para. 10.
[86] *Ibid*., paras 8 and 11. [REDACTED]
[87] Response to the Motion of 4 July 2006, para. 12.
[88] *Ibid*., para. 13.
[89] *Ibid*., paras 14-15.
[90] Reply to the Response to the Motion of 4 July 2006, paras 1 and 3.
[91] *Ibid*., paras 4-5.
[92] Reply to the Response to the Motion of 4 July 2006, para. 6.
[93] *Ibid*., para. 7.
[94] *Galić* 30 June 2005 Decision, para. 115; *Krstić* Decision of 5 August 2003, p. 3; *Prosecutor v. Radislav Krstić*, Case N°IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, paras 4-5: "The defence often seeks to satisfy this requirement

The Appellant must demonstrate that the "proffered evidence was not available to him at trial in any form" and that he had made use of all mechanisms of protection and compulsion available under the Statute and the Rules to bring the evidence before the Trial Chamber.[95] In the present case, the Appellant has not shown why he could not call [Witness ABC1] [REDACTED] as a Defence witness at trial in order to refute the evidence provided by Witness EB stating that, on the morning of 7 April 1994, he saw the Appellant go into the compound of Samvura's house together with many *Interahamwe*. Therefore, the Appeals Chamber is not satisfied that this evidence was unavailable at trial.

29. As to the relevance and credibility of the proffered evidence, the Appeals Chamber is satisfied that the *prima facie* requirements have been met. The testimony of Witness ABC1 in the *Bagosora et al*. case is, on its face, in contradiction with the testimony on the same events given by some of the Prosecution witnesses in the present case, and that of Witness EB in particular. The evidence in question thus appears to have some relevance to the Trial Chamber's findings on the credibility of these witnesses as well as to its factual findings with respect to the Appellant's participation in the killings that took place in Gisenyi on the morning of 7 April 1994.[96] Without prejudice to the Trial Chamber's findings in the *Bagosora et al*. case as to the credibility of Witness ABC1 and considering the fact that the testimony was given under solemn oath, the Appeals Chamber is satisfied that the proffered evidence is *prima facie* reasonably capable of belief or reliance.[97]

30. Having found that the evidence of Witness ABC1 was available at trial and could have been discovered at trial through the exercise of due diligence, the Appeals Chamber must determine whether the non-admission of the additional evidence would amount to a miscarriage of justice.

31. The Appellant claims that Witness ABC1's testimony in the *Bagosora et al*. case would have affected the Trial Chamber's findings as to the credibility of Prosecution Witnesses AHI, EB, AGX and Omar Serushago,[98] hence calling into question the findings of fact made by the Trial Chamber concerning the events in Gisenyi on the basis of the evidence given by those witnesses. The Appeals Chamber notes that, in the *Bagosora et al*. case, Witness ABC1 expressly affirmed that, on the morning of 7 April 1994, there was no meeting held at Samvura's place and that the Appellant was not present in [that] house.[99]

32. The relevant factual findings of the Trial Chamber in the present case appear to be made on the basis of evidence provided by Witness Serushago that the Appellant was transporting weapons on the morning of 7 April 1994[100] corroborated by the evidence of Witness EB that he saw the Appellant "on the morning of 7 April in a red taxi with a loudspeaker".[101] The Trial Chamber also took into account that Witness AHI saw the Appellant early in the morning that day "in military gear, carrying a gun" and that Witness AGX saw him at around 2:30 p.m.

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by asserting that an attempt had been made before or during the trial to ascertain from such prospective witnesses what evidence they could give, but that the prospective witnesses had either failed or declined to co-operate. However, before additional evidence will be admitted pursuant to Rule 115, the defence is obliged to demonstrate not only that the evidence was not available at trial but also that the evidence could not have been discovered through the exercise of due diligence […]. This obligation of due diligence is therefore directly relevant to the procedures of the Tribunal (in particular, Rule 54) both before and during trial, as well as on appeal." See also para. 19 *supra*.

[95] *Galić* 30 June 2005 Decision, para. 115; *Krstić* Decision of 5 August 2003, p. 3; *Prosecutor v. Radislav Krstić*, Case N°IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, paras 4-5.

[96] Trial Judgement, paras 825 and 836. The Appeals Chamber finds that the proffered evidence is irrelevant to the Trial Chamber's conclusions at paras 831 and 837 of the Trial Judgement.

[97] See *The Prosecutor v. Jean-Paul Akayesu*, Case N°ICTR-96-4-A, Judgement, 1 June 2001, paras 286-287.

[98] Motion of 4 July 2006, para. 5, referring to Trial Judgement, paras 812, 813, 824, 775.

[99] *Bagosora et al. case*, T. 13 June 2006, p. 10, l. 24-32 [closed session – REDACTED].

[100] Trial Judgement, para. 825.

[101] *Ibid*., para. 825.

"passing by on the road in a vehicle with *Interahamwe* and *Impuzamugambi*, armed with different kinds of weapons and speaking through a megaphone, calling on the public to flush out the enemy and enemy accomplices".[102]

Finally, the Trial Chamber noted, on the basis of evidence provided by Witness EB, that

"[w]eapons were distributed from a central location, Samvura's house, where Witness EB saw the *Interahamwe* picking them up".[103]

On these grounds, the Trial Chamber concluded that

Hassan Ngeze ordered the *Interahamwe* in Gisenyi on the morning of 7 April 1994 to kill Tutsi civilians and prepare for their burial at the Commune Rouge. Many were killed in the subsequent attacks that happened immediately thereafter and later on the same day. […] The attack that resulted in these and other killings was planned systematically, with weapons distributed in advance, and arrangements made for the transport and burial of those to be killed.[104]

The Appeals Chamber notes that the Trial Chamber considered that Omar Serushago's testimony was not consistently reliable and accepted it "with caution, relying on it only to the extent that it [was] corroborated".[105] The testimony of Witnesses AHI, AGX and EB was, however, found to be credible.[106]

33. Witnesses AHI and AGX did not specifically testify to the fact that there had been a meeting in Samvura's house on the morning of 7 April 1994, or that the Appellant attended that meeting or participated in the distribution of arms that day.[107] Therefore, their testimony and/or credibility would not be affected by the evidence provided by Witness ABC1 in the *Bagosora et al.* case.[108] However, the Appeals Chamber agrees that the account given by Witness ABC1 can be interpreted as contradicting the testimony of Witness EB in the present case, in particular, when he stated that, on 7 April 1994, at around 07:00 a.m., he saw the Appellant going towards the house of Barnabé Samvura.[109] The same morning, he also saw other people go into the compound of Samvura's house and, thirty minutes later, he heard the Appellant speak through his loudspeaker, telling the *Interahamwe* to kill the Tutsi and that some of them should go to the *Commune Rouge* to dig pits. According to Witness EB, when coming out of Samvura's house, the *Interahamwe* carried nail-studded clubs, rifles and grenades, and the attacks started around 01:00 p.m.[110]

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[102] Id.
[103] Id.
[104] *Ibid.*, para. 836. See also paras 955 and 977A concluding that the Appellant was guilty of genocide, pursuant to Article 6 (1) of the Statute of the Tribunal.
[105] *Ibid.*, para. 824. See also *Ngeze* Decision on Additional Evidence, paras 26-27.
[106] *Ibid.*, paras 775, 813 and 812, respectively.
[107] Witness AHI testified that he saw the Appellant on the morning of 7 April in a military outfit accompanied by his bodyguards (T. 4 September 2001, p. 51 l. 13-17 and p. 69 l. 17-25; T. 10 September 2001, p. 17 l. 18-20 and p. 92 l. 17-22). Witness AHI referred to distribution of arms by Colonel Anatole Nsenigyumva on 7 April 1994, but specified that the Appellant was present at a meeting held on 8 April 1994 (T. 4 September 2001, p. 58 l. 7-9 and p. 60 l. 11-19).
Witness AGX saw the Appellant in the afternoon of 7 April 1994 "passing by on the road in a vehicle aboard which were *Interahamwe* as well as *Impuzamugambi* of the CDR" (T. 11 June 2001, p. 39; T. 13 June 2001, p. 39; T. 14 June 2001, pp 40-42).
[108] The Appeals Chamber notes that Witness ABC1 also testified that there was no meeting with Anatole Nsengiyumva held in Samvura's house on 7 April 1994 and no distribution of weapons took place there (*Bagosora et al.* case, T. 13 June 2006 (closed session), p. 11 l. 34-35, p. 12 l. 29-31, p. 27 l. 16-18 and 26-31). Witness AHI referred to a meeting of MRND and CDR officials held on 8 April 1994 followed by distribution of weapons (T. 4 September 2001, pp 55-62) and Witness AGX testified that Colonel Nsengiyumva spoke in Gisenyi on 7 April 1994 around 10:00 a.m. saying that the President had been killed by enemies, adding that there were about two hundred people there (T. 11 June 2001, pp 34-39). Consequently, the Appeals Chamber concludes that the three witnesses were referring to different events and no flagrant contradiction affecting their credibility could reasonably be drawn from these accounts.
[109] T. 16 May 2001, pp 2-3.
[110] *Ibid.*, pp 5-8, 46; T. 17 June 2001, pp 108, 129-134.

34. The fact that there had been a meeting held at Samvura's house on the morning of 7 April 1994 involving the Appellant and distribution of arms is not in itself decisive for the Trial Chamber's conclusion as to the Appellant's responsibility for killings of the Tutsi civilians in Gisenyi. In fact, the Trial Chamber concluded that there was no evidence that the Appellant was present during the killings of 7 April 1994[111] and that, on that morning, the Appellant ordered the *Interahamwe* to kill the Tutsi and to prepare graves in *Commune Rouge*.[112] Consequently, the principal issue is whether, should the Trial Chamber have had the benefit of hearing the testimony of Witness ABC1, it *would* have disbelieved Witness EB with respect to the events that took place on the morning of 7 April 1994. In the presence of contradictory accounts of the two witnesses, the Trial Chamber would have had to determine which of the accounts was reliable and, in light of evidence provided by Witness ABC1 in the *Bagosora et al.* case and the fact that [REDACTED], the Appeals Chamber is not satisfied that a reasonable trier of fact *would* have found this witness credible to the detriment of the account provided by Witness EB. Moreover, Witness ABC1 in the *Bagosora et al.* case only testified to the fact that the Appellant was not at [Samvura's] house that morning and that there was no meeting there. The mere fact that [Witness ABC1] did not witness or hear him ordering the killings does not mean that this could not have occurred.[113] The Appeals Chamber notes to this extent that Witness EB testified that the Appellant ordered the killing through a loudspeaker from his vehicle and not *during* the meeting at Samvura's house.[114] Consequently, and in light of the findings above concerning Witnesses AHI and AGX, the Appeals Chamber is not satisfied that the exclusion of the proffered additional evidence would amount to a miscarriage of justice inasmuch as, had it been adduced at trial, it would not have had an impact on the verdict.

C. Motion of 28 August 2006

Submissions of the Parties

35. is Motion of 28 August 2006, the Appellant prays the Appeals Chamber to admit the Additional Statement of Witness EB purportedly affirming his Recantation Statement of April 2005.[115] The Appellant contends that this evidence is credible and relevant to the evidentiary hearing insofar as, if accepted, it "will clear the doubts of the Prosecution regarding the truthfulness of witness 'EB' [*sic*] first recanted statement".[116] He notes that this evidence, not available at trial, could not have been discovered through the exercise of due diligence, and its exclusion would amount to a miscarriage of justice.[117]

36. The Prosecution does not object to the Motion of 28 August 2006, acknowledging the relevance of the Additional Statement in light of the evidentiary hearing of Witness EB.[118] Nevertheless, it points out that the "agreement on the admissibility of this statement relates *only* to the actual admissibility of the statement, and not to the merits, that is, the reliability or credibility, of the contents of the document."[119] Furthermore, the Prosecution specifies that the admission of copies of the

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[111] Trial Judgement, para. 825.
[112] *Id.*
[113] See *Jean de Dieu Kamuhanda v. The Prosecutor,* Case N°ICTR-99-54A-A, Judgement, 19 September 2005, para. 158.
[114] At the same time, the Appeals Chamber recalls that the credibility of Witness EB, the only witness to have testified to the ordering of the killings by the Appellant (the only relevant part of Omar Serushago's testimony that was considered corroborated by the Trial Chamber, and thus reliable, referred to the fact that the Appellant "was transporting arms in a red Hilux vehicle on the morning of 7 April 1994" but not the fact that he ordered that attack), is yet to be re-assessed on the basis of his testimony at the appeals hearing to the subject of his purported Recantation Statement.
[115] Motion of 28 August 2006, preambulary para. See also para. 6 *supra*.
[116] Ibid., paras 4, 6.
[117] *Ibid.*, paras 5, 7.
[118] Response to the Motion of 28 August 2006, para. 2.
[119] *Ibid.*, para. 2.

envelopes in which copies of this letter were received by the Office of the Prosecutor would be necessary.[120]

Discussion

37. The Appeals Chamber notes that in the Additional Statement, Witness EB purportedly states that the reason for this new statement is that after having sent his Recantation Statement, he

> "learned that officials from the Office of the Prosecutor who had come to see [him] at [his] home had submitted [his] statement to the [Tribunal]"

and that

> "[t]hese employees of the Tribunal, who would usually meet [him] at the *Ubumwe* Hotel threatened [him], asking [him] why [he] had written to the Tribunal to announce [his] recantation".

Since he was

> "annoyed by their threats, and in order to get rid of them, [he] told them the document containing [his] recantation did not come from [him], even though [he] was indeed the one who had written it".

According to the Additional Statement, Witness EB met the "employees of the Tribunal" once more when they came back to confirm that he was the author of the Recantation Statement but had not heard from them ever since. Therefore, he decided to write the Additional Statement to confirm that both Recantation Statements of 5 and 27 April 2005 were written and signed by him. In addition to the information contained in Witness EB's purported original Recantation Statement, the Additional Statement specifies that, contrary to his testimony adduced at trial, he never saw the Appellant on 6-9 April 1994 in Gisenyi [REDACTED]. According to the Additional Statement, it was well known to the inhabitants of Gisenyi that the Appellant was arrested following President Habyarimana's death and remained in detention until 9 April 1994; besides, they also knew that the vehicle equipped with megaphones belonged to Hassan Gitoki from *Commune Rouge* and not to the Appellant. Finally, in the Additional Statement, Witness EB refers to the Prosecution Witness AFX who allegedly also falsely testified against the Appellant.

38. The Appeals Chamber considers that there is good cause for the late filing of the Motion of 28 August 2006, since, as explained above, the Appellant only received a copy the Additional Statement in August 2006.[121] For the reasons explained in the Ngeze Decision on Additional Evidence,[122] the Appeals Chamber finds that the proffered evidence was unavailable at trial and could not be obtained through the exercise of due diligence. The Appeals Chamber is equally satisfied that the tendered Additional Statement is *prima facie* credible and relevant.[123] Finally, the Appeals Chamber finds that the Additional Statement could have been a decisive factor in concluding upon the Appellant's responsibility for the events that took place in Gisenyi on 7-9 April 1994.[124] The Appeals Chamber emphasizes that the above findings pertain strictly to the admissibility and not to the merits of the proffered additional evidence.[125]

39. For the foregoing reasons, the Appeals Chamber finds that the Additional Statement is admissible as additional evidence on appeal.

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[120] *Ibid*., para. 3.
[121] See para. 6 *supra*.
[122] *Ngeze* Decision on Additional Evidence, para. 23
[123] See *ibid*., paras 19-22.
[124] Trial Judgement, paras 836-837. See also *Ngeze* Decision on Additional Evidence, paras 24-29.
[125] See *Ngeze* Decision on Additional Evidence, para. 28.

D. MOTION OF 7 SEPTEMBER 2006

40. In its Motion of 7 September 2006, the Prosecution seeks admission of the envelopes containing copies of the Additional Statement as additional evidence on appeal for the purposes of the evidentiary hearing of Witness EB.[126] The Prosecution claims that the information on the envelopes is relevant to the issue of determining the authenticity of the Additional Statement,

> "which in turn is relevant to the issues [of] the oral hearing, whether EB is recanting his trial testimony or whether the recantation statement is a product of the Appellant['s] efforts to interfere with and suborn the testimony of witnesses".[127]

It contends that

> "[t]he circumstances surrounding the receipt and timing of the letter […] are suspicious and lead to the inference that someone associated with the Appellant, or at least someone other than EB, has manufactured the letter".[128]

The Prosecution, being in the process of obtaining the originals of the envelopes, also seeks direction from the Appeals Chamber as to whether it ought to retain the originals until the evidentiary hearing or whether they should be filed immediately upon their receipt.[129] The Appellant did not respond to the Motion of 7 September 2006.

41. The Appeals Chamber recalls that, pursuant to Rule 115 of the Rules, motions for additional evidence on appeal must be directed towards the *contested* specific finding of fact made by the Trial Chamber. The Appeals Chamber recalls that, while the Rule itself does not expressly prohibit a party from seeking the admission of additional evidence to bolster challenged factual findings, in the practice of this Tribunal, as well as that of the ICTY,

> "motions for additional evidence are directed towards supporting an argument of factual error, and if additional evidence is sought to be admitted in support of a factual finding, it is admitted as rebuttal material to that additional evidence admitted in support of a factual error".[130]

The Prosecution has not appealed the Trial Judgement and is not, in the circumstances of the instant case, in a position to seek admission of additional evidence. Rather, it should have applied for admission of rebuttal material.

42. The Appeals Chamber finds that it is in the interests of justice to examine *proprio motu* whether the material tendered by the Prosecution in its Motion of 7 September 2006 can be admitted

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[126] Motion of 7 September 2006, para. 1.
[127] *Ibid*., para. 5.
[128] *Ibid*., para. 6. According to the Prosecution, several copies of the Additional Statement – and not the original – were sent to the offices of the ICTR in Arusha and Kigali, to two investigators and an interpreter from OTP, in June 2006, from Tanzania and Rwanda (paras 7-8). According to the Prosecution, "it would seem highly improbable that the date of the Appellant's Motion [of 19 June 2006], seeking admission of an additional statement received from Witness EB, is purely coincidental with the mailing of this letter" (paras 9-11, with reference to para. 3 of the Motion of 19 June 2006, in which the Appellant affirms that "the Prosecutor might have collected or *received* some material and/or statements from witness EB[…]") The Prosecution maintains that the fact that the Additional Statement was allegedly written in December 2005 but only posted in June 2006 militates for a conclusion that Witness EB may have written it under some duress or that the letters were manufactured by someone else (para. 11). It adds that it "is suspicious that a letter purporting to come from Witness EB, an indigent person living in Rwanda, was mailed from Tanzania and Rwanda", the only plausible explanation being that someone other than Witness EB posted several copies to several persons from several places in order to ensure that the letter was received by the Tribunal (para. 12).
[129] Motion of 7 September 2006, para. 2.
[130] *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case N°IT-03-69-AR65.1, Decision on Stanišić's Application under Rule 115 to Present Additional Evidence in his Response to the Prosecution's Appeal, 3 December 2004, para. 14.

as rebuttal evidence on appeal. It has been well established by the jurisprudence that rebuttal material is admissible if it directly affects the substance of the additional evidence admitted by the Appeals Chamber[131] and, as such, has a different test of admissibility from additional evidence under Rule 115 of the Rules.[132] In light of its findings above with respect to the admissibility of the Additional Statement, the Appeals Chamber finds that copies of envelopes in which the copies of the Additional Statement were purportedly sent to various addressees within the Office of the Prosecutor are directly relevant to the issue of the authenticity of the Additional Statement and *a fortiori* that of the Recantation Statement. Therefore, the Appeals Chamber is satisfied that the proffered material affects the substance of the admitted additional evidence and is thus admissible as rebuttal evidence on appeal.

43. The Appeals Chamber emphasizes that it is highly desirable to have the originals of the said rebuttal evidence, as well as of the Recantation Statement and the Additional Statement, filed and available at the evidentiary hearing.

IV. DISPOSITION

44. For the forgoing reasons, the Appeals Chamber DISMISSES the Motion of 19 June 2006; CONSIDERS the Motion of 14 July 2006 to be WITHDRAWN by the Appellant's Counsel; DISMISSES the Motion of 4 July 2006; GRANTS the Motion of 28 August 2006 and ADMITS the Additional Statement as additional evidence on appeal; DISMISSES the Motion of 7 September 2006. The Appeals Chamber *proprio motu* ADMITS as rebuttal evidence on appeal the copies of envelopes annexed to the Motion of 7 September 2006.

45. The Appeals Chamber INSTRUCTS the Registrar to provide the following material so far admitted into evidence on appeal with corresponding exhibit numbers:

- copy of the typed statement purportedly signed by Witness EB, index numbers 2223A-2220-A;
- Forensic Report, including the copy of the purported handwritten Recantation Statement, index numbers 3442/A-3413/A;
- copy of the Additional Statement in Kinyarwanda, as well as its translations into English and French, index numbers 8121A-8112/A
- copies of envelopes, index numbers 8183/A-8175/A.

Done in English and French, the English text being authoritative.

Dated this 27th day of November 2006, At The Hague, The Netherlands.

[Signed] : Fausto Pocar

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[131] *Prosecutor v. Ramush Haradinaj et al.,* Case N°IT-04-84-AR65.2, Decision on Lahi Brahimaj's Request to Present Additional Evidence under Rule 115, 3 March 2006 ("*Haradinaj* Decision"), para. 44; *Prosecutor v. Miroslav Kvočka et al.*, Case N°IT-98-30/1-A, Decision on Prosecution's Motion to Adduce Rebuttal material, 12 March 2004 ("*Kvočka* Decision"), p. 3; *The Prosecutor v. Tihomir Blaškić*, Case N°IT-95-14-A, Decision on Evidence, 31 October 2003, p. 5.
[132] *Haradinaj* Decision, para. 44; *Kvočka* Decision, p. 3.

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Decision on the Prosecutor's Motion to be Relieved from Filing the Appeal Book and Book of Authorities
27 November 2006 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge Andrésia Vaz, Pre-Appeal Judge

Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Obligation of the Prosecutor to release Appeal Book and Book of Authorities, Request for relieve of the obligation because of the planned amendments to the Rules and of the little practical purpose of the documents, No possible answer to the request without giving the Appellants the opportunity to respond to it – Motion moot – Motion dismissed

International Instrument cited :

Rules of Procedure and Evidence, rules 108 bis (B) and 117 bis

International Cases cited :

I.C.T.R. : Appeals Chamber, Ferdinand Nahimana et al. v. The Prosecutor, Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005 (ICTR-99-52) ; Appeals Chamber, Ferdinand Nahimana et al. v. The Prosecutor, Corrigendum to the Order of the Presiding Judge Designating the Pre-Appeal Judge, 25 August 2005 (ICTR-99-52)

I, ANDRÉSIA VAZ, Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) and the Pre-Appeal Judge in this case;[1]

BEING SEIZED OF the "Prosecutor's Motion to Be Relieved from Filing the Appeal Book and Book of Authorities" ("Prosecution" and "Motion", respectively) filed on 24 November 2006, in which the Prosecution requests to be relieved from its obligation under Rule 117 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules"), notably in light of the "planned amendments to the […] Rules" and "little practical purpose" of such filings;

NOTING that the Appellants have not yet responded to the Motion;

CONSIDERING, however, that this Motion may be disposed of without giving the Appellants the opportunity to respond to it, since no prejudice will be caused to the Appellants;[2]

NOTING that the amended Rules entered into force on 10 November 2006 and that they do not contain Rule 117 *bis* or any obligation to file an Appeal Book or a Book of Authorities;

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[1] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005; *Ferdinand Nahimana et al. v. The Prosecutor,* ICTR-99-52-A, Corrigendum to the Order of the Presiding Judge Designating the Pre-Appeal Judge, 25 August 2005.
[2] *Cf.* Rule 108 *bis* (B) of the Rules.

FINDING therefore that the Motion is moot;

FOR THE FOREGOING REASONS,

DISMISSES the Motion.

Done in English and French, the English text being authoritative.

Dated this 27th day of November 2006, At The Hague, The Netherlands.

[Signed] : Andrésia Vaz

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Decision on the Appellant Jean-Bosco Barayagwiza's Motion Concerning the Scheduling Order for the Appeals Hearing 5 December 2006 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron

Jean Bosco Barayagwiza – Appeals hearing, Request for more time for the presentation of oral arguments, Reasons in support of the Accused's argument that the Appeals Hearing should be scheduled for a later date : intention of the Appellant to file a motion for additional evidence, invitation to the Bar Counsel of England and Wales Human Rights Committee to attend and observe the Appeals Hearing, No provision in the Tribunal's Statute, Rules or Practice Directions as to the exact time to be allocated for the parties' oral submissions on appeal, Oral arguments focused on the grounds of appeal raised in the parties' briefs, Appeals hearing is not the occasion for presenting new arguments on the merits of the case, Scheduling ordered in full consideration of the particular circumstances and complexity of the present case, No statutory or regulatory provision of the Tribunal allows for the "right" of an appellant who is represented by counsel to personally address the Appeals Chamber – Motion dismissed

International Instrument cited :

Rules of Procedure and Evidence, rules 114, 115 and 115 (A)

International Cases cited :

I.C.T.R. : Pre-Appeal Judge, The Prosecutor v. Hassan Ngeze, Decision on Hassan Ngeze's Motions Concerning Restrictive Measures of Detention, 20 September 2006 (ICTR-99-52) ; Appeals Chamber, The Prosecutor v. Jean-Bosco Barayagwiza, Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel, 23 November 2006 (ICTR-99-52) ; Appeals Chamber, The Prosecutor v. Jean-Bosco Barayagwiza et al., Decision on the Prosecutor's Motion to Be Relieved from Filing the Appeal Book and Book of Authorities, 27 November 2006 (ICTR-99-52)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Blagoje Simić, Order Re-Scheduling Appeal Hearing, 5 May 2006 (IT-95-9)

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations Committed in the Territory of Neighboring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively),

RECALLING the "Scheduling Order for Appeals Hearing and Decision on Hassan Ngeze's Motion of 24 January 2006" rendered on 16 November 2006 ("Scheduling Order"), by which the Appeals Chamber ordered that the appeals hearing in the present case shall take place on 16, 17 and 18 January 2007 ("Appeals Hearing"), allowing each of the three co-Appellants two hours and thirty minutes time for their oral submissions on the merits, including arguments in reply, plus ten minutes each for a personal address to the Appeals Chamber;

BEING SEIZED OF "The Appellant Jean-Bosco Barayagwiza's Motion Concerning the Scheduling Order for the Appeals Hearing" filed on 23 November 2006 ("Motion"), requesting that "more time be set aside for the presentation of oral arguments and if necessary an extension of the date for hearing to include Friday 19th January 2007" and "[i]n the event that a co-counsel is not available that the proceedings be adjourned for one calendar month";[1]

NOTING the "Prosecutor's Response to 'The Appellant Jean-Bosco Barayagwiza's Motion Concerning the Scheduling Order for the Appeals Hearing'" filed by the Office of the Prosecutor ("Prosecution") on 28 November 2006 ("Response"), in which the Prosecution: (i) objects to any adjournment of the Appeals Hearing to a later date;[2] (ii) requests to be accorded additional time for its oral arguments in response should the Appellant's requests for additional time for his oral arguments be granted by the present decision;[3] (iii) contends that "the Appellant's boycott of his trial does not entitle him to more time for a personal address to the Appeals Chamber";[4] and (iv) submits that it reserves its right to object to the filing of skeleton arguments during the hearing should they contain new arguments;[5]

NOTING that the Appellant did not file a reply to the Response;

NOTING that in the Motion, the Appellant provides reasons in support of his argument that the Appeals Hearing should be scheduled for a later date than provided in the Scheduling Order including, *inter alia*, his intention to file a new motion under Rule 115 of the Tribunal's Rules of Procedure and Evidence ("Rules") as well to invite the Bar Counsel of England and Wales Human Rights Committee to attend and observe the Appeals Hearing;[6]

CONSIDERING that under Rule 115 (A) of the Rules, the parties may file motions for admission of additional evidence on appeal after the appeal hearing, provided that cogent reasons are shown for such a delay;

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[1] Motion, para. 1; see also paras 18, 23 and 24 whereby the Appellant requests that his Counsel be permitted to address the Appeals Chamber for a time of three hours plus one hour and half for a reply to the Prosecution's arguments, as well as that he be given thirty minutes for the personal address.
[2] Response, paras 2, 3-7.
[3] Response, para. 9.
[4] Response, para. 11.
[5] Response, para. 12.
[6] Motion, paras 2 and 3.

CONSIDERING that a party's intention to invite a third-party observer to the appeals hearing and the availability of that third-party on certain dates are not factors that the Appeals Chamber is required to take into consideration when setting the date for an appeals hearing;

CONSIDERING that since the Appeals Chamber's Decision of 23 November 2006[7] upheld the President's decision to refuse the withdrawal of the Appellant's Co-Counsel, the arguments in the Motion in relation to the absence of the Co-Counsel[8] are moot;

CONSIDERING that in light of the amendments to the Rules, which entered into force on 10 November 2006, the Appellant's arguments with respect to logistical problems in relation to the preparation of the Appeal Books on or before 18 December 2006[9] are moot, since the Rules no longer place such an obligation on the parties;[10]

FINDING therefore that the Appellant has failed to establish good cause for the Appeals Chamber delaying the Appeals Hearing as set in the Scheduling Order;

NOTING that the Appellant contends that the time allotted for oral submissions on the merits at the Appeals Hearing is inconsistent with the applicable provisions and jurisprudence of the Tribunal and is inadequate with respect to the complexity of the present case;[11]

NOTING further that the Appellant submits that he would need additional time for oral submissions due to a number of factors, *inter alia* (i) the fact "that neither the Appellant nor the current legal team participated in the original trial"; (ii) the nature of the charges and the seriousness of the sentence; (iii) the large number of pre-trial issues of law and fact; (iv) the length of the trial and the amount of evidence involved; (v) the need to cross-reference facts "as between the oral testimony and documentary exhibits which could not be set out in the Appeals Brief"; and (vi) the fact that he was not allowed to surpass the page-limit applicable to his Appeals Brief or to add "any annexes summarizing the position of either party";[12]

CONSIDERING that there exists no provision in the Tribunal's Statute, Rules or Practice Directions as to the exact time to be allocated for the parties' oral submissions on appeal, and that such decisions are taken by the Appeals Chamber on a case-by-case basis;

RECALLING that the parties are to focus their oral arguments on the grounds of appeal raised in their briefs[13] and that the appeals hearing is not the occasion for presenting new arguments on the merits of the case;

RECALLING further that, during the hearing of an appeal, the parties are expected

> "to prepare themselves in such a way as not simply to recount what has been set out in their written submission, but to confine their oral arguments to elaborating on points relevant to this appeal that they wish to bring to the Appeals Chamber's attention";[14]

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[7] Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel, 23 November 2006.
[8] Motion, paras 4-7.
[9] Motion, para. 7.
[10] *Cf*. Decision on the Prosecutor's Motion to Be Relieved from Filing the Appeal Book and Book of Authorities, 27 November 2006, p. 2.
[11] Motion, paras 10-23.
[12] Motion, paras 12, 18-19.
[13] *Cf*. the Appellant's arguments in paras 12, 18 and 19 of the Motion.
[14] *Prosecutor v. Blagoje Simić*, Case N°IT-95-9-A, Order Re-Scheduling Appeal Hearing, 5 May 2006, p. 6.

CONSIDERING that the Scheduling Order was issued by the Appeals Chamber under Rule 114 of the Rules in full consideration of the particular circumstances and complexity of the present case in accordance with the practice of the Tribunal;

FINDING therefore that the Appellant has failed to demonstrate any need, in the interests of justice, for the Appeals Chamber to allow more time than that allotted for the parties' oral submissions on the merits at the Appeals Hearing in the Scheduling Order;

NOTING that the Appellant also seeks to be permitted to present "a skeleton argument summarizing the oral submissions", as well as to make the following written submissions on the first day of the appeal hearing, namely

> "(a) a schedule of witness inconsistencies and contradictions (b) a schedule setting out the various standards of proof used to make findings of credibility and (c) a schedule setting out the identification evidence against the appellant together with the findings of the Trial Chamber";[15]

CONSIDERING that parties may use and/or formally present skeleton arguments, slides or schedules to the Appeals Chamber in support of their oral arguments, provided that they contain no new arguments on the merits of the case and that the opposing party does not object;[16]

CONSIDERING, however, that the Appeals Chamber is not in a position to decide whether the use of the documents referred to by the Appellant shall be allowed, since they were not presented with the Motion;

NOTING that the Appellant finally requests an extension of time of up to thirty minutes for his personal address to the Appeals Chamber on the grounds that (a) "there is no other jurisdiction where a personal address is short as to amount almost to an afterthought within the context of the proceedings" and (b) that the "Appellant did not attend his trial and had imposed counsel";[17]

CONSIDERING that no statutory or regulatory provision of the Tribunal allows for the "right" of an appellant who is represented by counsel to personally address the Appeals Chamber[18] but that the Appeals Chamber has, in practice, allowed for such an option as a matter of courtesy to appellants;

FINDING that the Appellant has failed to demonstrate in the Motion that it is in the interests of justice to allow the Appellant to surpass the time allocated to him by the Scheduling Order for the personal address;

ON THE BASIS OF THE FOREGOING,

HEREBY DISMISSES the Motion.

Done in English and French, the English text being authoritative.

Dated this 5th day of December 2006, At The Hague, The Netherlands.

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[15] Motion, paras 13 and 22.
[16] *E.g.*, *The Prosecutor v. Goran Jelisić*, Case N°IT-95-10-A, Public Transcript of Hearing (Cross-Appeal on Sentence), 22 and 23 February 2001, pp 37, 198, 199 and 245; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case N°IT-95-14/2-A, Transcript of Hearing of 17 May 2004 (Appeal Proceedings-Open session), pp 187, 255, 257-259, 283-285; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case N°IT-95-14/2-A, Transcript of Hearing of 19 May 2004 (Appeal Proceedings-Open session), pp 574-575, 577-578, 608-609; *The Prosecutor v. Blagoje Simić*, Case N°IT-95-9-A, Public Transcript of Hearing of 2 June 2006 (Appeal Proceedings-Open session), pp 40-42.
[17] Motion, paras 24-25.
[18] See Scheduling Order, p. 3; Decision on Hassan Ngeze's Motions Concerning Restrictive Measures of Detention, 20 September 2006, p. 7.

[Signed] : Fausto Pocar

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Order for Re-Certification of the Record 6 December 2006 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Andrésia Vaz, Pre-Appeal Judge

Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Accuracy of the French and English transcripts of Witness's testimony, Discrepancies due to the use of specific Kinyarwanda terms, Interest of justice to clarify these questions before the appeal hearing – Motion granted

I, ANDRÉSIA VAZ, Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) and Pre-Appeal Judge in this case;[1]

NOTING that questions regarding the accuracy of the French and English transcripts of Witness AFB's testimony have been raised by Jean-Bosco Barayagwiza in his Appeal Brief;[2]

NOTING that discrepancies related to the use of specific Kinyarwanda terms appear between the English and French versions of the transcripts of Witnesses AAM, AFB and AGK's testimonies[3] and between the Judgement and the transcripts of Witness X's testimony;[4]

NOTING further, that Ferdinand Nahimana is challenging the translation, contained in Exhibit P105/2B, of the verb *"gufatanya"* allegedly used in his interview of 25 April 1994 with Radio Rwanda;[5]

CONSIDERING therefore, that it is in the interest of justice to clarify these questions before the appeal hearing and to review the relevant transcripts and exhibit for accuracy;

FOR THE FOREGOING REASONS,

HEREBY *proprio motu* ORDER the Registry

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[1] Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005; Corrigendum to the Order of the Presiding Judge Designating the Pre-Appeal Judge, 25 August 2005.
[2] Barayagwiza's Appellant's Appeal Brief, 12 October 2006, paras 112-14 ("Barayagwiza's Appeal Brief").
[3] T. 12 February 2001 p. 103 and *CRA du 12 février 2001*, p.106 for Witness AAM ; T. 6 March 2001, pp. 61-62 and CRA du 6 mars 2001, p. 72 for Witness AFB; T. 21 June 2001, pp. 96-97, 99 and *CRA du 21 juin 2001*, p. 104, 106-107 for Witness AGK.
[4] *Prosecutor v. Nahimana et al.*, Case N°ICTR-99-52, Judgement, 3 December 2003, para. 336 ("Trial Judgement").
[5] Nahimana's Revised Appeal Brief, para. 281 referring to Exhibit P105/2A, admitted on 20 March 2002, containing the Kinyarwanda transcription of the interview, which includes the words *"dufatanye", "mfatanye", "bagafatanya*" on p. 25 (2) and p. 28, and to Exhibit P105/2B admitted on 20 March 2003, which consists of the English version of the interview and which, according to Ferdinand Nahimana, translates the term *"gufatanya"* as "to work together", see p. 3.

1. To review for accuracy the audio-tapes of the testimonies given before the Trial Chamber by Witnesses AAM, AFB, AGK and X as follows:

- Testimony of Witness AAM of 12 February 2001, to determine whether the Witness declared "they[6] were shouting – they were singing tuzatsembatsembe, let me spell ; T-U-Z-A-T-S-E-M-B-A-T-S-E-M-B-E[7], in other words, let's exterminate them" – as quoted from the English transcripts and in the Judgement – [8] or whether the witness stated "*Barayagwiza portait une casquette de la CDR, et il*[9] *chantait, disait tuzitsembatsembe. Je vais épeler : T-U-Z-I-T-S-E-M-B-A-T-S-E-M-B-E*[10]" – as indicated in the French transcript.[11]
- Testimony of Witness AFB of 6 March 2001, to ascertain which Kinyarwanda terms were used by the witness and translated into English[12] and French[13] by the words "we shall exterminate them" and *"nous les exterminerons"*, respectively;
- Testimony of Witness AGK of 21 June 2001, to verify whether the witness used the terms *"tubatsembatsembe"* or *"tuzitsembambe"*;[14]
- Video-conference testimony of Witness X of 18 February 2002, to ascertain whether the witness used the term *"tubatsembatsembe"* as indicated in the Judgement.[15]

2. To confirm the English and French translations of the following purported Kinyarwanda terms mentioned in Barayagwiza's Appeal Brief and Barayagwiza's Reply,[16] and in the Judgement:[17]

Tubatsembatsembe
Tulabatembatemba
Tuzabatsembatsemba
Gutsembatsemba
Tuzazitsembatsemba
Tuzitsembatsembe
Tuzatsembatsembe
Tabatsembatsembe
Tuzitsembambe[18]

3. To review for accuracy the translation – contained in Exhibit P105/2B – of the section of Ferdinand Nahimana's interview of 25 April 1994 with Radio Rwanda, where the Kinyarwanda verb *"gufatanya"* is allegedly used.[19]

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[6] Emphasis added.
[7] Emphasis added.
[8] T. 12 February 2001 p. 103 ; Trial Judgement, paras 702, 718, 797.
[9] Emphasis added.
[10] Emphasis added.
[11] CRA du 12 février 2001, p.106.
[12] T. 6 March 2001, pp. 61-62.
[13] CRA du 6 mars 2001, p. 72.
[14] T. 21 June 2001, pp. 96-97, 99 and *CRA du 21 juin 2001*, p. 104, 106-107.
[15] Trial Judgement, para. 336.
[16] Barayagwiza's Appeal Brief, paras 112-115, 121, 123; The Appellant Jean Bosco Barayagwiza's Reply to the Consolidated Respondent Brief, para. 80 ("Barayagwiza's Reply").
[17] Trial Judgement, paras 308, 310, 319, 336, 340, 697, 702, 708, 718, 719, 797, 964, 967, 975, 1035.
[18] This term is not mentioned in the Trial Judgement or in Barayagwiza's Appeal Brief, but in Witness AGK's testimony, see note 14 above.
[19] Nahimana's Revised Appeal Brief, para. 281 referring to Exhibit P105/2A, admitted on 20 March 2002, which contains the Kinyarwanda transcription of the interview and to Exhibit P105./2B, admitted on 20 March 2003, which contains the English translation of the interview. The English translation of the excerpt is as follows:
"André Nambaje : During these last days you were out, I suspect or rather I can confirm you were following the events occurring in Kigali town. You must also have known that the populations in virtually all the corners of the country have stood up to assist the military in defending our country. How do you view the zeal demonstrated by the Rwandans – indeed I am indeed referring to those of them who are patriots?
F. Nahimana: Thank you Ndayambaje for asking me that question. The radio stations of this country of ours, to wit: Radio Rwanda and RTLM Radio – apart from Bujumbura where we could not listen to RTLM, but when we arrived in Bukavu, we

4. To submit to the Appeals Chamber and the parties newly certified copies of the relevant portions of the transcripts and of Exhibit P105/2B in the official languages of the International Tribunal not later than 10 January 2007.

Done in English and French, the English version being authoritative.

Done this 6th day of December 2006, At The Hague, The Netherlands.

[Signed] : Andrésia Vaz

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could listen to radio Rwanda and RTLM Radio. We were satisfied with both radio stations because they informed use on how the population from all corners of the country had stood up and worked together with our armed forces, the armed forces of our country with a view to halting the enemy. What I can tell you about this is something I have often said."

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Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence 8 December 2006 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron

Jean Bosco Barayagwiza – Necessity of delaying his motion for additional evidence of expert witness, Time-limit for the filing of a motion to admit additional evidence is thirty days from the date for filing of the brief in reply, Demonstration of good cause – Additional evidence, Three distinct motions, Party may file a corrigendum to their previously filed brief or motion in case a minor or clerical error without requesting leave from the Appeals Chamber, Late Filing of the Rule 115 Motion, Demonstration of good cause for the late filing : documents recently declassified at national level, unavailability of the proffered evidence at trial, Party adducing additional evidence must establish that the said evidence was not available at trial in any form whatsoever, Admission as additional evidence on appeal only if the Appeals Chamber concludes that its exclusion would result in a miscarriage of justice, Determination of what material meets disclosure requirements is primarily a fact-based judgement made by and under the responsibility of the Prosecution, Demonstration by the Defence of the prima facie exculpatory nature and of its prejudice to request disclosure form the Prosecutor – Motion partially granted

International Instruments cited :

Rules of Procedure and Evidence, rules 68, 68 (A), 115 and 115 (A) ; Statute, art. 24 ; Statute of the ICTY, art. 25

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Alfred Musema, "Décision sur la « Confidential Motion (i) to File Two Witness Statements Served by the Prosecutor on 18 May 2001 Under Rule 68 Disclosure to the Defence, and (ii) to File the Statement of Witness II Served by the Prosecutor on 18 April 2001 and (iii) to File a Supplemental Ground of Appeal » ; et Ordonnance portant calendrier", 28 September 2001 (ICTR-96-13) ; Appeals Chamber, Georges Rutaganda v. Prosecutor, Decision on Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, 12 December 2002 (ICTR-96-3) ; Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgement, 23 May 2005 (ICTR-98-44A) ; Appeals Chamber, The Prosecutor v. Sylvestre Gacumbitsi, Decision on "Requête en extrême urgence aux fins d'admission de moyen de preuve supplementaire en appel", 9 February 2006 (ICTR-2001-64) ; Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006 (ICTR-98-44) ; Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006 (ICTR-98-44) ; Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief, 17 August 2006 (ICTR-99-52) ; Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza, Decision on the Appellant Jean-Bosco Barayagwiza's Corrigendum Motions of 5 July 2006, 30 October 2006 (ICTR-99-52)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and

Additional Filings, 26 September 2000 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Decision Granting Leave to Dario Kordić to Amend His Grounds of Appeal, 9 May 2002 (IT-95-14/2) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Decision on Prosecution's Application to Seek Guidance from the Appeals Chamber regarding Redaction of the Statement of "Witness Two" for the purposes of Disclosure to Dario Kordić under Rule 68, 4 March 2004 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Miroslav Kvočka et al., Decision, 22 March 2004 (IT-98-30/1) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, [confidential] Decision on Prosecution's Application to Seek Guidance from the Appeals Chamber regarding Redaction of the Statement of "Witness Two" for the purposes of Disclosure to Paško Ljubičić under Rule 68, 30 March 2004 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Radislav Krstić, Judgement, 19 April 2004 (IT-98-33) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Judgement, 29 July 2004 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Radoslav Brđanin, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004 (IT-99-36) ; Appeals Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Decision on Prosecution's Motion to Admit Additional Evidence in Relation to Dario Kordić and Mario Čerkez, 17 December 2004 IT-95-14/2) ; Appeals Chamber, The Prosecutor v. Mladen Naletilić and Vinko Martinović, Decision on Naletilić's Motion for Leave to File His Second Rule 115 Motion to Present Additional Evidence Pursuant to Rule 115, 27 January 2005 (IT-98-34) ; Appeals Chamber, The Prosecutor v. Željko Mejakić et al., Decision on Joint Defense Motion for Enlargement of Time to File Appellants' Brief, 30 August 2005 (IT-02-65) ; Appeals Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Decision on Motions Related to the Pleadings in Dragan Jokić's Appeal, 24 November 2005 (IT-02-60) ; Appeals Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief, 26 June 2006 (IT-02-60) ; Appeals Chamber, The Prosecutor v. Miroslav Bralo, Decision on Motions for Access to Ex Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006 (IT-95-17)

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of five motions by the Appellant Jean-Bosco Barayagwiza ("Appellant"):

- "The Appellant Jean-Bosco Barayagwiza's Motion Giving Notice of the Further Delay in the Filing of the Motion for Additional Evidence Relating to Alison Des Forges, Pursuant to the Decision of 26 May 2006" filed on 26 June 2006 ("Motion Giving Notice of Delay");[1]
- "The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)" filed on 7 July 2006 ("First Rule 115 Motion");[2]
- "The Appellant Jean-Bosco Barayagwiza's *Corrigendum* Motion Relating to the Appellant's Reply to the Prosecutor's Response to the Appellant's Motion for Leave to Present Additional Evidence (Rule 115) Dated 20th July 2006" filed on 31 July 2006 ("*Corrigendum* Motion");[3]
- "The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)" filed on 13 September 2006 ("Second Rule 115 Motion");[4]

[1] The Prosecution did not file a response to the Motion Giving Notice of Delay.

[2] The Prosecution filed the "Prosecutor's Response to 'The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)'" on 17 July 2006 ("Response to the First Rule 115 Motion"). The Appellant filed "The Appellant Jean-Bosco Barayagwiza's Reply to the Prosecutor's Response to 'The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)'" on 21 July 2006 ("Reply to the First Rule 115 Motion").

[3] The Prosecution did not file a reponse to the Corrigendum.

[4] The Prosecution filed the "Prosecutor's Response to 'The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)'" on 22 September 2006 ("Response to the Second Rule 115 Motion"), and the Appellant

- "The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)" filed on 14 November 2006 ("Third Rule 115 Motion").[5]

2. In the First Rule 115 Motion, the Appellant requests the Appeals Chamber to admit twelve pieces of additional evidence on appeal to support his allegation that Alison Des Forges, who testified as an expert witness at trial, was biased against the Appellant. The Motion Giving Notice of Delay and the Corrigendum Motion are ancillary to the First Rule 115 Motion. In the Second Rule 115 Motion, the Appellant seeks admission of three documents related to his role within the "*Coalition pour la Défense de la République*" ("CDR") as additional evidence on appeal. In the Third Rule 115 Motion, the Appellant requests the Appeals Chamber to admit two documents which, in his view, show that the testimony of Witness AGK, who testified at trial, was unreliable.

3. Trial Chamber I rendered its Judgement in this case on 3 December 2003.[6] Pursuant to the decisions of 17 May 2005[7] and 6 September 2005,[8] the Appellant filed both his Notice of Appeal and his Appellant's Brief on 12 October 2005 ("Notice of Appeal" and "Appellant's Brief", respectively). The briefing with respect to the Appellant's appeal was completed on 12 December 2005.[9]

Applicable law

4. The Appeals Chamber recalls that under the jurisprudence of the Tribunal and that of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), an appeal pursuant to Article 24 of the Statute of the Tribunal (Article 25 of the Statute of the ICTY) is not a trial *de novo*[10] and is not an opportunity for a party to remedy any "failures or oversights" made during the pre-trial and trial phases.[11] Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules") provides for a mechanism to address "the situation where a party is in possession of material that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial".[12]

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filed "The Appellant Jean-Bosco Barayagwiza's Reply to the Prosecutor's Response to the 'Motion for Leave to Present Additional Evidence (Rule 115)'" on 28 September 2006 ("Reply to the Second Rule 115 Motion").

[5] The Prosecution filed the "Prosecutor's Response to 'The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)'" on 22 November 2006 ("Response to the Third Rule 115 Motion") and the Appellant filed confidentially "The Appellant Jean-Bosco Barayagwiza's Reply to the Prosecutor's Response to 'The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115)'" ("Reply to the Third Rule 155 Motion") on 30 November 2006. The Appeals Chamber notes that the Appellant gives no reason as to why the Reply to the Third Rule 115 Motion or the present decision need to be confidential and finds that there is no apparent reason for the confidential classification of the Reply to the Third Rule 115 Motion. Consequently, both the Reply to the Third Rule 115 Motion and the present decision should be public.

[6] *The Prosecutor v. Ferdinand Nahimana et al.,* Case N°ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("Trial Judgement").

[7] Decision on "Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", 17 May 2005 ("Decision of 17 May 2005").

[8] Decision on Clarification of Time Limits and on Appellant Barayagwiza's Extremely Urgent Motion for Extension of Time to File his Notice of Appeal and his Appellant's Brief, 6 September 2005 ("Decision of 6 September 2005").

[9] The Appellant Jean-Bosco Barayagwiza's Reply to the Consolidated Respondent's Brief, 12 December 2005 ("Reply Brief"). For a more detailed procedural background, the Appeals Chamber refers to its earlier decisions in the present case (Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006 ("Decision of 5 May 2006"), paras. 3-5; Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct His Appellant's Brief, 17 August 2006, paras. 5-8).

[10] *Confidential* Decision on Appellant Hassan Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage, 23 February 2006 ("Decision of 23 February 2006"), para. 5; Decision on Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator, 4 October 2005 ("Decision of 4 October 2005"), p. 3; *Prosecutor v. Jean-Paul Akayesu,* Case N°ICTR-96-4-A, Judgement, 1 June 2001, para. 177.

[11] Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, 3 May 2005, p. 3; *Prosecutor v. Drazen Erdemović*, Case N°IT-96-22-A, Judgement, 7 October 1997, para. 15.

[12] Decision of 23 February 2006, para. 6; Decision of 4 October 2005, p. 4; *Prosecutor v. Zoran Kupreškić et al.*, Case N°IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence

5. According to Rule 115, for additional evidence to be admissible on appeal, the following requirements must be met: first, the motion to present additional evidence should be filed "not later than thirty days from the date for filing of the brief in reply, unless good cause or, after the appeal hearing, cogent reasons, are shown for a delay.[13] Second, the Appeals Chamber must find "that the additional evidence was not available at trial and is relevant and credible".[14] When determining the availability at trial, the Appeals Chamber will consider whether the party tendering the evidence has shown that it sought to make "appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence […] before the Trial Chamber."[15] In this respect, the Appeals Chamber has held that

> Counsel is expected to apprise the Trial Chamber of all the difficulties he or she encounters in obtaining the evidence in question, including any problems of intimidation, and his or her inability to locate certain witnesses" and that "[t]he obligation to apprise the Trial Chamber constitutes not only a first step in exercising due diligence but also a means of self-protection in that non-cooperation of the prospective witness is recorded contemporaneously.[16]

With regards to relevance, the Appeals Chamber will consider whether the proposed evidence sought to be admitted relates to a material issue. As to credibility, the Appeals Chamber will only refuse to admit evidence at this stage if it does not appear to be reasonably capable of belief or reliance, without prejudice to a determination of the weight to be afforded.[17]

6. Once it has been determined that the additional evidence meets these conditions, the Appeals Chamber will determine whether the evidence "could have been a decisive factor in reaching the decision at trial."[18] To satisfy this requirement, the evidence must be such that it *could* have had an impact on the verdict, *i.e.* it *could* have shown that a conviction was unsafe.[19] Accordingly, the additional evidence must be directed at a specific finding of fact related to a conviction or to the sentence.[20] Although Rule 115 of the Rules does not explicitly provide for this, where the evidence is relevant and credible, but was available at trial, or could have been discovered through the exercise of due diligence, the Appeals Chamber may still allow it to be admitted on appeal provided the moving party can establish that the exclusion of it *would* amount to a miscarriage of justice. That is, it must be demonstrated that had the additional evidence been adduced at trial, it *would* have had an impact on the verdict.[21]

Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94 (B), 8 May 2001 ("*Kupreškić et al*. Decision of 8 May 2001"), para. 5.

[13] Rule 115 (A) of the Rules as amended on 10 November 2006.

[14] Rule 115 (B).

[15] *The Prosecutor v. André Ntagerura et al*., Case N°ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004 ("*Ntagerura et al*. Decision of 10 December 2004"), para. 9 [internal references omitted].

[16] Id.

[17] Decision of 23 February 2006, para. 7; *Prosecutor v. Zoran Kupreškić et al*., Case N°IT-95-16-A, Decision on Motions for the Admission of Additional Evidence Filed by the Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić, 26 February 2001, para. 28; *Prosecutor v. Zoran Kupreškić et al*., Case N°IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić* Appeal Judgement"), para. 63; *Prosecutor v. Tihomir Blaškić*, Case N°IT-95-14-A, Decision on Evidence, 31 October 2003 ("*Blaškić* Decision of 31 October 2003"), p. 3; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case N°IT-98-34-A, Decision on Naletilić's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence, 7 July 2005, para. 12.

[18] Rule 115 (B) of the Rules.

[19] *Zoran Kupreškić* Appeal Judgement, para. 68; *Prosecutor v. Radislav Krstić*, Case N°IT-98-33-A, Decision on Application for Admission of Additional Evidence on Appeal, 5 August 2003 ("*Krstić* Decision of 5 August 2003"), p. 3; *Blaškić* Decision of 31 October 2003, p. 3.

[20] Decision of 23 February 2006, para. 8.

[21] *Juvénal Kajelijeli v. The Prosecutor*, Case N°ICTR-98-44A-A, Decision on Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 28 October 2004 ("*Kajelijeli* Decision of 28 October 2004"), para. 11; *Ntagerura et al*. Decision of 10 December 2004, para. 11. *See* also *Prosecution v. Rasim Delić*, Case N°IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002, para. 18; *Prosecution v. Radislav Krstić*, Case

7. The Appeals Chamber recalls that, whether the additional evidence was or was not available at trial, the additional evidence must always be assessed in the context of the evidence presented at trial, and not in isolation.[22]

The Motion Giving Notice of Delay

8. As a preliminary matter, the Appeals Chamber turns to the Motion Giving Notice of Delay. The Appellant states that he wishes to notify the Pre-Appeal Judge of the necessity of delaying his motion for additional evidence relating to Alison Des Forges and the reasons for this delay.[23] He thereby requests that, in considering the admissibility of his future Motion for Additional Evidence, the Appeals Chamber recognizes the efforts he made to obtain the additional evidence.[24]

9. As recalled above, the time-limit for the filing of a motion to admit additional evidence is thirty days from the date for filing of the brief in reply, unless good cause is shown for delay.[25] The Appeals Chamber understands that through the Motion Giving Notice of Delay, the Appellant seeks to show good cause for the delayed filing of his First Rule 115 Motion. The Appeals Chamber notes that where arguments are made demonstrating good cause for a late filing after the filing deadline has passed, as a matter of practice, that showing is normally made as part of the Rule 115 motion itself with a request that the motion be recognized as validly filed. Thus, the Appeals Chamber will consider the arguments contained in the Motion Giving Notice of Delay when disposing of the Appellant's submissions concerning good cause for the late filing of his First Rule 115 Motion as follows.

The First Rule 115 Motion

A. Submissions of the Parties

10. In the First Rule 115 Motion, the Appellant requests the admission of twelve documents as additional evidence on appeal,[26] which, he claims, show that Alison Des Forges, by instigating a civil suit in the New York District Court, "actively pursued the Appellant […] to neutralize him and undermine the efforts of the Rwandan Interim Government to get support from the United Nations".[27] In addition, the Appellant argues, Alison Des Forges did not disclose her role in the civil suit until her cross-examination in the *Zigiranyirazo* case in March 2006, and the Prosecution, although aware of

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N°IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para. 16; *Krstić* Decision of 5 August 2003, p. 4; *Blaškić* Decision of 31 October 2003, p. 3.

[22] *Kajelijeli* Decision of 28 October 2004, para. 12; *Ntagerura et al*. Decision of 10 December 2004, para. 12. See also *Blaškić* Decision of 31 October 2003, p. 3; *Momir Nikolić v. Prosecutor*, Case N°IT-02-60/1-A, *Confidential* Decision on Motion to Admit Additional Evidence, 9 December 2004, para. 25.

[23] Motion Giving Notice of Delay, para. 2.

[24] *Ibid*., para. 9.

[25] The Appeals Chamber notes that, under the provision applicable at the time of the filing of the Motion Giving Notice of Delay, the deadline was set to seventy-five days after the trial judgement.

[26] Statement of Alison Des Forges relating to the Civil Suit against the Appellant lodged in the New York District Court, and the Appellant's letter to the Judge Ceda Baum [presiding over the case] (Annex 1); Extract of the Prosecution's closing arguments on Civil Suits against the Appellant (Annex 2); Extract of the transcript of the cross-examination of Alison Des Forges on 14 June 2004 in the case *Prosecutor v. Casimir Bizimungu et al*. Case N°ICTR-99-50-T (Annex 3); Extract of the transcript of the cross-examination of Alison Des Forges on 1 March 2006 in the case *Prosecutor v. Protais Zigiranyirazo*, Case N°ICTR-01-73-T (Annex 4); Prosecution's Response to the Appellant's request for disclosure of the case file of the Civil Suit in the New York District Court, dated 22 March 2006 (Annex 5); Letter from the Appellant to the US Ambassador in Cameroon dated 12 April 1996 (Annex 6); five documents related to the activities of the Rwandan Interim Government with regard to the United Nations, taken from a publication "The United Nations and Rwanda 1993 to 1996" (Annexes 7 through 11); and a number of transcripts of interviews with the foreign minister of the Interim Government, Jerome Bicamumpaka in 1994 taken from the BBC summary of world broadcasts (Annex 12).

[27] First Rule 115 Motion, para. 16.

these facts, did not disclose them to the Appellant.[28] Moreover, documents in Annexes 7 through 11, the Appellant contends, "refute the propaganda disseminated by Alison Desforges [*sic*]"[29] about the intentions of the Interim Government and show that her statement given to the New York District Court was false.[30]

11. The Appellant submits that the evidence only became available to him in June 2006, because the Prosecution did not disclose the information about Alison Des Forges' involvement in the New York civil suit.[31] The Appellant argues that he was not aware of this suit. He admits that he had received a document from the court in 1994, but was not sure whether it was genuine, because it was not served on him by officials.[32]

12. The Prosecution responds that the documents proffered by the Appellant as new evidence do not satisfy the criteria of admissibility under Rule 115 of the Rules.[33] The Prosecution argues that the Appellant was aware of the New York lawsuit, that he sent a letter to the judge who decided the matter, and that he referred to the lawsuit in his book "*Rwanda, le Sang Hutu est-il rouge?*". He was therefore in the position to look for the documents from this lawsuit and use them at his trial.[34] In addition, the Prosecution argues that Counsel for the Appellant was aware of Alison Des Forges' involvement in the civil suit and cross-examined her about it at trial.[35] Furthermore, the Prosecution submits that Alison Des Forges is neither biased against the Appellant, nor gave any inconsistent or misleading information about her involvement in the civil suit.[36] Regarding the documents related to the policy of the Interim Government in 1994, the Prosecution submits that they are neither new, nor could they have influenced the trial.[37]

13. In reply, the Appellant submits that the Response to the First Rule 115 Motion should be expunged from the record because it exceeds the page limit of ten pages.[38] Regarding the Prosecution's arguments, he submits that he only became aware of the importance of the documents after Alison Des Forges' testimony in the *Zigiranyirazo* case, and that they were therefore not available at trial.[39]

B. DISCUSSION

Preliminary Issues

14. At the outset, the Appeals Chamber notes that the Appellant filed the separate *Corrigendum* Motion to correct a clerical error in his Reply to the First Rule 115 Motion.[40] The Appeals Chamber recalls that

> "a party may, *without requesting leave* from the Appeals Chamber, file a *corrigendum* to their previously filed brief or motion whenever a minor or clerical error in said brief or motion is

[28] *Id*.
[29] *Ibid*., para. 17.
[30] *Ibid*., paras 32-43.
[31] *Ibid*., para. 19; Motion Giving Notice of Delay, paras 5-8.
[32] First Rule 115 Motion, para. 23.
[33] Response to the First Rule 115 Motion, para. 5.
[34] *Ibid*., paras. 7-8.
[35] *Ibid*., para. 9.
[36] *Ibid*., paras. 13-20.
[37] *Ibid*., paras. 21-25.
[38] Reply to the First Rule 115 Motion, paras. 2-3.
[39] *Ibid*., para. 7.
[40] Corrigendum Motion, para. 1.

subsequently discovered and where correction of the error is necessary in order to provide clarification".[41]

Although it was unnecessary for the Appellant to file a motion to this extent, the Appeals Chamber finds that the submitted amendment indeed corrects an obvious clerical error and does not amount to any substantial change of the Appellant's Reply to the First Rule 115 Motion. Therefore, the Appeals Chamber finds that the Appellant's Reply to the First Rule 115 Motion should be read in accordance with the amendments proposed by the *Corrigendum* Motion and allowed by the present decision.

15. Second, the Appellant takes issue with the length of the Prosecution's submission, which, in his view, "deliberately and manifestly" disregards a decision by the Pre-Appeal Judge denying a request for an extension of the page limits for the Prosecution's response to the Appellant's First Rule 115 Motion.[42] The Appeals Chamber notes that, in response to the Appellant's request for an extension of page limits for its First Rule 115 Motion, the Prosecution requested a reciprocal extension for its response. The Pre-Appeal Judge denied the Prosecution's request because she considered the request for an extension of the page limit for a potential response to a motion that had not yet been filed to be unsubstantiated and premature.[43] This decision did not prevent the Prosecution from requesting an extension once the actual motion had been filed, which it did in its Response to the First Rule 115 Motion.[44] Considering the length of the First Rule 115 Motion and the number and size of the documents proffered as additional evidence, the Appeals Chamber finds that the Prosecution has shown good cause for the filing exceeding the regular page limit, and accepts the Response to the First Rule 115 Motion as validly filed.

Late Filing of the First Rule 115 Motion

16. With respect to the Appellant's First Rule 115 Motion, the deadline for the filing of motions under Rule 115 of the Rules expired on 11 January 2006. Any Rule 115 motions filed by the Appellant at the present stage of the proceedings are therefore admissible only if the Appellant shows good cause for the late filing.[45] The Appeals Chamber recalls that

> "the good cause requirement obliges the moving party to demonstrate that it was not able to comply with the time limit set out in the Rule, and that it submitted the motion in question as soon as possible after it became aware of the existence of the evidence sought to be admitted".[46]

17. The Appeals Chamber notes that most of the documents proffered by the Appellant as additional evidence are more than one year old, the majority of them even dating back to the 1990s. The only argument advanced by the Appellant as explanation for the late filing of these documents is that he became aware of Alison Des Forges' involvement in the New York civil suit only in March 2006.[47]

18. However, the Appeals Chamber finds that the Appellant knew as soon as 1994 that a civil action had been brought against him in New York. In his letter to Judge Ceda Baum of the New York

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[41] Decision on the Appellant Jean-Bosco Barayagwiza's Corrigendum Motions of 5 July 2006, 30 October 2006, p. 2, quoting *Prosecutor v. Željko Mejakić et al.*, Case N°IT-02-65-AR11*bis*.1, Decision on Joint Defense Motion for Enlargement of Time to File Appellants' Brief, 30 August 2005, p. 3.
[42] Reply to the First Rule 115 Motion, para. 3.
[43] Decision of 26 May 2006, p. 4.
[44] Response to the First Rule 115 Motion, paras. 3, 32.
[45] Rule 115 (A) of the Rules.
[46] *Prosecutor v. Dario Kordić and Mario Čerkez*, Case N°IT-95-14/2-A, Decision on Prosecution's Motion to Admit Additional Evidence in Relation to Dario Kordić and Mario Čerkez, 17 December 2004, p. 2; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case N°IT-98-34-A, Decision on Naletilić's Motion for Leave to File His Second Rule 115 Motion to Present Additional Evidence Pursuant to Rule 115, 27 January 2005, p. 3.
[47] First Rule 115 Motion, para. 21; Motion Giving Notice of Delay, paras 5-8.

District Court, he wrote that he had received a document containing a complaint against him, and asked the Judge to dismiss the claim stating

> "I am persecuted by a so-called human rights organisation which is in fact, an organisation committed to RPF criminal ambitions".[48]

This shows that the Appellant was not only aware of the lawsuit but also attributed it to a political campaign against him orchestrated by a human rights organization.[49] During trial, Counsel for the Appellant cross-examined Alison Des Forges about her involvement in the lawsuit:

> Q :You did not meet Barayagwiza, but that did not stop you from testifying against him in the United States?
>
> A: I did not testify in any trial against Mr. Barayagwiza. I contributed documentation and witness testimonies to a civil proceeding which was heard without contest, and because there was no contest there was no trial.[50]

Even assuming *arguendo* that the Appellant was not aware of the extent of Alison Des Forges' involvement in this lawsuit, he had sufficient information to show that she was involved in one way or the other in the lawsuit, which he had already in 1994 characterized as a political campaign against him. Given that the relevant documents were all readily accessible, nothing prevented the Appellant from presenting them within the time limit of Rule 115 of the Rules.

19. The extract of the transcript of the *Zigiranyirazo* case dated 1 March 2006 is the only document proffered as additional evidence in the First Rule 115 Motion, which recently became available to the Appellant. However, the Appeals Chamber observes that the Appellant did not submit the relevant parts of this transcript with his First Rule 115 Motion.[51] Furthermore, the Appeals Chamber finds that this document does not reveal any information about the role of Alison Des Forges which would have been new to the Appellant. During her cross-examination in the *Zigiranyirazo* case, with respect to the New York civil suit, she explained that she had "played part in initiating this suit and bringing it to court" by "providing contextual information for the lawyers who prepared the suit in conjunction for the Rwandan plaintiffs"[52]. This is consistent with her testimony in the present case that she contributed documentation to a civil proceeding against the Appellant.[53] In this context, the Appeals Chamber observes that nothing in the documents proffered by the Appellant supports his assertion that Alison Des Forges was the "driving force"[54] behind the civil suit. Considering that the other documents were earlier available to the Appellant and that the extract of Alison Des Forges' testimony in the *Zigiranyirazo* case presented no new information to the Appellant, the Appeals Chamber finds that it does not justify the late filing of the First Rule 115 Motion. In any case, the extract itself became available to the Appellant soon after the hearing in March 2006, because it was this transcript which occasioned his letter to the Prosecution of 12 March 2006,[55] and the Appellant has not shown good cause for seeking admission of this document as additional evidence more than four months after it became available to him.

20. In light of the above, the Appeals Chamber concludes that the Appellant has not shown good cause for the late filing of any of the documents proffered as additional evidence. The Appeals

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[48] First Rule 115 Motion, Annex 1, "Appellant's Letter to Judge Ceda Baum".
[49] In addition, the documents submitted by the Appellant show that the complaint was served a second time upon the Appellant in Zaire in January 1995: Motion Giving Notice of Further Delay, Annex "U.S. District Court Southern District of New York (Foley Square), Civil Docket for Case#: 1-94-cv-03627-JSM", p. 2.
[50] T. 29 May 2002, p. 217.
[51] According to the list of documents attached to the motion, the extract should comprise pages 30-68 of the trial transcript. The actual extract submitted to the Appeals Chamber (Annex 4) comprises only pages 50-54.
[52] *Prosecutor v. Protais Zigiranyirazo*, Case N°ICTR-01-73-T, T. 1 March 2006, p. 38.
[53] T. 29 May 2002, p. 217.
[54] Reply to the First Rule 115 Motion, para. 17.
[55] Motion Giving Notice of Further Delay, para. 2.

Chamber thus finds no need to consider the merits of the First Rule 115 Motion[56] and dismisses it in its entirety.

The Second Rule 115 Motion

A. Submissions of the Parties

21. In the Second Rule 115 Motion, the Appellant submits three documents which show, in his view, that the Trial Chamber erred in finding that he was President of the CDR at the national level.[57] The three documents are two messages by David Rawson, U.S. Ambassador to Rwanda in 1994,[58] and a letter from the CDR, signed by Théoneste Nahimana, the then first Vice-President of the CDR.[59] In the two messages from Ambassador Rawson, the Appellant is referred to as "CDR counselor" or "CDR deputy-designate", respectively. This shows, the Appellant argues, that someone as well-informed as the U.S. Ambassador did not consider the Appellant to be the CDR President.[60] Regarding the letter signed by Théoneste Nahimana, the Appellant argues that its content was so important that it would have been signed by the President of the CDR. The fact that it was not signed by the Appellant therefore shows, in the Appellant's view, that he did not occupy this position.[61]

22. Prosecution responds that the Appellant overstates the importance of the Trial Chamber's finding about his position in the CDR.[62] Regarding the documents proffered by the Appellant, the Prosecution argues that the Appellant has not demonstrated that the evidence was unavailable at trial in any form and could not have been discovered through the exercise of due diligence.[63] In fact, the Prosecution submits, the Appellant abuses the procedure provided by Rule 115 of the Rules to remedy the consequences of his tactics at trial and failings in this appeal.[64] The Prosecution argues that all the documents were available much earlier than July 2006 and that the Appellant accordingly has not shown good cause for the late filing of the motion. In addition, the Prosecution maintains that none of the documents *could* or *would* have been a decisive factor at trial.[65]

23. The Appellant replies that Defence Counsel imposed on him at trial was incompetent and grossly negligent and, as a result, he was not adequately represented. Therefore, he argues, even evidence which was available at trial, but was not properly used by his Counsel, should be considered as "new".[66]

B. Discussion

24. As with the First Rule 115 Motion, the Second Rule 115 Motion was filed eight months after the expiry of the time period stipulated under Rule 115 (A) of the Rules. The Appellant submits that the documents proffered as additional evidence were obtained by him during the month of July 2006, when he received an electronic file called "Alchemy" from the "National Archive", a non-governmental research institute based in the United States which "collects and publishes declassified documents obtained through the Freedom of Information Act".[67] The Appeals Chamber is therefore satisfied that there is good cause justifying the late filing of the Second Rule 115 Motion.

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[56] *Cf.* Decision of 5 May 2006, para. 27.
[57] Second Rule 115 Motion, paras 2-3.
[58] *Ibid.*, paras 8-11 and 15.
[59] *Ibid.*, paras 12-14.
[60] *Ibid.*, para. 11.
[61] *Ibid.*, para. 13.
[62] Response to the Second Rule 115 Motion, para. 3.
[63] *Ibid.*, para. 7.
[64] *Ibid.*, paras. 4-6.
[65] *Ibid.*, paras 18-23.
[66] Reply to the Second Rule 115 Motion, para. 7.
[67] Second Rule 115 Motion, para. 8.

25. With respect to availability of the proffered evidence at trial, the Appeals Chamber is not satisfied that the Appellant was unable to obtain it in spite of the exercise of due diligence. As, the Prosecution points out, the declassifying process of U.S. documents started in 1998 and many unclassified documents were accessible on the National Security Archive webpage in 2001.[68] The Appeals Chamber finds that the Appellant's reply to this argument, that the Prosecution failed to prove that the documents were declassified before his trial,[69] is misguided; it is for the Appellant to show that the documents were available to him only recently. On the contrary, the Appellant's own arguments seem to suggest that the documents were accessible earlier than 2003: the compilation of documents which the Appellant received is the result of research carried out between 1994 and 2003.[70]

26. In addition, the Appeals Chamber notes that both messages in their relevant parts refer to conversations between the Appellant and Ambassador Rawson.[71] The Appellant was therefore aware that these conversations had taken place. The point the Appellant wishes to make by proffering the messages is that the U.S. Ambassador

> "who was monitoring closely the political events in Rwanda, would have been among the first diplomats to be informed"

about the Appellant's eventual appointment as CDR President and would have referred to him as such in his messages.[72] The Appellant's role in the CDR was clearly an issue at trial.[73] Given the Appellant's contacts with Ambassador Rawson, the Appellant could have attempted to contact Ambassador Rawson, either to learn about his reports to the U.S. government in 1994 as a reliable and independent source of political information on Rwanda, or with the objective to adduce his live testimony about the Appellant's role in the CDR at trial.

27. Regarding the letter signed by Théoneste Nahimana, the Appellant's submissions show that he was aware of the existence of this letter at trial. The Appeals Chamber also notes that the report by Ambassador Rawson dated 28 March 1994 suggests that the Appellant was at least involved in the drafting of the letter signed by Théoneste Nahimana, as he was informed about his content before it was signed and took suggestions from Ambassador Rawson as to its content.[74] Furthermore, it was the Appellant himself who gave a copy of this letter to Ambassador Rawson in 1994.[75] The Appeals Chamber notes that a number of CDR documents were adduced at trial on behalf of the Appellant.[76] The Appellant has thus not shown that the letter was unavailable to him at trial or that he had made efforts to obtain a copy thereof in the exercise of due diligence.

28. In light of the above, while the Appeals Chamber finds that the proffered evidence is *prima facie* relevant and credible, it will admit it as additional evidence on appeal only if it concludes that its exclusion would result in a miscarriage of justice, *i.e.* it *would* have had an impact on the verdict if it had been adduced at trial. The Appeals Chamber notes that the Appellant only suggests the proffered

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[68] Response to the Second Rule 115 Motion, para. 10.
[69] Reply to the Second Rule 115 Motion, para. 6.
[70] Second Rule 115 Motion, para. 8, fn. 7, referring to a statement by the "National Archive".
[71] *Ibid*., Annex 1: "Message of the US Ambassador Rawson dated 31 March 1994", para. 2: "CDR Counselor, Jean Bosco Barayagwiza, telephoned ambassador about 10:30 PM [illegible word] of 3/30…"; Second Rule 115 Motion, Annex 3: "Message of the US Ambassador Rawson dated 28 March 1994", para. 14: "CDR Deputy-designate Jean-Bosco Barayagwiza called Ambassador morning 3/27…"
[72] Second Rule 115 Motion, para. 11.
[73] *Cf*. Trial Judgement, paras 258-277.
[74] Second Rule 115 Motion, Annex 3: "Message of the US Ambassador Rawson dated 28 March 1994", para. 15.
[75] *Ibid*., para. 15.
[76] Response to the Second Rule 115 Motion, para. 16, referring to Exhibits 2D12 to 2D34.

evidence *could* have been a decisive factor for the Trial Chamber's finding with respect to the Appellant's position in the CDR.[77]

29. Concerning the letter from the CDR Party to the Prime Minister, the Appellant argues that the letter was of such importance for the CDR that only the President could have signed it; thus, the Appellant claims, the fact that it was signed not by himself, but by Théoneste Nahimana, shows that he was not acting as the president.[78] However, the Appellant does not advance any support for his argument demonstrating why this letter should have been necessarily signed by the president. The Appeals Chamber recalls that Théoneste Nahimana was the first Vice-President of the CDR.[79] The Statute of the CDR, to which the Appellant refers, shows that the first Vice-President was the "first supplementary legal representative" ("*le premier Représentant Légal Suppléant*") of the CDR and was thus able to represent the party.[80] Considering the Trial Chamber's finding that the Appellant was seen as "working to some extent behind the scenes", the fact that the letter was signed by Théoneste Nahimana is not inconsistent with the Trial Chamber's conclusions. Therefore, the Appeals Chamber finds that this piece of evidence, had it been adduced at trial, would not have changed the verdict with regard to the Appellant's position.

30. As regards the messages sent by the U.S. Ambassador, Mr. David Rawson, the Appellant argues that these documents prove that he was not the CDR National President.[81] In light of the evidence adduced at trial, the Appeals Chamber is not satisfied that the Trial Chamber would have arrived at a different conclusion upon examination of the two messages in question. The Appellant has not shown that the Trial Chamber would necessarily opt for the evidence that he now proffers instead of the totality of the evidence that it chose to rely on to conclude that Barayagwiza held the position of a superior in the CDR including that, after the assassination of Bucyana in February 1994, Barayagwiza succeeded him as President of the CDR at the national level.[82]

31. The Appeals Chamber also rejects the Appellant's argument in relation to the incompetence of his counsel at trial.[83] While it is true that, where the failure resulted solely from counsel negligence or inadvertence, the Appeals Chamber can permit admission of additional evidence to remedy for such negligence or inadvertence, this would only be allowed if the proffered evidence is of such substantial importance to the success of the appeal such as its exclusion would lead to a miscarriage of justice.[84] In these exceptional cases, the Appeals Chamber has reasoned, the interests of justice require that an

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[77] Second Rule 115 Motion, paras 19, 23; see also para. 25: "The newly discovered evidence enhances the exculpatory value of the existing material and renders all the more obvious that the finding and the conviction against the Appellant, based on the fact that he succeeded Bucyana as the National President of CDR, are baseless and should be quashed."
[78] *Ibid*., para. 13.
[79] *Ibid*., para. 15.
[80] Article 19 of the CDR Statute, Second Rule 115 Motion, Annex 4 (1), "CDR Statute (Exhibit 2D9)", p. 29.
[81] Second Rule 115 Motion, paras 11 and 15.
[82] See, *inter alia* Trial Judgement, para. 258 referring to Exhibit 2D9; para. 260 referring to Alison Des Forges' testimony and Exhibit P141; para. 261 referring to the testimony of Alison Des Forges, Omar Serushago, Fançois-Xavier Nsanzuwera and Exhibits P142, P107/37; para. 263 referring to Witness B3; para. 264 referring to the testimony of Thomas Kamilindi, Alison Des Forges, Jean-Pierre Chrétien, Witness AHI, Witness EB, Witness AFX, Witness Omar Serushago; para. 266 referring to the testimony of Witness ABC, Witness LAG, Omar Serushago, Kamilindi, Kabanda and Alison Des Forges and that of Hassan Ngeze; para. 267 referring to Exhibit 2D35 (the book written by the Appellant "*Le Sang Hutu est-il rouge?*"; and paras 273, 276, 977.
[83] Second Rule 115 Motion, para. 16.
[84] See, by analogy, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief, 17 August 2006, para. 12; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case N°IT-02-60-A, Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief, 26 June 2006, para. 9; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case N°IT-02-60-A, Decision on Motions Related to the Pleadings in Dragan Jokić's Appeal, 24 November 2005, para. 8; *Blagojević* Decision of 14 October 2005, para. 8; *Prosecutor v. Dario Kordić and Mario Čerkez,* Case N°IT-95-14/2-A, Decision Granting Leave to Dario Kordić to Amend His Grounds of Appeal, 9 May 2002, para. 5.

appellant not be held responsible for the failures of counsel.[85] However, in light of the findings above, the Appeals Chamber is not satisfied that non-admission of the proffered evidence would amount to a miscarriage of justice.

32. Finally, with respect to the Appellant's arguments concerning the "already existing exculpatory material erroneously not taken into account by the [T]rial Chamber",[86] the Appeals Chamber notes that these arguments relate to specific grounds of appeal raised by the Appellant against the Trial Judgement and that they will be appropriately addressed by the Appeals Chamber in rendering its appeals judgement on the Appellant's main appeal.[87] Therefore, the Appeals Chamber will not dispose of them in the present decision.

33. In addition to his request for admission of additional evidence, the Appellant argues that the Prosecution failed to disclose the letter signed by Théoneste Nahimana to him under its obligations pursuant to Rule 68 (A) of the Rules and that this failure

> "should be considered as an abuse of process and a serious obstruction to a fair trial which deserves a sanction".[88]

The Appeals Chamber first observes

> "that the Prosecution may be relieved of its Rule 68 obligation if the existence of the relevant exculpatory material is known to the Defence and if it is reasonably accessible through the exercise of due diligence".[89]

As noted above, the document was known to the Appellant, and he has not demonstrated that the document was not reasonably accessible to him.

34. Second, the Appeals Chamber recalls that

> "material will fall within the ambit of Rule 68 if it tends to suggest the innocence or mitigate the guilt of the accused, or affects the credibility of Prosecution evidence".[90]

The determination of what material meets Rule 68 disclosure requirements is primarily a fact-based judgement made by and under the responsibility of the Prosecution.[91] Therefore, as noted previously, the Appeals Chamber will not intervene in the exercise of the Prosecution's discretion,

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[85] Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief, 17 August 2006, para. 12.
[86] Second Rule 115 Motion, para. 24 referring to Exhibits 2D9, 2D12, P203, P140 and P103/190C.
[87] Appeals Brief, paras 181-193 (Grounds 18-21).
[88] Second Rule 115 Motion, para. 14.
[89] *Prosecutor v. Edouard Karemera et al.*, Case N°ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, para. 15; *Prosecutor v. Tihomir Blaškic*, Case N°IT-95-14-A, Appeal Judgement, 29 July 2004 ("*Blaškić* Appeals Judgement"), para. 296.
[90] *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeal Judgement, 19 April 2004, para. 178.
[91] Decision on Appellant Jean-Bosco Barayagwiza's Motion Requesting that the Prosecution Disclosure of the Interview of Michel Bagaragaza Be Expunged from the Record, 30 October 2006, ("*Barayagwiza* Decision on Disclosure") para. 6; *Prosecutor v. Edouard Karemera et al.*, Case N°ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 16; *Prosecutor v. Radoslav Brđanin,* Case N°IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004 ("*Brđanin* 7 December 2004 Decision"), p. 3; *Blaškić* Appeals Judgement, para. 264; *Prosecutor v. Tihomir Blaškić,* Case N°IT-95-14-A, Decision on Prosecution's Application to Seek Guidance from the Appeals Chamber regarding Redaction of the Statement of "Witness Two" for the purposes of Disclosure to Dario Kordić under Rule 68, 4 March 2004, ("*Blaškić* 4 March 2004 Decision"), para. 44; *Prosecutor v. Tihomir Blaškić,* Case N°IT-95-14-A, [confidential] Decision on Prosecution's Application to Seek Guidance from the Appeals Chamber regarding Redaction of the Statement of "Witness Two" for the purposes of Disclosure to Paško Ljubičić under Rule 68, 30 March 2004 ("*Blaškić* 30 March 2004 Decision"), paras 31-32; *Prosecutor v. Tihomir Blaškić,* Case N°IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000 ("*Blaškić* 26 September 2000 Decision"), paras 38, 45.

unless it is shown that the Prosecution abused it and, where there is no evidence to the contrary, will assume that the Prosecution is acting in good faith.[92] In this respect, the Appeals Chamber notes that, if an appellant wishes to show that the Prosecution is in breach of these obligations, he/she must identify specifically the materials sought, present a *prima facie* showing of its probable exculpatory nature, and prove the Prosecutor's custody or control of the materials requested.[93] Finally, even when the Defence satisfies the Chamber that the Prosecution has failed to comply with its Rule 68 obligations, the Chamber will still examine whether the Defence has actually been prejudiced by such failure before considering whether a remedy is appropriate.[94] The Appeals Chamber is neither satisfied that the document is of *prima facie* exculpatory nature, nor that the alleged Prosecution's failure to communicate it to the Appellant would have caused him any prejudice.[95]

35. For these reasons, the Appeals Chamber finds that the Appellant's argument that the Prosecution did not fulfil its obligations under Rule 68 (A) of the Rules by not disclosing the letter, is unfounded.

The Third Rule 115 Motion

A. Submissions of the Parties

36. In the Third Rule 115 Motion, the Appellant submits another two messages from U.S. Ambassador Rawson, which he obtained from the same source as the two messages submitted in the Second Rule 115 Motion.[96] Both messages are dated 22 February 1994 and relate to a demonstration by CDR members outside the Ministry of Foreign Affairs in Kigali. The Appellant argues that both messages show that the testimony of Witness AGK at trial about the CDR demonstration is false and that, accordingly, the Trial Chamber's findings based on this evidence are unsafe.[97]

37. The Prosecution responds that the Appellant impermissibly tries to use the procedure of Rule 115 to remedy his failings at his trial and on appeal.[98] The Prosecution argues that the evidence proffered by the Appellant is not new and that he does not advance any argument that could constitute good cause for the late filing of the motion.[99] Finally, the Prosecution argues that the new evidence neither could nor would have been a decisive factor at trial.[100]

B. Discussion

38. As a preliminary matter, the Appeals Chamber observes that the Reply to the Third Rule 115 Motion was filed after the time-limit for its filing had expired. The Appeals Chamber notes the Appellant's explanation that he received the Prosecution's Response to the Third Rule 115 Motion only on 27 November 2006, and thus accepts it as validly filed.

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[92] *Barayagwiza* Decision on Disclosure, para. 6; *Prosecutor v. Miroslav Bralo*, Case N°IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006 ("*Bralo* Decision"), para. 31; *Brđanin* 7 December 2004 Decision, p. 3; *Prosecutor v. Miroslav Kvočka et al.*, Case N°IT-98-30/1-A, Decision, 22 March 2004, p. 3; *Georges Rutaganda v. Prosecutor*, Case N°ICTR-96-3-A, Decision on Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, 12 December 2002, pp 4-5; *Alfred Musema v. Prosecutor,* Case N°ICTR-96-13-A, Decision on the Appellant's Motions for the Production of Material, Suspension of Extension of the Briefing Schedule, and Additional Filings, 18 May 2001, p. 4; *Blaškić* 26 September 2000 Decision, para. 39.
[93] *Bralo* Decision, para. 31; *Kajelijeli* Appeal Judgement, para. 262; *Brđanin* 7 December 2004 Decision, p. 3.
[94] *Bralo* Decision, para. 31; *Kajelijeli* Appeal Judgement, para. 262; *Krstić* Appeal Judgement, para. 153.
[95] See also *supra* at para. 29.
[96] Third Rule 115 Motion, para. 1.
[97] *Ibid*., paras 6-16.
[98] Response to the Third Rule 115 Motion, paras. 4-7.
[99] *Ibid*., paras. 8-10.
[100] *Ibid*., paras. 19-22.

39. The Appeals Chamber notes that the Appellant claims to have obtained the two documents attached to the Third Rule 115 Motion from the same compilation of documents, the "National Archive", as the two messages from Ambassador Rawson submitted in the Second Rule 115 Motion.[101] Considering that the Appellant received the material in August 2006 only, the Appeals Chamber is satisfied that the Appellant has shown good cause for the late filing of the Third Rule 115 Motion.

40. The Appeals Chamber is also satisfied that the proffered evidence is *prima facie* relevant and credible. However, the Appeals Chamber finds that the Appellant has failed to show that the evidence was not available to him at his trial or could not be obtained through exercise of due diligence. The Appeals Chamber recalls that the party adducing additional evidence must establish that the said evidence was not available at trial *in any form whatsoever*.[102] As in the Second Rule 115 Motion, the Appellant again merely asserts that the documents "have been declassified only recently" without giving any further details about the declassification process or any earlier attempts to access the material.[103] As the Prosecution points out, unclassified U.S. documents were available during the Appellant's trial, and the possibility to access classified documents through a Freedom of Information Act application also existed.[104] Further, the Appellant has not shown that he tried to contact Ambassador Rawson to adduce his live testimony at trial. Finally, the Appeals Chamber notes that the Appellant acknowledges that other evidence concerning the date of the demonstration, the most important point of the documents proffered as additional evidence, was available to him.[105]

41. Accordingly, the two documents proffered would be admissible as additional evidence only if they *would* have affected the verdict. According to the Appellant, the two messages from Ambassador Rawson show that Witness AGK's testimony at trial about a CDR demonstration was unreliable, because there are significant contradictions between Witness AGK's testimony and the two messages. The main discrepancies noted by the Appellant are the date of the demonstration and the presence of UNAMIR soldiers.[106]

42. As a preliminary matter, the Appeals Chamber notes that the documents proffered as additional evidence are immaterial to a number of arguments raised by the Appellant, for example, the Trial Chamber's reference to the term "*tubatsembatsembe*" or internal inconsistencies of Witness AGK's testimony.[107] With regard to the date of the demonstration and the presence of UNAMIR soldiers, the Appeals Chamber finds that the Appellant does not show that Witness AGK's testimony and the two messages from Ambassador Rawson relate to the same event. Although the Appellant asserts that there is no evidence that there was more than one demonstration,[108] the very discrepancies noted by the Appellant would suggest that Witness AGK and Ambassador Rawson refer to two different events.

43. Further, the Appeals Chamber notes that the Trial Chamber was aware of the alleged discrepancies in Witness AGK's testimony. The witness was cross-examined about the date he gave for the demonstration (May 1993). Counsel in particular asked the witness whether the demonstration took place before or after the signing of the Arusha accords[109] and explained that the witness referred to the presence of UNAMIR soldiers, which would have been impossible in May 1993 because

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[101] Third Rule 115 Motion, para. 1. See *supra,* para. 24.
[102] Prosecutor v. Sylvestre Gacumbitsi, Case N°ICTR-2001-64-A, Decision on "Requête en extrême urgence aux fins d'admission de moyen de preuve supplementaire en appel", 9 February 2006, para. 6.
[103] Third Rule 115 Motion, para. 17. See *supra,* para 25.
[104] Response to the Third Rule 115 Motion, para. 10, referring to T. 8 July 2002, p. 42 and T. 9 July 2002, pp. 42-44, 69, 75.
[105] Reply to the Third Rule 115 Motion, para. 18, referring to Response to the Third Rule 115 Motion, para. 12. The evidence in question includes transcripts from Radio Rwanda broadcasts of 21 February 1994.
[106] Third Rule 115 Motion, para. 14.
[107] *Id.*
[108] Reply to the Third Rule 115 Motion, para. 20.
[109] T. 25 June 2001, pp. 28-29.

UNAMIR was deployed only after the signing of the Arusha accords.[110] Nevertheless, the Trial Chamber was satisfied that "May 1993 was [Witness AGK's] recollection of the date" and accepted his testimony.[111] Finally, the Appeals Chamber notes that Witness AGK's evidence about the demonstration was only one of several bases for the Trial Chamber's findings regarding the Appellant's role in the CDR.[112]

44. In light of the above, the Appeals Chamber finds that the documents proffered as additional evidence with the Third Rule 115 Motion would not have been a decisive factor in the Trial Chamber's decision. Accordingly, the Appeals Chamber dismisses the Third Rule 115 Motion it in its entirety.

Disposition

45. For the foregoing reasons, the Appeals Chamber GRANTS the *Corrigendum* Motion; DISMISSES the Motion Giving Notice of Delay; and DISMISSES the First Rule 115 Motion, the Second Rule 115 Motion and the Third Rule 115 Motion in their entirety.

Done in English and French, the English text being authoritative.

Dated this 8th day of December 2006.

At The Hague, The Netherlands.

[Signed] : Fausto Pocar

[110] *Ibid*., p. 30.
[111] Trial Judgement, para. 710.
[112] *Ibid*., paras 714-719.

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Decision on Jean-Bosco Barayagwiza's Motion for Clarification and Guidance Following the Decision of the Appeals Chamber Dated 16 June 2006 in Prosecutor v. Karemera et al. Case and Prosecutor's Motion to Object to the Late Filing of Jean-Bosco Barayagwiza's Reply
8 December 2006 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron

Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Edouard Karemera et al. Case – Request for reconsideration of a decision in one case filed by an appellant who is not party to that case must fail for lack of standing to seek such reconsideration, Judicially noticed facts in the Karemera Case, Ability of the Defence to challenge the existence of genocide, Judicial notice of facts of common knowledge does not shift the ultimate burden of persuasion which remains on the Prosecution, Introduction of a wholly new ground of appeal requests a good cause, "Good cause requirement" must be interpreted restrictively at late stages of appeal proceedings – Defence Motion denied – Prosecution Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 108

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Laurent Semanza, Judgement, 20 May 2005 (ICTR-97-20)N°Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief, 17 August 2006 (ICTR-99-52)N°Appeals Chamber, Aloys Ntabakuze v. The Prosecutor, Decision on Motion for Reconsideration, 4 October 2006 (ICTR-98-41)N°Appeals Chamber, Karemera et al. v. The Prosecutor, Decision on Motions for Reconsideration, 1 December 2006 (ICTR-98-44)

I.C.T.Y. : Appeals Chamber, Momir Nikolić v. The Prosecutor, Decision on Motion for Leave to Vary Notice of Appeal, 30 September 2004 (IT-02-60/1)N°Appeals Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Decision on Defence Motion for Extension of Time in Which to File the Defence Notice of Appeal, 15 February 2005 (IT-02-60) ; Appeals Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Decision on Dragan Jokić's Request to Amend Notice of Appeal, 14 October 2005 (IT-02-60) ; Appeals Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Decision on Motions Related to the Pleadings in Dragan Jokić's Appeal, 24 November 2005 (IT-02-60) ; Appeals Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief, 26 June 2006 (IT-02-60)

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of "The Appellant Jean-Bosco Barayagwiza's Urgent Motion for Clarification and Guidance Following the Decision of the

Appeals Chamber Date 16th June 2006 in *Prosecutor v Karemera et al*. [*sic*]" filed by Jean-Bosco Barayagwiza on 17 August 2006 ("Motion" and "Appellant", respectively). The Prosecution responded to the Motion on 24 August 2006 requesting the Appeals Chamber to dismiss it and impose sanctions.[1]

2. The Appellant filed his Reply out of time on 18 September 2006.[2] He requests the Appeals Chamber to accept the late Reply on the grounds that his "lead counsel was on holiday out of the jurisdiction between August 21st 2006 and September 7th 2006".[3] The Appellant further submits that, because of his limited communications with Lead Counsel during that period of time and in light of the fact that he "has been attempting since February 2006 to have [his] co-counsel's name removed from the record", he was "unable in the absence of lead counsel to file a reply any sooner".[4] By a motion filed on 20 September 2006, the Prosecution objects to the late filing of the Reply, arguing that "[t]he excuses given by Counsel for the late filing ought not be considered 'good cause' for the purposes of Rule 116" of the Rules of Procedure and Evidence of the Tribunal ("Rules").[5] In his Response, filed on 2 October 2006, the Appellant submits that the Prosecution's Motion "should be dismissed […] as being procedurally incorrect".[6]

3. With regard to the timeliness of the Appellant's Reply, the Appeals Chamber notes that this Reply should have been filed "within four days of the filing of the response" that is, no later than 28 August 2006.[7] Pursuant to Rule 116 of the Rules, the Appeals Chamber "may grant a motion to extend a time limit upon a showing of good cause". The Appeals Chamber recalls that Counsel, when accepting assignment as Lead Counsel in a case before the Tribunal, is under an obligation to give absolute priority to observe the time limits prescribed in the Rules.[8] In particular, the Appeals Chamber reiterates that the unavailability of Lead Counsel to perform his professional obligations due to his holiday schedule does not amount to good cause within the meaning of Rule 116 of the Rules.[9] Accordingly, the Appeals Chamber rejects the Appellant's request to accept the late Reply and will therefore not consider the submissions contained therein.

I. Procedural Background

[1] The Prosecutor's Response to the Appellant Jean-Bosco Barayagwiza's "Urgent Motion for Clarification and Guidance Following the Decision of the Appeals Chamber Date [*sic*] 16th June 2006 in *Prosecutor v. Karemera et al.*", 24 August 2006 ("Response"), paras 1, 14.
[2] The Appellant Jean-Bosco Barayagwiza's Reply to the Prosecution Response to the Appellant "Urgent Motion for Clarification and Guidance Following the Decision of the Appeals Chamber Dated 16 June 2006 in '*Prosecutor v. Karemera et al.*'", 18 September 2006 ("Reply").
[3] Reply, preliminary para.
[4] Reply, preliminary para.
[5] The Prosecutor's Motion to Object to the Late Filing of "The Appellant Jean-Bosco Barayagwiza's Reply to the Prosecution Response to the Appellant's Urgent Motion for Clarification and Guidance Following the Decision of the Appeals Chamber Dated 16 June 2006 in '*Prosecutor v. Karemera et al*'", 20 September 2006, ("Prosecution's Motion"), para. 3.
[6] The Appellant Jean-Bosco Barayagwiza's Response to the Prosecution Motion Calling for the Appellants Reply to the Prosecution Response Concerning the Karemera Decision to Be Expunged from the Record on Account of its Late Filing [*sic*], 2 October 2006 ("Appellant's Response"), para. 4.
[7] Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal of 16 September 2002, para. 12.
[8] Decision on Clarification of Time Limits and on Appellant Barayagwiza's Extremely Urgent Motion for Extension of Time to File his Notice of Appeal and his Appellant's Brief, 6 September 2005 ("Decision of 6 September 2005"), p. 5; Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006, para. 26; *Mikaeli Muhimana v. The Prosecutor*, Case N°ICTR-95-IB-A, Decision on Appellant's Motion for Extension of Time to File a Brief in Reply and Postponement of a Status Conference, 21 June 2006, p. 3; *Emmanuel Ndindabahizi v. The Prosecutor*, Case N°ICTR-0l-71-A, Decision on « *Requête Urgente aux Fins de Prorogation de Délai pour le Dépôt du mémoire en Appel* », 5 April 2005, p. 3.
[9] *See* Decision of 6 September 2005, p. 5.

4. Trial Chamber I rendered its Judgement in this case on 3 December 2003.[10] The Appellant filed a first notice of appeal on 22 April 2004,[11] which was amended on 27 April 2004.[12] His initial Appellant's brief was filed on 25 June 2004.[13] Pursuant to the decisions of 17 May 2005[14] and 6 September 2005,[15] the Appellant filed a revised Notice of Appeal and Appellant's Brief on 12 October 2005. The briefing with respect to the Appellant's appeal was completed on 12 December 2005.[16]

5. On 16 June 2006, the Appeals Chamber issued the Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice in the *Prosecutor v. Edouard Karemera et al.* case,[17] in which it directed the Trial Chamber in that case to take judicial notice, under Rule 94 (A) of the Rules, of the following facts:

> (i) The following state of affairs existed in Rwanda between 6 April 1994 to 17 July 1994: There were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed or caused serious bodily or mental harm to person[s] perceived to be Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity;[18]
>
> (ii) Between 1 January 1994 and 17 July 1994 in Rwanda there was an armed conflict not of an international character;[19]
>
> (iii) Between 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group.[20]

II. Submissions of the Parties

6. The Appellant submits that the *Karemera* Decision would have serious consequences for his appeal if it would no longer be necessary for the Prosecution to prove any of the judicially noticed facts.[21] He therefore seeks clarification as to whether the *Karemera* Decision is applicable to his case, arguing that such application might cause a miscarriage of justice, by preventing him from challenging the assertion that genocide occurred and from challenging the "logical implication of this supposed fact – *i.e.* that a conspiracy did indeed exist to exterminate the Tutsi".[22] The Appellant disputes the existence of genocide in Rwanda in 1994, contending that the conflict was political and that the killings were indiscriminate and politically, rather than racially or ethnically, motivated.[23] In this

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[10] *The Prosecutor v. Ferdinand Nahimana et al.,* Case N°ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("Trial Judgement").
[11] « Notice d'Appel (conformément aux dispositions de l'article 24 du Statut et de l'article 108 du Règlement) », 22 April 2004.
[12] « Acte d'appel modifié aux fins d'annulation du Jugement rendu le 3 décembre 2003 par la Chambre I dans l'affaire 'Le Procureur contre Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze, ICTR-99-52-T' », 27 April 2004.
[13] « Mémoire d'Appel », 25 June 2004.
[14] Decision on "Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", 17 May 2005 ("Decision of 17 May 2005").
[15] See Decision of 6 September 2005.
[16] The Appellant Jean-Bosco Barayagwiza's Reply to the Consolidated Respondent's Brief, 12 December 2005 ("Reply Brief").
[17] *The Prosecutor v. Edouard Karemera et al.*, Case N°ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ("*Karemera* Decision"), with reference to The Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (Rule 73 (c)), 12 December 2005, Annex A ("Annex A"). Requests for reconsideration of the *Karemera* Decision by the three appellants in that case were recently rejected by the Appeals Chamber. See *Karemera et al. v. The Prosecutor,* Case N°ICTR-98-44-AR73(C), Decision on Motions for Reconsideration, 1 December 2006 ("*Karemera* Decision of 1 December 2006").
[18] *Karemera* Decision, paras 26 and 57, referring to Annex A, para. 2.
[19] *Karemera* Decision, paras 26 and 57, referring to Annex A, para. 5.
[20] *Karemera* Decision, paras 33 and 57, referring to Annex A, para. 6.
[21] Motion, paras 5, 7.
[22] Motion, para. 12.
[23] Motion, para. 11.

regard, the Appellant seeks additional clarification as to whether the *Karemera* Decision, if applicable to his case, would prevent him from disputing that he was party to a plan to commit genocide through the means of the *Radio Television Libre des Mille Collines* ("RTLM") and the Coalition to Defend the Republic ("CDR").[24]

7. The Appellant further submits that the Appeals Chamber erred in holding in the *Karemera* Decision that there was no room for disagreement about the nature of the conflict in Rwanda in 1994.[25] He argues that judicial notice could not be taken of such disputed facts, but rather that the Tribunal would have to "hear evidence and argument from the parties and to make findings of fact accordingly".[26] Therefore, he claims that the *Karemera* Decision "must be reconsidered as a matter of urgency".[27]

8. Finally, should the Appeals Chamber find that the *Karemera* Decision is binding in his case, the Appellant seeks leave to vary the Notice of Appeal and to amend his Appeal Brief by adding "further grounds of appeal dealing specifically with the issues raised by the *Karemera* Decision".[28]

9. In its Response, the Prosecution requests the Appeals Chamber to dismiss the Motion in its entirety as misconceived and amounting to an abuse of the appeal process.[29] It submits that the clarification sought by the Appellant is not provided for in the Rules and that, in any event, such clarification is unnecessary in light of the Appeals Chamber's jurisprudence.[30] It argues further that, considering the Trial Chamber's specific findings on the occurrence of genocide in Rwanda, the judicial notice of this fact in the *Karemera* Decision is not relevant in the Appellant's case.[31] Moreover, the Prosecution submits that the Appellant has failed, in his Appeal Brief, to challenge the factual findings of the Trial Chamber that a genocide occurred in Rwanda[32] and that, in any event, these specific findings have no bearing on the Appellant's ability to dispute his conviction for conspiracy to commit genocide, as the actual occurrence of genocide is irrelevant to such a conviction.[33] Finally, the Prosecution concludes that the Appellant has failed to show that good cause exists to amend his Notice of Appeal or his Appeal Brief at such a late stage of the appeal proceeding.[34]

III. Analysis

10. In respect of the Appellant's submission that "the *Karemera* Decision must be reconsidered as a matter of urgency",[35] the Appeals Chamber recalls that a request for reconsideration of a decision in one case filed by an appellant who is not party to that case must fail for lack of standing to seek such reconsideration.[36] The Appeals Chamber will therefore not address the Appellant's arguments challenging the substance of the *Karemera* Decision.[37] The Appeals Chamber also declines to address whether the *Karemera* Decision is applicable to the Appellant's case since, for the reasons given below, his Motion fails in any event.

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[24] Motion, paras 14 and 28.
[25] Motion, paras 15-16.
[26] Motion, para. 18.
[27] Motion, para. 26.
[28] Motion, para. 24.
[29] Response, paras 1, 14.
[30] Response, paras 1-2.
[31] Response, paras 1, 3-4.
[32] Response, paras 1, 5.
[33] Response, paras 1, 9-10.
[34] Response, para. 13.
[35] Motion, para. 26.
[36] *Aloys Ntabakuze v. The Prosecutor*, Case N°ICTR-98-41-AR73, Decision on Motion for Reconsideration, 4 October 2006, paras 14-15.
[37] See, in particular, Motion, paras 18-23.

11. The Appellant argues that the *Karemera* Decision, if applicable to his case, would adversely affect his ability to challenge the existence of genocide,[38] which would impact upon his ability to dispute, on appeal, the finding that "he was party to a plan to commit genocide through the means of RTLM and the CDR".[39] The Appeals Chamber disagrees and stresses the need for a clear distinction between the issue of the existence of genocide in Rwanda in 1994, a fact judicially noticed by the Appeals Chamber in the *Karemera* Decision,[40] from the separate questions regarding the existence of a conspiracy to commit genocide between the three co-appellants in the present case, and the Appellant's participation in such a conspiracy. The Appeals Chamber finds that there is nothing in the Appellant's arguments to suggest that the judicially noticed facts in the *Karemera* Decision would prevent him either from challenging the existence of a conspiracy to commit genocide or from disputing his participation therein. The *Karemera* Decision is clear in that its direction to the Trial Chamber to take judicial notice of facts of common knowledge does not shift the ultimate burden of persuasion, which remains on the Prosecution,[41] with respect to the personal responsibility of each accused. It has been subsequently specified by the Appeals Chamber that with regard to the *Karemera* Decision, "taking of judicial notice of this fact does not imply the existence of a plan to commit genocide".[42] Therefore, the Appeals Chamber, noting that the Appellant indeed challenges the Trial Chamber's findings of conspiracy, both in his Notice of Appeal and in his Appeal Brief,[43] considers that he has failed to demonstrate how the *Karemera* Decision, if applicable to his case, could impact on his ability to dispute that "he was party to a plan to commit genocide".

12. Furthermore, the Appeals Chamber notes that in the present case the Trial Chamber made specific findings of fact with regard to the occurrence of genocide in Rwanda.[44] Should the Appellant therefore have wished to dispute in his appeal the Trial Chamber's finding that what occurred in Rwanda amounted to genocide, he could have done so in his Notice of Appeal and in his Appeal Brief, both of which were filed before the issuance of the *Karemera* Decision. The Appeals Chamber notes that contrary to the references given in his Motion,[45] the Appellant did not do so. In fact, in the invoked Ground 30 of his Notice of Appeal, developed in his Appeal Brief, the Appellant does not challenge the existence of genocide, but rather argues that the Trial Chamber erred in concluding from the evidence before it that a conspiracy to commit genocide existed and disputes *his* involvement therein. The Appeals Chamber, finding that the Appellant has failed to raise on appeal any argument challenging the occurrence of genocide, considers therefore that he has not shown how the judicially noticed facts in the *Karemera* Decision, if applicable to his case, could adversely affect his appeal. His request for clarification in this regard is therefore denied as unfounded.

13. Turning to the Appellant's request for variance of the Notice of Appeal and Appeal Brief, the Appeals Chamber considers that the Appellant, through his present Motion, in fact seeks to introduce a wholly new ground of appeal. Pursuant to Rule 108 of the Rules, the Appeals Chamber "may, on good cause being shown by motion, authorize a variation of the grounds of appeal" contained in the Notice of Appeal. The Appeals Chamber recalls its Decision of 17 August 2006, in which it outlined its jurisprudence concerning variation of grounds of appeal under Rule 108 of the Rules.[46] In particular,

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[38] Motion, para. 12.
[39] Motion, paras 14 and 28.
[40] *Karemera* Decision, para. 35.
[41] *Karemera* Decision, paras 30 and 42; see also *Prosecutor v. Semanza*, Case N°ICTR-97-20-A, Judgement, 20 May 2005, para. 192.
[42] *Karemera* Decision of 1 December 2006, para. 21.
[43] Notice of Appeal, Ground 30 and Appeal Brief paras 243-249.
[44] Trial Judgement, para. 121: "Following the shooting of the plane and the death of President Habyarimana on 6 April 1994, widespread and systematic killing of Tutsi civilians, *a genocide*, in Rwanda commenced" (emphasis added).
[45] Motion, fn. 3, referring to Ground 30 of his Notice of Appeal and his Appeal Brief, paras 243-249.
[46] Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief, 17 August 2006 ("Decision of 17 August 2006"), paras 9-14, referring, in particular, to *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case N°IT-02-60-A, Decision on Motion of

the Appeals Chamber recalls that the concept of "good cause" under this provision encompasses both good reason for including the new or amended grounds of appeal and good reason showing why these grounds were not included (or were not correctly phrased) in the original notice of appeal.[47] The Appeals Chamber held specifically that the "good cause requirement" must be interpreted restrictively at late stages of appeal proceedings when amendments would necessitate a substantial slowdown in the progress of the appeal.[48] To hold otherwise, would leave appellants free to change their appeal strategy and essentially restart the appeal process at will, interfering with the expeditious administration of justice and prejudicing the other parties to the case.[49]

14. In the present case, the Appellant claims that

> "[t]he issues raised by the *Karemera* Decision could not have been anticipated by the Defence when the Notice of Appeal and Appeal Brief were filed".[50]

As noted above,[51] the judicially noticed facts within the *Karemera* Decision now challenged by the Appellant relate to the same issues specifically considered by the Trial Chamber and contained in its findings.[52] The Appellant has not demonstrated any justification for failing to challenge the Trial Chamber's findings on the existence of genocide in Rwanda in his Notice of Appeal. Moreover, the Appeals Chamber finds that the Appellant has not formulated any specific wording for the grounds he wishes to add in his Notice of Appeal,[53] but merely seeks to amend his Appeal Brief "by the addition of further grounds of appeal dealing specifically with the issues raised by the *Karemera* Decision".[54] Pursuant to Rule 108 of the Rules, read in conjunction with paragraphs 2 and 3 of the Practice Direction on Formal Requirements for Appeals from Judgement,[55] a request to amend a notice of appeal must, at least, explain precisely what amendments are sought and why, with respect to each such amendment, the "good cause" requirement of Rule 108 of the Rules is satisfied.[56] The generic submissions of the Appellant fall well short of satisfying this requirement. Therefore, the request for leave to vary the Notice of Appeal and to amend the Appeal Brief is denied as unfounded.

IV. Disposition

15. For the foregoing reasons, the Appeals Chamber DISMISSES the Motion and GRANTS the Prosecution's Motion.

Done in English and French, the English text being authoritative.

Dated this 8th day of December 2006.

Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief, 26 June 2006 ("*Blagojević* Decision of 26 June 2006"), para. 7; See also, *e.g.*, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case N°IT-02-60-A, Decision on Motions Related to the Pleadings in Dragan Jokić's Appeal, 24 November 2005 ("*Blagojević* Decision of 24 November 2005"), para. 10; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case N°IT-02-60-A, Decision on Defence Motion for Extension of Time in Which to File the Defence Notice of Appeal, 15 February 2005 ("*Blagojević* Decision on Defence Motion for Extension of Time"), pp. 2-3.

[47] Decision of 17 August 2006, para. 10; See also, *e.g.*, *Blagojević* Decision of 26 June 2006, para. 7; *Blagojević* Decision of 24 November 2005, paras 7-8; *Blagojević* Decision on Defence Motion for Extension of Time, pp. 2-3.

[48] Decision of 17 August 2006, para. 11, referring to *Blagojević* Decision of 26 June 2006, para. 8.

[49] Id.

[50] Motion, para. 26.

[51] See *supra* para. 13.

[52] Trial Judgement, para.121.

[53] *Momir Nikolić v. The Prosecutor,* Case N°IT-02-60/1-A, Decision on Motion for Leave to Vary Notice of Appeal, 30 September 2004, p. 4.

[54] Motion, para. 24.

[55] Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005.

[56] *The Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case N°IT-02-60-A, Decision on Dragan Jokić's Request to Amend Notice of Appeal, 14 October 2005, pp 3-4.

At The Hague, The Netherlands.

[Signed]: Fausto Pocar

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Decision on Hassan Ngeze's Request for a Status Conference 13 December 2006 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Andrésia Vaz, Pre-Appeal Judge

Hassan Ngeze – Request for a Status Conference, Request without giving the Prosecution the opportunity to respond to it because no prejudice will be caused to the Prosecution, Medical officer of the UNDF responsible for the physical and mental health of the detainees, Complaint relating to the conditions of Detention to the Commanding Officer, No demonstration by the Appelant that he followed the procedure – Appointment and/or withdrawal of members of a Defence team are within the primary competence of the Registrar of the Tribunal, Jurisdiction of the Appeals Chamber to intervene in matters concerning counsel

International Instruments cited :

Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, Rules 28, 31, 32, 82 ans 83 ; Rules of Procedure and Evidence, rules 65 bis (A) and 65 bis (B)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Hassan Ngeze, Decision on "Appellant Hassan Ngeze's Motion for Leave to Permit his Defence Counsel to Communicate with him during Afternoon Friday, Saturday, Sunday and Public Holidays", 25 April 2005 (ICTR-97-27) ; Appeals Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, 3 May 2005 (ICTR-99-52) ; Appeals Chamber, Ferdinand Nahimana et al. v. The Prosecutor, Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005 (ICTR-99-52) ; Appeals Chamber, Ferdinand Nahimana et al. v. The Prosecutor, Corrigendum to the Order of the Presiding Judge Designating the Pre-Appeal Judge, 25 August 2005 (ICTR-99-52) ; Appeals Chamber, The Prosecutor v. Hassan Ngeze, Decision on Hassan Ngeze's Motion for a Psychological Examination, 6 December 2005 (ICTR-97-27) ; Appeals Chamber, The Prosecutor v. Hassan Ngeze, Decision on Hassan Ngeze's Motion to Set Aside President Møse's Decision and Request to Consummate his Marriage, 6 December 2005 (ICTR-97-27) ; Appeals Chamber, The Prosecutor v. Hassan Ngeze, Decision on Hassan Ngeze's Request for a Status Conference, 13 December 2005 (ICTR-97-27) ; Appeals Chamber, Sylvestre Gacumbitsi v. The Prosecutor, Decision on the Appellant's Motion of 8 December 2005, 16 December 2005 (ICTR-01-64) ; Pre-Appeal Judge, The Prosecutor v. Hassan Ngeze, Decision on Hassan Ngeze's Motions Concerning Restrictive Measures of Detention, 20 September 2006 (ICTR-99-52) ; Appeals Chamber, The Prosecutor v. Jean-Bosco Barayagwiza et al., Decision on the Prosecutor's Motion to Be Relieved from Filing the Appeal Book and Book of Authorities, 27 November 2006 (ICTR-99-52)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Milan Milutinović et al., Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003 (IT-05-87)

I, ANDRÉSIA VAZ, Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) and Pre-Appeal Judge in this case,[1]

BEING SEIZED OF the "Appellant Hassan Ngeze's Request of an Extremely Urgent Status Conference Pursuant to Rule 65 *bis* (B) of the Rules of Procedure and Evidence" filed on 6 December 2006 ("Appellant" and "Request", respectively), in which the Appellant requests the Appeals Chamber to convene a status conference on 13 December 2006, or any other date, in order to enable him to address

> "his personal problems (including his deteriorating mental and physical condition) and the absence of Co-counsel Behram Shroff who has recently resigned from the defence team on account of illness";[2]

NOTING that the Prosecution has not yet filed a response to the Appellant's Request;

CONSIDERING, however, that, in view of its nature, this Request may be disposed of without giving the Prosecution the opportunity to respond to it, especially because no prejudice will be caused to the Prosecution;[3]

RECALLING that, pursuant to Rule 65 *bis* (A) of the Tribunal's Rules of Procedure and Evidence ("Rules"), the purpose of a status conference is "to organise exchanges between the parties so as to ensure expeditious trial proceedings";

CONSIDERING that, pursuant to Rules 28 and 31 of the Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal[4] ("Detention Rules"), the medical officer is responsible for the physical and mental health of the detainees and the administration of any treatment or medication to them;

NOTING that Rule 32 of the Detention Rules prescribes the procedure to be followed in cases where the medical officer

> "considers that the physical or mental health of a detainee has been or will be adversely affected by any condition of his detention";

NOTING that, according to Rules 82 and 83 of the Detention Rules, where a detainee is not satisfied with the conditions of his or her detention, he or she is entitled to "make a complaint to the Commanding Officer or his representative at any time" and, in case of an unsatisfactory response, to "make a written complaint, without censorship, to the Registrar, who shall forward it to the President";

CONSIDERING that the Appellant does not specify whether he has followed this procedure or why it was impossible for him to comply with it before seizing the Pre-Appeal Judge with a request to hold a status conference to address these issues;

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[1] Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005; Corrigendum to the Order of the Presiding Judge Designating the Pre-Appeal Judge, 25 August 2005.
[2] Request, p. 2.
[3] See Decision on the Prosecutor's Motion to Be Relieved from Filing the Appeal Book and Books of Authorities, 27 November 2006, p. 2; *Sylvestre Gacumbitsi v. The Prosecutor*, Case N°ICTR-01-64-A, Decision on the Appellant's Motion of 8 December 2005, 16 December 2005, para. 2.
[4] Adopted on 5 June 1998.

FINDING therefore that the Appellant has not exhausted the remedies available to him under the Detention Rules;[5]

CONSIDERING also that the Appellant does not explain how the alleged physical and psychological problems he faces affect the preparation of his appeal and has thus not demonstrated any threat to the fairness and expeditiousness of the proceedings on appeal;[6]

NOTING further that the Appellant wishes to address the absence of his Co-Counsel who, according to him, resigned due to illness;

NOTING that the Registrar of the Tribunal is presently seized of the Co-Counsel's request of 3 December 2006 to be withdrawn from the case due to health issues resulting notably in his inability to be travel to Arusha in preparation of the Appeals Hearing scheduled for 16-18 January 2007;

CONSIDERING that the matters concerning the appointment and/or withdrawal of members of a Defence team are within the primary competence of the Registrar of the Tribunal;[7]

RECALLING that the Appeals Chamber has the statutory duty to ensure the fairness of the proceedings on appeal[8] and, thus, has jurisdiction to intervene matters concerning counsel, but only after an appellant has followed the requisite complaints procedure under the Directive;[9]

CONSIDERING that the Appellant has not shown that a status conference is necessary to ensure expeditious proceedings on appeal in the present case;[10]

FINDING, therefore, that there is no need to convene a status conference under Rule 65 *bis* of the Rules with regard to the Request,

FOR THE FOREGOING REASONS,

DISMISS the Request.

Done in English and French, the English text being authoritative.

Dated this 13th day of December 2006, In Arusha, Tanzania

[Signed] : Andrésia Vaz

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[5] Decision on Hassan Ngeze's Motion for a Psychological Examination, 6 December 2005 ("Decision of 6 December 2005"), p. 4.
[6] See Decision on Hassan Ngeze's Request for a Status Conference, 13 December 2005 ("Decision of 13 December 2005"), p. 3; Decision of 6 December 2005, p. 5; Decision on Hassan Ngeze's "Request of an Extremely Urgent Status Conference Pursuant to Rule 65 *bis* of Rules of Procedure and Evidence", 20 September 2005 ("Decision of 20 September 2005"), p. 3.
[7] *Cf*. Directive on the Assignment of Defence Counsel adopted on 9 January 1996, as amended ("Directive").
[8] Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase, 3 May 2005, paras 4 and 7; Decision on "Appellant Hassan Ngeze's Motion for Leave to Permit his Defence Counsel to Communicate with him during Afternoon Friday, Saturday, Sunday and Public Holidays", 25 April 2005, p. 3. See also *Prosecutor v. Milan Milutinović et al*., Case N°IT-99-37-AR.73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003 ("*Milutinović et al*. Decision of 13 November 2003"), para. 19.
[9] See Decision on Hassan Ngeze's Motions Concerning Restrictive Measures of Detention, 20 September 2006, p. 5 Decision on Hassan Ngeze's Motion to Set Aside President Møse's Decision and Request to Consummate his Marriage, 6 December 2005, p. 4; *Milutinović et al*. Decision of 13 November 2003, para. 20.
[10] See also Decision of 13 December 2005, p. 4; Decision of 20 September 2005, p. 3.

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Decision on Prosecution's Motion for Leave to Call Rebuttal Material 13 December 2006 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron

Hassan Ngeze – Rebuttal evidence, Recantation statement of a deceased witness, Expert witness in handwriting, Rebuttal material is admissible if it directly affects the substance of the additional evidence admitted by the Appeals Chamber, Late disclosure of statements to the Defence, No prejudice by the Appellant in terms of preparation for the appeals hearing – Disclosure obligation of the Prosecutor, Statements attached to the Investigation Report of the Prosecution are documents to disclose, Documents communicated to the Accused more than a month before the appeals hearing, Absence of Prejudice to the Defence, Documents non disclosed : breach of the Rules by the Prosecutor – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rules 15 (F), 54, 66, 66 (B), 66 (C), 70, 85, 89, 98, 107, 115 and 115 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Judgement and Sentence, 3 December 2003 (ICTR-99-52) ; Appeals Chamber, The Prosecutor v. Jean de Dieu Kamuhanda, Oral decision (Rule 115 Contempt of False Testimony), 19 May 2005 (ICTR-99-54A) ; Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza et al., Decision on Appellant Hassan Ngeze's Six Motions for Admission of Additional Evidence on Appeal and /or Further Investigation, 23 February 2006 (ICTR-99-52) ; Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza et al., Confidential Decision on the Prosecutor's Motion for on Order and Directives in Relation to Evidentiary Hearing on Appeal Pursuant to Rule 115, 14 June 2006 (ICTR-99-52) ; Appeals Chamber, The Prosecutor v. Hassan Ngeze, Decision on Motions Relating to the Appellant Hassan Ngeze's and Prosecution's Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EB, 27 November 2006 (ICTR-99-52)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Radislav Krstić, Confidential Decision on the Prosecution's Motion to Be Relieved of Obligation to Disclose Sensitive Information Pursuant to Rule 66 (C), 27 March 2003 (IT-98-33) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Decision on Evidence, 31 October 2003 (ICTR-95-14) ; Appeals Chamber, The Prosecutor v. Miroslav Kvočka et al., Decision on Prosecution's Motion to Adduce Rebuttal material, 12 March 2004 (IT-98-30/1) ; Appeals Chamber, The Prosecutor v. Ramush Haradinaj et al., Decision on Lahi Brahimaj's Request to Present Additional Evidence under Rule 115, 3 March 2006 (IT-04-84)

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the territory of Neighbouring States, Between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of the "Prosecutor's Urgent Motion for Leave to Call Rebuttal Evidence Pursuant to Rules 54, 85, 89, 107 and 115" filed by the Office of the Prosecutor ("Prosecution") on 27 November 2006 ("Motion") together with

"Strictly Confidential Annexes to the Prosecutor's Urgent Motion for Leave to Call Rebuttal Evidence Pursuant to Rules 54, 85, 89, 107 and 115" filed confidentially on the same date ("Annexes"). Hassan Ngeze ("Appellant") did not respond to the Motion.[1]

I. Procedural background

2. Trial Chamber I of the Tribunal ("Trial Chamber") rendered its Judgement in this case on 3 December 2003.[2] The Appellant filed his Notice of Appeal on 9 February 2004,[3] amended on 9 May 2005,[4] and Appellant's Brief on 2 May 2005.[5] The Prosecution filed its Respondent's Brief on 22 November 2005.[6] The Appellant replied on 15 December 2005.[7]

3. By its Decision of 23 February 2006,[8] the Appeals Chamber admitted as additional evidence on appeal handwritten and typed copies of Witness EB's purported recantation statement dated April 2005 ("Recantation statement")[9] and the Forensic Report of Mr. Antipas Nyanjwa, an expert in handwriting, who assessed the authenticity of Witness EB's statement,[10] pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), and ordered that Witness EB be heard by the Appeals Chamber, pursuant to Rules 98 and 107 of the Rules.[11]

4. On 14 June 2006, the Appeals Chamber dismissed the Prosecution's request for an order to the Appellant to produce the original handwritten and typed versions of Witness EB's purported Recantation Statement and ordered Witness EB to appear, as a witness of the Appeals Chamber, at an evidentiary hearing, pursuant to Rule 115 of the Rules.[12] By the same decision, the Appeals Chamber modified the protective measures applicable to Witness EB and prohibited the parties, their agents or any person acting on their behalf from contacting Witness EB, unless expressly authorized to do so by the Appeals chamber.[13]

5. Finally, by its Decision of 27 November 2006,[14] the Appeals Chamber admitted as additional evidence on appeal a copy of the statement, in Kinyarwanda, purportedly written by Witness EB dated 15 or 16 December [year illegible] affirming his Recantation Statement ("Additional Statement") and

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[1] The dead-line for filing a response to the Motion expired ten days after the filing of the Motion, or on 7 December 2006, and the Appellant has not filed a motion seeking for extension of the applicable time limit (See. para. 13 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, 8 December 2006. The Appeals Chamber considers that the extended deadline of t h y days for filing a response to "a motion pursuant to Rule 115" under the cited provision is not applicable to motions for admission of rebuttal material, but rather concerns motions for admission of additional evidence on appeal).

[2] The *Prosecutor v. Ferdinand Nahimana et al.,* Case N°ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("Trial Judgement").

[3] Defence Notice of Appeal (Pursuant to Rule 108 of the Rules of Procedure and Evidence), 9 February 2004.

[4] *Confidential Amended* Notice of Appeal, 9 May 2005.

[5] *Confidential* Appellant's Brief (Pursuant to Rule 111 of the Rules of Procedure and Evidence), 2 May 2005.

[6] Consolidated Respondent's Brief, 22 November 2005.

[7] Appellant Hassan Ngeze's Reply Brief (Article 113 of the Rules of Procedures and Evidence), 15 Decembcr 2005.

[8] *Confidential* Decision on Appellant Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or further Investigation at the Appeal Stage, 23 February 2006 ("Decision of 23 February 2006").

[9] Decision of 23 February 2006, para. 29; Confidential Decision on the Prosecutor's Motion for on Order and Directives in Relation to Evidentiary Hearing on Appeal Pursuant to Rule 115, 14 June 2006 ("Decision of 14 June 2006"), p. 3.

[10] Report of the Forensic Document Examiner, Inspector Antipas Nyanjwa, dated 20 June 2005, Annex 4 to the "Prosecutor's Additional Submissions In Response to 'Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB'", filed confidentially on 7 July 2005 ("Forensic Report"), See Decision of 23 February 2006, para. 41.

[11] Decision of 23 February 2006, para. 81.

[12] Decision of 14 June 2006.. D.. 5.

[13] *Ibid*., p. 6.

[14] Confidential Decision on Motions Relating to the Appellant Hassm Ngeze's and the Prosecution's Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EB, 27 November 2006 ("Decision of 27 November 2006"); see Public Redacted Version filed on 1 December 2006.

its translations into English and French.[15] By the same decision, the Appeals Chamber admitted as rebuttal material copies of the envelopes in which copies of the Additional Statement were received by the Prosecution.[16]

II. Discussion

6. In rebuttal to the additional evidence admitted on appeal with respect to Witness EB, the Prosecution seeks to call two witnesses to give oral testimony, namely Prosecution Investigator Moussa Sanogo and Witness AEU,[17] as well as to have admitted the "underlying documentary evidence relating to their testimony", including the Report from the Officer in Charge of the Division of Investigations dated 23 August 2006 ("Investigation Report").[18] The Prosecution submits that the material proffered in rebuttal will

> "demonstrate that the purported recantation of Witness EB is false and unworthy of any credit, in that there is compelling evidence that the purported recantation is the product of a campaign to attempt to obstruct the course of justice, on behalf of the Appellant",

as well as prove that "Witness EB was not subjected to any pressure by the OTP to cause him to deny a recantation that he made".[19]

7. Rule 115 (A) of the Rules provides that rebuttal material may be presented by any party affected by a motion to present additional evidence before the Appeals Chamber. The Appeals Chamber recals that rebuttal material is admissible if it directly affects the substance of the additional evidence admitted by the Appeals Chamber[20] and, as such, has a different test of admissibility from additional evidence under Rule 115 of the Rules.[21] The Appeals Chamber also recalls that a hearing under Rule 115 of the Rules "is intended to be a sharply delimited proceeding for entering discrete, specific evidence into the record" and "is not intended to be a trial within a trial that opens the door to the exploration of every issue that might be raised during the hearing".[22]

8. The substance of the additional evidence so far admitted by the Appeals Chamber relates to Witness EB's purported wish to recant his testimony provided at trial, notably with respect to the Appellant's participation in the killings in Gisenyi on 7-9 April 1994. The Appeals Chamber is satisfied that the anticipated testimony of Prosecution Investigator Moussa Sanogo directly affects the substance of the admitted additional evidence and is thus admissible as rebuttal material on appeal inasmuch as it would relate to his "investigation into the circumstances of the purported recantation of Witness EB's trial testimony".[23] However, the anticipated testimony of Investigator Moussa Sanogo,

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[15] *Ibid*., paras 39 and 44.
[16] *Ibid*., paras 42 and 44.
[17] The Prosecution seeks to call Investigator Moussa Sanogo who is anticipated to testify on the subject of his investigations into the alleged recantation of Witness EB and 'the wider context within which the purported recantation statement of EB was produced" as well as Witness AEU who is anticipated to testify on the basis of the evidence contained in [the] written statement, dated 24 August 2005, given to the Special Counsel to the Prosecutor and investigators of the OTP" (Motion, para. 3; Annexes 1-5).
[18] Motion, para. 3; Annex 6.
[19] Motion, paras 11, 14-18.
[20] Decision of 27 November 2006, para. 42; *Prosecutor v. Ramush Haradinaj et al.,* Case N°IT-04-84AR65.2, Decision on Lahi Brahimaj's Request to Present Additional Evidence Under Rule 115, 3 March 2006 ("*Haradinaj* Decision"), para. 44; *Prosecutor v. Miroslav Kvočka,* Case N°IT-98-30/1-A, Decision on Prosecution's Motion to Adduce Rebuttal Material, 12 March 2004 ("*Kvočka* Decision"), p. 3; *The Prosecutor v. Tihomir Blaškić,* Case N°IT-95-14-A, Decision on Evidence, 31 October 2003, p. 5.
[21] Decision of 27 November 2006, para. 42; *Haradinaj* Decision, para. 44; *Kvočka* Decision p. 3
[22] *Jean de Dieu Kamuhanda v. The Prosecutor,* Case N°ICTR-99-54A-A, Oral Decision (Rule 115 and Contempt of False Testimony), 19 May 2005 (*Cfr*. T. 19 May 2002 (Appeals Hearing), p. 49, lines 34-36).
[23] Motion, para 15. The Appeals Chamber notes that issues related to the alleged attempts by the Appellant to subvert the course of justice in the present appeal by way of threats, intimidation, bribing or other form of interference with a witness should be addressed within the scope of Rules 77 and 91 (B).

as well as that of Witness AEU, with respect to alleged attempts on behalf of the Appellant to approach other Prosecution witnesses with the view of recantation of their trial testimony, is not admissible as rebuttal material under Rule 115.

9. For the same reasons, the declaration of Investigator Moussa Samgo dated 21 November 2006 is admissible inasmuch as it describes the circumstances in which Witness EB was interviewed on 22 and 23 May 2005,[24] but not with respect to general allegations against the Appellant's family and their purported interferences with Prosecution witnesses in Gisenyi.[25] The Appeals Chamber fails to understand, however, why this declaration was only made in late November 2006, *i.e.* some eight months after the Appeals Chamber decided to call Witness EB to provide additional evidence on appeal. Nevertheless, in the instant case, considering that the statement taken from Witness EB on 23 May 2005 was disclosed to the Appellant on 7 July 2005,[26] the Appeals Chamber is satisfied that no prejudice was suffered by the Appellant in terms of his preparation for the appeals hearing on 16 January 2007.

10. The Appeals Chamber further admits the "*Compte-rendu de la fin de la mission du 16 au 18 octobre 2006 à Gisenyi*" dated 18 October 2006, inasmuch as it refers to the purported recantation of Witness EB.[27] The Appeals Chamber also admits as rebuttal material on appeal the Investigation Report with its annexes, since it is directly relevant to the substance of fie Additional Statement. Finally, with respect to "Various Witness Statements Taken in the Course of the Investigations Led by Investigator Moussa Sanogo" in May 2005,[28] the Appeals Chamber is satisfied that the Statements of Witness EB dated 22 May and 23 June 2005 directly affect the substance of the Recantation Statement and thus, considers them admissible as rebuttal material on appeal.

11. While the Appeals Chamber finds the "End of Mission on Appeal Case in Gisenyi, 19th to 24th 2005 *[sic]* dated 27 May 2005"[29] relevant to Witness EB's Additional Statement as it confirms that investigators met Witness EB on 22 May 2005 and had his statement signed on 23 May 2005, it fails to h d any information that would directly affect the substance of the admitted additional evidence and therefore, declines to admit it as rebuttal material. With respect to "*Compte-rendu de la mission effectuée à Gisenyi du 9 au 14 mai 2005*" dated 15 May 2005,[30] the Appeals Chamber notes that during the mission in question, the investigator did not meet Witness EB; therefore, this document does not directly affect the substance of the additional evidence on appeal.

12. In light of its findings above,[31] the Appeals Chamber will not admit the Statements of Witness AEU dated 11-12 May 2005 (unsigned) and 24 August 2005,[32] since they do not concern the purported recantation of testimony by Witness EB. As far as the Statements of Witnesses AFX, OAB, AHI, PA and DO are concerned,[33] the Appeals Chamber finds that, while they might be relevant to the allegations against the Appellant with respect to interference with the Prosecution's witnesses, these materials do not directly affect the substance of the additional evidence on appeal, *i.e.* Witness EB's purported recantation.[34] Therefore, these documents are inadmissible as rebuttal material on appeal.

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[24] Motion, Annex 1, pp 4-6.
[25] *Ibid.,* pp 1-4.
[26] Prosecutor's Additional Submissions In Response to "Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB", filed confidentially on 7 July 2005 ("Additional Submissions"), Annex 2.
[27] Motion, Annex 2, notably paras 1-9, 21-28 and 42.
[28] Motion, Annex 7.
[29] Motion, Annex 3.
[30] Motion, Annex 4.
[31] See *supra*, para. 8.
[32] Motion, Annex 5.
[33] Motion, Annex 7. The Appeals Chamber notes that all these statements were communicated to the Appellant in July 2005 as annexes to the Additional Submissions.
[34] See *supra*, para. 8.

13. The Appeals Chamber notes the lateness of these submissions, considering that the decision to call Witness EB as additional evidence on appeal was taken in February 2006, and now turns to examine *proprio motu* whether the Prosecution acted in full conformity with its disclosure obligations under Rule 66 of the Rules. In this respect, the Appeals Chamber notes that the Investigation Report is dated 23 August 2006 and contains witness statements taken in August 2006 from staff members of the Prosecution concerning their missions with respect to Witness EB. Despite a number of explicit requests from the Appellant, including his motion of 19 June 2006,[35] to have access to any witness statement obtained by the Prosecution in the scope of its investigations on the issue, the Prosecution provided them to the Appellant only with the Motion.

14. The Appeals Chamber reiterates that Rule 66 (B) applies to appellate proceedings and that, consequently, the Prosecution, on request of the Defence,

> "has to permit the inspection of any material which is capable of being admitted on appeal or which may lead to the discovery of material which is capable of being admitted on appeal".[36]

In this respect, the Appeals Chamber recalls that "purely inculpatory material is not necessarily immaterial for the preparation of the Defence"[37] and that the Prosecution shall provide the Defence with access to any documents that are material to the preparation of the Defence, with the exception of Rule 70 material and, if necessary, request from the Appeals Chamber permission to withhold any information provided by these sources under Rule 66 (C) of the Rules.[38] The Appeals Chamber considers that the statements attached to the Investigation Report fall within the scope of Rule 66 (B) and are not protected by Rule 70[39] and therefore, should have been communicated to the Appellant upon his request for them. The report also mentions two interviews with Witness EB conducted by the Prosecution's Investigators in March 2006;[40] however, no information in this respect was communicated to the Appellant prior to the present Motion.[41]

15. In light of the above, the Appeals Chamber concludes that the Prosecution acted in violation of its obligations under Rule 66 (B) in this case. Considering that the Appellant has not suffered any apparent prejudice as a result of this violation, since these documents were communicated to him more than a month before the appeals hearing, the Appeals Chamber will not impose sanctions on the Prosecution for this violation. However, the Appeals Chamber warns the Prosecution of the possibility of sanctions should it again be found in violation of its disclosure obligations in the present case.

16. The Appeals Chamber also notes that although the submitted Statements of Witness AEU are dated 11-12 May 2005 (unsigned) and 24 August 2005, the Prosecution communicated them to the Appellant only with the Motion. However, the Appeals Chamber has already considered that these documents are irrelevant to the preparation for the appeals hearing on 16 January 2007[42] and therefore

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[35] Appellant Hassan Ngeze's Motion to Order the Prosecutor to Disclose Material and/or *Statements* of Witness EB Which Might Have Come in his Possession Subsequent to the Presentation of Forensic Expert's Report on Witness EB's Recanted Statement, 19 June 2006.
[36] Decision of 27 November 2006, para. 16; *Prosecutor v Radislav Krstić*, Case N°IT-98-33-A, Confidential Decision on the Prosecution's Motion to Be Relieved of Obligation to Disclose Sensitive Information Pursuant to Rule 66 (C), 27 March 2003, p. 4.
[37] Id.
[38] Decision of 27 November 2006, para. 16.
[39] See Decision of 27 November 2006, para. 14.
[40] Motion, Annex 6, p. 3 of the *Rapport d'enquête* and *Annex* 2 thereto *(e-mail from* Mr. Aaron Muonda to Mr. James Stewart on the results of the interview with Witness EB on 7 March2006).
[41] The Appeals Chamber notes the "Prosecutor's Disclosure of Relevant Pages of the Gacaca Records Book Pertinent to Prosecution Witness EB's Testimony before the Gacaca, [REDACTED]" filed confidentially on 20 June 2006. However, this document only mentions the fact that it was obtained the Prosecution's investigators "from the Gacaca President of Dukorc, on 5 May 2006" and does not refer to any contact with Witness EB in March 2006, as described in the Investigation Report, p. 3 [REDACTED].
[42] See *supra*, para. 12.

finds that the question as to whether the Prosecution acted in violation of Rule 66 (B) with respect to these documents needs not be considered.

III. Disposition

17. For the forgoing reasons, the Appeals Chamber GRANTS the Motion IN PART and ADMITS as rebuttal material on appeal copies of the following documents:

- Declaration of Moussa Sanogo dated 21 November 2006, index numbers 8841/A-8835/A to the extent specified in paragraph 9 above;
- Compte-rendu de la fin de la mission du 16 au 18 octobre 2006 à Gisenyi, dated 18 October 2006, index numbers 8834/A-8829/A
- Investigation Report dated 23 August 2006 with its annexes, index numbers 8789/A-8745/A;
- Statements of Witness EB dated 22 May and 23 June 2005, index numbers 8742/A-8730/A.

The Appeals Chamber also ORDERS that, pursuant to Rules 98, 107 and 115 of the Rules, Investigator Mr oussa Sanogo shall be heard by the Appeals Chamber on 16 January 2007, as rebuttal material to the additional evidence admitted with respect to Witness EB. The Motion is DISMISSED in all other respects.

18. The Appeals Chamber INSTRUCTS the Registrar to assign exhibit numbers to the rebuttal material admitted hereby and place them under seal.

Done in English and French, the English text being authoritative.

Dated this 13th day of December 2006,

At The Hague, The Netherlands.

[Signed] : Mohammed Shahabuddeen[43]

[43] The Appeals Chamber renders this decision in the absence of the Presiding Judge, Judge Fausto Pocar, who is temporarily absent due to his responsibilities as President of the International Criminal Tribunal for the former Yugoslavia and is thus unable to exercise his functions as Presiding Judge. The Appeals Chamber has been authorized to do so by the President of the Tribunal pursuant to Rule 15 *bis* (F) of the Rules and has elected Judge Mohammed Shahabuddeen as Presiding Judge in Judge Pocar's absence for the purpose of issuing is decision.

Le Procureur c. Jean Bosco BARAYAGWIZA, Ferdinand NAHIMANA et Hassan NGEZE

Affaire N° ICTR-99-52

Fiche technique: Jean Bosco Barayagwiza

• Nom: BARAYAGWIZA

• Prénoms: Jean Bosco

• Date de naissance: 1950

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: directeur des affaires politiques au ministère des affaires étrangères au Rwanda

• Date de confirmation de l'acte d'accusation: 23 octobre 1997

• Date de modifications de l'acte d'accusation: voyez les décisions du 5 novembre 1999 et du 11 avril 2000

• Date de jonction d'instance: 6 juin 2000 avec Ferdinand Nahimana et Hassan Ngeze (aff. N° ICTR-99-52)

• Chefs d'accusation: génocide, complicité dans le génocide, entente en vue de commettre le génocide, incitation directe et publique à commettre le génocide et crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date et lieu de l'arrestation: 27 mars 1996, au Cameroun

• Date du transfert: 19 novembre 1997

• Date de la comparution initiale: 23 février 1998

• Précision sur le plaidoyer: non coupable

• Date du début du procès: 23 octobre 2000

• Date et contenu du prononcé: 3 décembre 2003, condamné à l'emprisonnement à vie, réduit à 35 ans d'emprisonnement du fait de la violation de ses droits durant le procès

• Appel: 28 novembre 2007, peine réduite à 32 ans d'emprisonnement

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Fiche technique: Ferdinand Nahimana

• Nom: NAHIMANA

• Prénom: Ferdinand

• Date de naissance: 15 juin 1950

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: directeur de la *Radio Télévision Libre des Mille Collines* (RTLM)

• Date de la confirmation de l'acte d'accusation: 12 juillet 1996

• Date des modifications de l'acte d'accusation: 10 novembre 1999

• Date de jonction d'instance: 30 novembre 1999 avec Hassan Ngeze et 6 juin 2000 avec Jean Bosco Barayagwiza (aff. N°ICTR-99-52)

• Chefs d'accusation: entente en vue de commettre le génocide, génocide, incitation directe et publique à commettre le génocide, complicité dans le génocide et crimes contre l'humanité

• Date et lieu de l'arrestation: 27 mars 1996, au Cameroun

• Date du transfert: 23 janvier 1997

• Date de la comparution initiale: 19 février 1997

• Précision sur le plaidoyer: non coupable

• Date du début du procès: 23 octobre 2000

• Date et contenu du prononcé: 3 décembre 2003, condamné à l'emprisonnement à vie

• Appel: 28 novembre 2007, peine réduite à 30 ans d'emprisonnement

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Fiche technique: Hassan Ngeze

• Nom: NGEZE

• Prénom: Hassan

• Date de naissance: 1961

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: rédacteur en chef du journal *Kangura*

• Date de la confirmation de l'acte d'accusation: 3 octobre 1997

• Date des modifications de l'acte d'accusation: 10 novembre 1999

• Date de jonction d'instance: 30 novembre 1999 avec Ferdinand Nahimana et 6 juin 2000 avec Jean Bosco Barayagwiza (aff. N°ICTR-99-52)

• Chefs d'accusation: entente en vue de commettre le génocide, génocide, complicité dans le génocide, incitation directe et publique à commettre le génocide et crimes contre l'humanité

• Date et lieu de l'arrestation : 18 juillet 1997, au Kenya

• Date du transfert: 18 juillet 1997

• Date de la comparution initiale: 19 novembre 1997

• Précision sur le plaidoyer: non coupable

• Date du début du procès: 23 octobre 2000

• Date et contenu du prononcé de la peine: 3 décembre 2003, condamné à l'emprisonnement à vie

• Appel: 28 novembre 2007, peine réduite à 35 ans d'emprisonnement

Ordonnance de convocation d'une conférence de mise en état 9 mars 2006 (ICTR-99-52-A)

(Original : Français)

Chambre d'appel

Juge : Andrésia Vaz , Juge de la mise en état d'appel

Jean Bosco Barayagwiza, Ferdinand Nahimana et Hassan Ngeze – Conférence de mise en état d'appel

Instrument international cité :

Règlement de Procédure et de preuve, art. 54, 65 bis (A) et 65 bis (B)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Ferdinand Nahimana et consorts, Jugement et sentence, 3 décembre 2003 (ICTR-99-52)

NOUS, ANDRÉSIA VAZ, Juge de la Chambre d'appel du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 (« Chambre d'appel » et « Tribunal », respectivement) et Juge de la mise en état en appel en la présente affaire[1];

VU le jugement de la Chambre de première instance I du Tribunal rendu le 3 décembre 2003[2] ;

VU que Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze (« Appelants ») restent en détention en attendant que leurs appels respectifs soient entendus ;

VU que la dernière conférence de mise en état s'est tenue le 9 mars 2005[3] ;

ATTENDU qu'en vertu de l'article 65 *bis* (A) et (B) du Règlement de procédure et de preuve du Tribunal (« Règlement »), un juge de la Chambre d'appel peut convoquer une conférence de mise en état à l'effet d'organiser, entre les parties, des échanges de vues propres à assurer un déroulement rapide de l'instance ;

ATTENDU qu'une conférence de mise en état serait utile à ce stade de la procédure pour faire en sorte que la présente affaire procède sans délai inutile ;

conformÉment aux articles 54 et 65 *bis* (B) du RÈGLEMENT

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[1] Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005; Rectificatif à l'Ordonnance intitulée "Order of the Presiding Judge Designating the Pre-Appeal Judge", 25 août 2005.
[2] Judgement and Sentence, 3 December 2003.
[3] Une conférence de mise en état a été également tenue le 1 avril 2005 par voie de vidéoconférence afin de donner à l'Appelant Barayagwiza et son Conseil (absent à la conférence de mise en état du 9 mars 2005) la possibilité de soulever les questions de compensation et de délais.

ORDONNONS aux parties de se présenter devant nous pour une conférence de mise en état le 7 avril 2006 à 15h00 et les INFORMONS que, sans préjudice de leur droit de soulever des questions se rapportant à l'état d'avancement de l'affaire, la conférence de mise en état portera sur les sujets suivants :

- le calendrier de la procédure, y compris les dates butoirs pour le dépôt des traductions de certains actes de procédure ;
- les questions relatives à la représentation des Appelants ;
- les conditions de détention des Appelants, y compris leur état de santé physique et mental ;
- l'état des requêtes introduites par les parties et rappel des principes et directives applicables en matière de dépôt des requêtes en vue d'assurer une procédure d'appel rapide et équitable ;

ORDONNONS aux conseils principaux des Appelants d'être présents à la conférence de mise en état, ou d'y participer par voie de téléconférence si les Appelants concernés y consentent par écrit, ou, à défaut, de se faire représenter par leur co-conseil ;

DEMANDONS au Greffier de prendre les arrangements nécessaires à l'organisation de cette conférence de mise en état, y compris la fourniture des services d'interprétation et la préparation d'un compte-rendu en français et en anglais.

Fait en français et en anglais, le texte français faisant foi.

Fait le 9 mars 2006, à La Haye (Pays-Bas).

[Signé] : Andrésia Vaz

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Décision sur la requête de Ferdinand Nahimana aux fins d'extension du nombre de pages autorisées pour la réplique de la Défense 20 avril 2006 (ICTR-99-52-A)

(Original : Français)

Chambre d'appel

Juge : Andrésia Vaz , Juge de la mise en état d'appel

Ferdinand Nahimana – Mémoire en réplique, Extension du nombre de pages, Un mémoire en réplique ne doit traiter que des arguments en réplique au mémoire de l'intimé, Efficacité du mémoire en réplique non nécessairement liée à sa longueur, Pas de démonstration par l'appelant de la méconnaissance de ses droits – Requête rejetée

Instruments internationaux cités :

Directive pratique relative à la longueur des mémoires et des requêtes en appel, para. 1 (c) et 6 ; Statut, art. 6 (1)

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Ferdinand Nahimana et consorts c. Le Procureur, Decision on Ferdinand Nahimana's Motion for an Extension of Page Limits for Appellant's Brief and on Prosecution's Motion Objecting to Nahimana's Appellant's Brief, 24 juin 2004 (ICTR-99-52) ; Chambre d'appel, Ferdinand Nahimana et consorts c. Le Procureur, Decision on Ferdinand Nahimana's Second Motion for an Extension of Page Limits for Appellant's Brief, 31 août 2004

(ICTR-99-52) ; Chambre d'appel, Le Procureur c. Ferdinand Nahimana et consorts, Decision on 'Appellant Jean-Bosco Baraygwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", 17 mai 2005 (ICTR-99-52) ; Chambre d'appel, Ferdinand Nahimana et consorts c. Le Procureur, Decision on the Prosecutor's Extremely Urgent Motion for Extension of Page Limits, 15 novembre 2005 (ICTR-99-52) ; Chambre d'appel, Le Procureur c. Jean Bosco Barayagwiza et consorts, Decision on Jean-Bosco Barayagwiza's and Hassan Ngeze's Urgent Motions for Extension of Page and Time Limits for their Replies to the Consolidated Prosecution Response, 6 décembre 2005 (ICTR-99-52)

NOUS, ANDRÉSIA VAZ, Juge de la Chambre d'appel du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 (« Chambre d'appel » et « Tribunal », respectivement) et Juge de la mise en état en appel en la présente affaire[1];

VU la « Requête urgente aux fins d'extension du nombre de pages autorisées pour la réplique de la Défense » déposée le 13 avril 2006 par Ferdinand Nahimana (« Requête » et « appelant », respectivement) par laquelle il demande « l'autorisation de déposer un mémoire en réplique de 60 pages ou 18.000 mots »[2];

VU que le mémoire en réplique de l'appelant doit être déposé dans un délai de quinze jours à compter du 7 avril 2006[3], date à laquelle la Défense de l'appelant a reçu la communication de la traduction française du Mémoire unique de l'Intimé[4], c'est-à-dire le 24 avril 2006 au plus tard ;

DÉCIDONS, en vertu du paragraphe 6 de la Directive pratique relative à la longueur des mémoires et des requêtes en appel (« Directive pratique »), de statuer sur la Requête sans attendre l'expiration du délai de dix jours imparti au Procureur pour y répondre[5], celui-ci ne pouvant en l'espèce en subir aucun préjudice ;

ATTENDU que le paragraphe 1 (c) de la Directive pratique prévoit que

> « la réplique de l'appelant, dans le cadre de l'appel contre le jugement final d'une Chambre de première instance, n'excède pas 30 pages ou 9000 mots » ;

ATTENDU qu'en demandant l'autorisation d'outrepasser cette limite, la partie intéressée doit « expliquer les circonstances exceptionnelles qui justifient le dépôt d'une écriture plus longue »[6] ;

ATTENDU que l'appelant fonde sa demande sur le principe d'égalité des armes et sur son droit à disposer des facilités nécessaires à la préparation de sa défense en s'appuyant sur le fait que le Procureur a déposé, après y avoir été autorisé[7], son Mémoire de l'Intimé de 198 pages, dépassent, ainsi, de 28 pages la limite fixée par la Directive pratique[8], ce qui lui aurait permis de

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[1] Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 août 2005 et Rectificatif à l'Ordonnance intitulée "Order of the Presiding Judge Designating the Pre-Appeal Judge", 25 août 2005.
[2] Requête, p. 2.
[3] Scheduling Order Concerning the Filing of Ferdinand Nahimana's Reply to the Consolidated Respondent's Brief, 6 décembre 2005, p. 3; Compte-rendu de la Conférence de mise en état du 7 avril 2006, pp. 4-6.
[4] Mémoire unique de l'Intimé, 22 novembre 2005 (Traduction française enregistrée le 4 avril 2005) (« Mémoire de l'Intimé »).
[5] Directive pratique relative à la procédure de dépôt des écritures en appel devant le tribunal , para. 11.
[6] *Ibid*., para. 5.
[7] La Requête, en pages 2 et 3, se réfère à la Décision de la Juge de la mise en état en appel du 15 novembre 2005 (*Decision on the Prosecutor's Extremely Urgent Motion for Extension of Page Limits,* 15 novembre 2005 (« Décision du 15 novembre 2005 »)).
[8] Requête, p. 2.

« développer de nombreux arguments en réponse aux moyens qui n'ont pas pu être suffisamment étayés par l'appelant »[9] ;

ATTENDU que l'appelant précise que le Procureur a proposé de nouveaux arguments, « parfois fondés sur une jurisprudence récente, postérieure au mémoire de l'appelant », notamment à propos de la forme de sa responsabilité pénale individuelle au titre de l'article 6 (1) du Statut du Tribunal, question que l'appelant n'avait pourtant pas développée dans son mémoire d'appel « en raison de l'absence de motivation du jugement »[10] ;

ATTENDU que l'appelant prétend de ce fait être placé

« dans une situation qui n'est même pas celle de la rédaction d'un mémoire d'appel, mais bien plutôt celle de la rédaction d'un mémoire de première instance, en réponse à un mémoire préalable du Procureur »[11] ;

ATTENDU qu'à propos des arguments développés par le Procureur sur la responsabilité de l'appelant en vertu de l'Article 6 (1) du Statut du Tribunal, l'appelant estime que pour « envisager les déclinaisons de chaque proposition » élaborée dans le Mémoire de l'Intimé, il devra répliquer par un développement au moins deux fois plus important[12] ;

ATTENDU que, dans son Mémoire de l'Intimé, le Procureur avait à répondre aux actes d'appel et aux mémoires des trois appelants qui contenaient un nombre considérable d'erreurs alléguées[13], alors que l'appelant ne doit répliquer au Mémoire de l'Intimé que dans la mesure où il répond aux arguments qu'il a développés dans ses propres acte d'appel et mémoire d'appelant[14] ;

ATTENDU que l'appelant affirme que les arguments du Procureur portant sur la forme de la responsabilité pénale individuelle de l'appelant retenue au titre de l'article 6 (1) du Statut du Tribunal par le jugement de la Chambre de première instance[15], sont développés sur huit pages du Mémoire de l'Intimé[16] ;

CONSIDÉRANT qu'un mémoire en réplique ne doit traiter que des arguments en réplique au mémoire de l'intimé[17] et que son efficacité n'est pas nécessairement liée à sa longueur, mais relève d'avantage de sa clarté et de la pertinence des arguments développés ;

CONSIDÉRANT que la Chambre d'appel peut, le cas échéant, demander aux parties de préciser ou développer leurs arguments sur certaines questions, par écrit ou lors des plaidoiries en audience[18] ;

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[9] *Ibid*., p. 3.
[10] *Ibid*., p. 4.
[11] *Ibid*., pp. 3-4.
[12] *Ibid*., p. 5.
[13] Décision du 15 novembre 2005, p. 3.
[14] Decision on Jean-Bosco Barayagwiza's and Hassan Ngeze's Urgent Motions for Extension of Page and Time Limits for their Replies to the Consolidated Prosecution Response, 6 décembre 2005 (« Décision du 6 décembre 2005 »), p. 4.
[15] *Procureur c. Nahimana et al*., ICTR-99-52-T, Jugement, 3 décembre 2003 (traduction française certifiée déposée le 2 mars 2006.
[16] Requête, p. 5 ; *voir* notamment le Mémoire de l'Intimé, para. 335-355 (cinq pages).
[17] Directive pratique relative aux conditions formelles applicables au recours en appel contre un jugement, 4 juillet 2005, para. 6.
[18] Ibid., p. 5; voir également Decision on "Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", 17 mai 2005, p. 3; Decision on Ferdinand Nahimana's Second Motion for an Extension of Page Limits for Appellant's Brief, 31 août 2004, p. 3; Decision on Ferdinand Nahimana's Motion for an Extension of Page Limits for Appellant's Brief and on Prosecution's Motion Objecting to Nahimana's Appellant's Brief, 24 juin 2004, p. 3.

CONSIDÉRANT que l'appelant n'a pas démontré en quoi son droit à un procès équitable et le principe de l'égalité des armes seraient méconnus par le refus de lui accorder la possibilité de dépasser du nombre de pages sollicité;

CONSIDÉRANT que l'appelant n'a pas démontré l'existence des circonstances exceptionnelles qui justifieraient le dépassement de la limite du nombre de pages édictée pour les mémoires d'appelant en réplique ;

PAR CES MOTIFS

REJETONS la Requête dans son intégralité.

Fait en français et en anglais, le texte français faisant foi.

Fait le 20 avril 2006, à Arusha (Tanzanie).

[Signé] : Andrésia Vaz

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Décision relative à la requête de l'appelant Jean-Bosco Barayagwiza demandant l'examen de la requête de la défense datée du 28 juillet 2000 et réparation pour abus de procédure
23 juin 2006 (ICTR-99-52-A)

(Original : Français)

Chambre d'appel

Juges : Fausto Pocar, Président de Chambre ; Mohamed Shahabuddeen ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron

Jean Bosco Barayagwiza, Ferdinand Nahimana et Hassan Ngeze – Clarification des notions de révision et de réexamen, Seul un jugement définitif peut être révisé, Economie judiciaire, Pas de demande de réexamen possible par voie de requête au stade de la mise en état de l'affaire en appel, Pas d'incompétence de principe d'une Chambre de première instance pour réviser une décision de la Chambre d'appel – Abus de procédure, Demande à adresser à la Chambre d'appel dans le cadre de la procédure d'appel – Indemnisation – Requête partiellement acceptée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 115, 120, 121, 122 et 123 ; Statut, art. 25

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Jean Bosco Barayagwiza, Arrêt (Demande du Procureur en révision ou réexamen), 31 mars 2000 (ICTR-97-19) ; Chambre d'appel, Le Procureur c. Samuel Imanishimwe, Arrêt (requête en révision), 12 juillet 2000 (ICTR-97-36); Chambre d'appel, Le Procureur c. Jean-Bosco Barayagwiza, Décision sur la requête en révision et/ou en réexamen, 14 septembre 2000 (ICTR-97-19) ; Chambre d'appel, Le Procureur c. Laurent Semanza, Arrêt (requête en révision de la décision de la Chambre d'appel du 31 mai 2000), 4 mai 2001 (ICTR-97-20) ; Chambre de première instance, Le Procureur c. Laurent Semanza, Décision sur la requête de la défense aux fins que la Chambre de première instance III se déclare incompétente pour statuer sur al requête de la défense en révision de l'arrêt rendu par la Chambre d'appel le 31 mai 2000 en vertu de

l'article 25 du Statut et des articles 120 et 121 du Règlement de procédure et de preuve du TPIR déposée le 2 mars 2001 sur le fondement de l'arrêt de la Chambre d'appel du 4 mai 2001 et de l'article 54, 5 octobre 2001 (ICTR-97-20) ; Chambre de première instance, Le Procureur c. Ignace Bagilishema, Arrêt (Requêtes en demande de révision des ordonnances rendues par le juge de la mise en état les 30 novembre et 19 décembre 2001), 6 février 2002 (ICTR-95-1A) ; Chambre d'appel, Le Procureur c. Ferdinand Nahimana et consorts, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 février 2005 (ICTR-99-52) ; Chambre d'appel, Le Procureur c. Juvénal Kajelijeli, Arrêt, 23 mai 2005 (ICTR-98-44A)

T.P.I.Y. : Chambre d'appel, Le Procureur c. Hazim Delić, http://www.icty.org/x/cases/mucic/acdec/fr/020425.htm*Décision relative à la requête en révision, 25 avril 2002 (IT-96-21) ; Chambre d'appel,* Le Procureur c. Duško Tadić, http://www.icty.org/x/cases/tadic/acdec/fr/020730.htm*Arrêt relatif à demande en révision, 30 juillet 2002 (IT-94-1) ; Chambre d'appel,* Le Procureur c. Dragan Nikolić, *Décision relative à l'appel interlocutoire concernant la légalité de l'arrestation, 5 juin 2003 (IT-94-2)*

1. La Chambre d'appel du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 (ci-après « Chambre d'appel » et « Tribunal », respectivement) est saisie de la requête introduite par l'appelant Jean-Bosco Barayagwiza (ci-après « appelant ») le 26 septembre 2005[1], par laquelle il demande notamment à la Chambre d'appel d'examiner au fond sa requête du 28 juillet 2000[2] et de réexaminer et annuler l'arrêt qu'elle a rendu en date du 31 mars 2000[3]. Le Procureur a déposé sa réponse le 6 octobre 2005[4] et l'appelant sa réplique le 13 octobre 2005[5].

2. La Chambre d'appel relève d'emblée que la Réplique de l'appelant a été déposée trois jours après la date limite prévue au paragraphe 12 de la Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal[6]. L'appelant fait valoir que

> « le personnel du Greffe a fait suivre les documents au cabinet du Conseil principal à Londres alors qu'il savait pertinemment que celui-ci et la plupart des membres de l'équipe de la Défense se trouvaient à Arusha »[7].

La Chambre d'appel estime que la raison avancée par l'appelant justifie que la Chambre d'appel utilise la discrétion que lui confère le paragraphe 16 de la Directive pratique pour reconnaître la validité du dépôt de la Réplique de l'appelant.

3. La Chambre d'appel est également saisie d'une requête déposée le 20 octobre 2005[8], par laquelle le Procureur demande à la Chambre d'appel de rejeter la déclaration sous serment de M.

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[1] Requête urgente demandant l'examen de la requête de la Défense datée du 28 juillet 2000 et réparation pour abus de procédure, 26 septembre 2005 (ci-après « Requête du 26 septembre 2005 »).
[2] *Jean-Bosco Barayagwiza c. le Procureur*, affaire n°ICTR-97-19-AR72, Requête en extrême urgence de l'Appelant en révision et/ou réexamen de la décision de la Chambre d'appel rendue le 31 mars 2000 et pour sursis des procédures, 28 juillet 2000 (ci-après « Requête du 28 juillet 2000 »).
[3] *Jean-Bosco Barayagwiza c. le Procureur*, affaire n°ICTR-97-19-AR72, Arrêt (Demande du Procureur en Révision ou Réexamen), 31 mars 2000 (ci-après « Arrêt du 31 mars 2000 »).
[4] Réponse du Procureur à la Requête urgente de l'appelant Jean-Bosco Barayagwiza demandant l'examen de la Requête de la Défense datée du 28 juillet 2000 et réparation pour abus de procédure, 6 Octobre 2005 (ci-après « Réponse du Procureur»).
[5] Réplique de l'Appelant à la Réponse du Procureur, datée du 6 octobre 2005, intitulée Prosecutor's Response to 'Appellant Jean-Bosco Barayagwiza's Urgent Motion Requesting Examination of Defence Motion Dated 28 July 2000, and Remedy for Abuse of Process', 13 Octobre 2005 (ci-après « Réplique de l'Appelant »).
[6] 16 septembre 2002 (« Directive pratique »).
[7] Réplique de l'Appelant, Introduction.
[8] Requête du Procureur tendant à obtenir le rejet de l'*affidavit* de Justry Patrick Lumumba Nyaberi, 20 octobre 2005 (ci-après « Requête du 20 octobre 2005 »).

Justry Patrick Lumumba Nyaberi datée du 3 octobre 2005 et déposée confidentiellement par l'appelant le 18 octobre 2005[9]. L'appelant a répondu le 1er novembre 2005[10] et le Procureur a répliqué le jour suivant[11].

4. La Chambre d'appel note que la Réponse de l'appelant a été déposée onze jours après la date limite prévue au paragraphe 12 de la Directive pratique. L'appelant prie la Chambre d'appel de proroger le délai de dépôt en arguant que la Requête du 20 octobre 2005 aurait été adressée à une mauvaise adresse électronique du Conseil[12]. La Chambre d'appel constate que le Procureur ne s'oppose pas à une telle demande[13] et, dans les circonstances de l'espèce, reconnaît la validité du dépôt de la Réponse de l'appelant.

I. Rappel de la procédure

5. Le 3 Novembre 1999[14], la Chambre d'appel faisait droit à l'appel interjeté par l'appelant contre la décision de première instance II du 17 novembre 1998[15], laquelle rejetait l'exception préjudicielle soulevée par l'appelant fondée sur l'illégalité de son arrestation le 15 avril 1996 ainsi que celle de sa détention jusqu'à son transfert au centre de détention du Tribunal le 19 novembre 1997. Dans son Arrêt du 3 novembre 1999, la Chambre d'appel concluait au rejet de l'acte d'accusation et ordonnait l'arrêt définitif des poursuites ainsi que la mise en liberté immédiate de l'appelant aux fins de réparer la violation du droit de l'appelant à bénéficier d'une comparution initiale sans délai conformément à l'article 40 du Règlement de procédure et de preuve du Tribunal (« Règlement »).

6. Dans son Arrêt du 31 mars 2000[16], la Chambre d'appel accédait à la requête en révision déposée par le Procureur le 1er décembre 1999[17] et décidait, à la lumière des faits nouveaux présentés par le Procureur, de réviser son Arrêt du 3 novembre 1999 en modifiant la réparation accordée à l'appelant et en rejetant sa demande de mise en liberté[18].

7. Dans sa Requête du 28 juillet 2000, l'appelant sollicitait le réexamen et/ou la révision de l'Arrêt du 31 mars 2000 en se fondant sur de prétendus faits nouveaux[19].

8. Lors de la conférence de mise en état du 11 septembre 2000, la Chambre de première instance rejetait par décision orale la requête de l'appelant et des autres co-accusés tendant à la disqualification du Procureur adjoint[20].

9. Le 14 septembre 2000, la Chambre d'appel déboutait l'appelant de sa Requête du 28 juillet 2000 au motif, pour ce qui concerne la révision, que cette décision ne constituait pas un jugement

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[9] *Affidavit* de Justry Patrick Lumumba Nyaberi, 18 octobre 2005 (ci-après « *Affidavit* de M. Nyaberi »).
[10] Réponse de l'Appelant à la Requête du Procureur tendant à obtenir le rejet de l'*affidavit* de Justry Patrick Lumumba Nyaberi, 1er novembre 2005 (« Réponse de l'Appelant »).
[11] Réplique du Procureur à la Réponse de l'Appelant à la Requête du Procureur tendant à obtenir le rejet de l'*affidavit* de Justry Patrick Lumumba Nyaberi, 2 novembre 2005 (« Réplique du Procureur »).
[12] Réponse de l'Appelant, par. 1.
[13] Réplique du Procureur, par. 2.
[14] *Jean-Bosco Barayagwiza c. le Procureur*, affaire n°ICTR-97-19-AR72, Arrêt, 3 novembre 1999 (ci-après « Arrêt du 3 novembre 1999 »).
[15] *Le Procureur c. Jean-Bosco Barayagwiza*, affaire n°ICTR-97-19-I, Décision sur la requête en extrême urgence de la Défense aux fins d'ordonnances prescrivant le réexamen et/ou l'annulation de l'arrestation et de la détention provisoire du suspect, 17 novembre 1998.
[16] Arrêt du 31 mars 2000, par. 74.
[17] *Jean-Bosco Barayagwiza c. le Procureur*, affaire n°ICTR-97-19-AR72, Demande du Procureur en révision ou réexamen de l'arrêt rendu par la Chambre d'appel le 3 novembre 1999 en l'affaire Jean-Bosco Barayagwiza contre le Procureur et requête en sursis d'exécution, 1er décembre 1999.
[18] *Ibid*., par. 74.
[19] Requête du 28 juillet 2000, p. 4.
[20] CRA du 11 septembre 2000 (audience à huis clos), pp. 116-119 (« Décision du 11 septembre 2000 »).

définitif mettant un terme à la procédure contre l'appelant et, pour ce qui concerne le réexamen, que « le pouvoir de réexamen ne [pouvait] pas être utilisé comme un pouvoir de révision dans les cas où la révision [n'était] pas prévue et […] l'exercice de ce pouvoir [n'était] pas justifié »[21].

10. Le 3 décembre 2003, la Chambre de première instance rendait son jugement dans la présente affaire[22]. L'appelant interjetait appel du Jugement et déposait son acte d'appel le 22 avril 2004[23].

II. Discussion

11. Dans sa Requête du 26 septembre 2005, l'appelant formule deux demandes distinctes. Il requiert en premier lieu la tenue d'une audience préliminaire en vue de l'examen au fond de sa Requête du 28 juillet 2000 et, par là, le réexamen et l'annulation de l'Arrêt du 31 mars 2000[24]. L'appelant sollicite également de la Chambre d'appel qu'elle examine l'abus de procédure commis, selon lui, par la Chambre de première instance à compter de l'Arrêt du 3 novembre 1999[25]. Il réclame subséquemment (i) une décision sur la réparation appropriée pour l'abus de procédure, (ii) une « indemnisation adéquate de l'[A]ppelant », et, dans l'hypothèse où l'Arrêt du 31 mars 2000 devait être confirmé, une réduction sensible de sa peine en proportion du préjudice subi en raison de la violation de ses droits fondamentaux et de l'abus de procédure[26].

12. La Chambre d'appel analysera les arguments développés en distinguant les deux demandes de l'appelant et celle du Procureur.

A. Examen de la Requête du 28 juillet 2000

(1) Arguments des parties

13. L'appelant fait valoir que sa Requête du 28 juillet 2000 n'a été examinée au fond ni par la Chambre d'appel, ni par la Chambre de première instance, cette dernière ayant considéré qu'elle était « incompétente pour trancher une question liée à une affaire examinée par la Chambre d'appel »[27]. Il prétend que la Chambre d'appel dispose d'un pouvoir inhérent lui permettant de réexaminer l'Arrêt du 31 mars 2000 dans l'intérêt de la justice[28], en cas d'erreur grave ayant entraîné un déni de justice[29]. L'appelant invoque également l'opinion individuelle du Juge Shahabuddeen, jointe à l'Arrêt du 31 mars 2000 et réitérée dans l'affaire Semanza[30] pour soutenir qu'une décision ayant force de chose jugée peut être révisée « lorsqu'une des parties n'a pas eu droit à un procès équitable »[31].

14. L'appelant demande à la Chambre d'appel de considérer en particulier les éléments suivants, rapportés au terme d'une mission du précédent conseil de l'appelant au Cameroun du 17 juin au 8 juillet 2000 et présentés au soutien de sa Requête du 28 juillet 2000 :

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[21] *Jean-Bosco Barayagwiza c. le Procureur,* affaire n°ICTR-97-19-AR72, Décision sur la Requête en révision et/ou en réexamen, 14 septembre 2000 (ci-après « Décision du 14 septembre 2000 »), p. 3.
[22] *Le Procureur c. Ferdinand Nahimana et al.*, affaire n°ICTR-99-52-T, Jugement et sentence, 3 décembre 2003 (« Jugement »).
[23] Notice d'Appel (conformément aux dispositions de l'article 24 du Statut et de l'article 108 du Règlement), 22 avril 2004. L'acte d'appel a fait l'objet de plusieurs amendements. Voir, « Acte d'appel modifié » aux fins d'annulation du Jugement rendu le 03 décembre 2003 par la Chambre I dans l'affaire « Le Procureur contre Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze, ICTR-99-52-T », 27 avril 2004 ; Acte d'appel modifié, 12 Octobre 2005.
[24] Requête du 26 septembre 2005, par. 2-24, 40 (i), (ii), (iii).
[25] *Ibid.*, par. 25-36, 39, 40 (iv).
[26] *Ibid.*, par. 40.
[27] *Ibid.*, par. 1, se référant à la Décision du 11 septembre 2000.
[28] *Ibid.*, par. 3-5.
[29] *Ibid.*, par. 37, 38.
[30] Opinion individuelle du Juge Shahabuddeen dans *Laurent Semanza c. le Procureur*, affaire n°ICTR-97-20-A (« affaire *Semanza* »), Décision, 31 mai 2000.
[31] Requête du 26 septembre 2005, par. 6.

- le texte authentifié du compte rendu de l'audience du 3 mai 1996 devant une juridiction camerounaise[32];
- des documents relatifs à la procédure d'extradition présentée par le Gouvernement rwandais ainsi qu'à la demande de transfèrement de l'appelant et de quatre autres détenus[33];
- une lettre datée du 28 juillet 2000 et adressée par le Greffier en chef du Tribunal de première instance de Buea (Cameroun) au conseil de l'appelant à l'époque, M[e] Camille Marchessault[34].

Il s'appuie également sur les éléments suivants:

- une lettre du Greffier en chef du Tribunal de première instance de Buea (Cameroun) adressée le 3 février 2000 à un conseil dans une autre affaire[35];
- la décision rendue le 26 janvier 2001 par le Tribunal de première instance de Yaoundé (Cameroun), notant le défaut d'authentification du compte rendu de l'audience du 3 mai 1996 précité[36] ;
- une décision du Tribunal de première instance de Buea du 15 février 2001[37].

15. L'appelant fait valoir que ces éléments entament la fiabilité et la force probante des éléments de preuves ayant conduit la Chambre d'appel à minorer le rôle joué par les manquements du Procureur dans son Arrêt du 31 mars 2000[38].

16. En réponse, le Procureur soumet que l'appelant réclame de la Chambre d'appel qu'elle fasse précisément ce qu'elle a refusé de faire dans sa Décision du 14 septembre 2000[39], et souligne que la Chambre d'appel a déjà spécifié que les questions considérées dans son Arrêt du 31 mars 2000 et dans son Arrêt du 3 novembre 1999 n'avaient pas besoin d'être réexaminées[40]. Il argue que, faute pour l'appelant d'avoir présenté à la Chambre de première instance – plutôt qu'à la Chambre d'appel – les prétendus faits nouveaux établissant selon lui l'incompétence du Tribunal, il aurait perdu tout droit à contester la compétence du Tribunal[41]; il ajoute que la Décision du 11 septembre 2000 tranchait une requête d'une autre nature[42]. Le Procureur s'appuie également sur l'arrêt dans l'affaire *Kajelijeli*[43] pour faire valoir que toute réclamation relative à des décisions interlocutoires ainsi qu'à une réduction de la peine devraient être traitées dans le cadre de l'examen de l'appel sur le fond et non d'une requête participant de la mise en état de l'affaire en appel[44].

17. Le Procureur affirme que la procédure de révision ne peut s'appliquer qu'à des décisions définitives mettant un terme aux procédures et il soutient que les « faits nouveaux » sont ceux déjà présentés dans la Requête du 28 juillet 2000[45]. Le Procureur soumet que l'appelant devrait demander à la Chambre d'appel le réexamen de la Décision du 14 septembre 2000 avant d'attaquer l'Arrêt du 31

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[32] *Ibid*., par. 15. Ce texte est contenu dans l'Annexe 1 de la Requête du 28 juillet 2000.
[33] *Ibid*., par. 21, qui semble renvoyer, sans que cela apparaisse expressément dans la Requête du 26 septembre 2005, aux Annexes 5, 7 et 8 de la Requête du 28 juillet 2000.
[34] *Ibid*., par. 24, qui semble se référer à la Requête du 28 juillet 2000, Annexe 10.
[35] *Ibid*., par. 24, Annexe 4.
[36] *Ibid*., par. 13 ; l'Appelant ne joint pas ce document.
[37] L'Appelant soumet en particulier que cette seconde décision rendue par des juridictions camerounaises a été présentée à la Chambre d'appel puis à une Chambre de première instance dans l'affaire *Semanza*, mais qu'elle n'a pas été considérée dans le cadre d'un examen au fond. Voir Requête du 26 septembre 2005, par. 23 et Annexe 3.
[38] *Ibid*., par. 7-8. Voir également par. 9-24.
[39] Réponse du Procureur, par. 2, 12.
[40] Ibid., par. 2, 8, citant la Decision on "Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", 17 May 2005, note de bas de page 5.
[41] *Ibid*., par. 2, 7, 10, 11.
[42] *Ibid*., par. 9-11.
[43] *Ibid*., par. 5, 6, se référant à *Juvénal Kajelijeli v. the Prosecutor,* Case N°ICTR-98-44A-A, *Judgement,* 23 May 2005 (ci-après « Arrêt *Kajelijeli* »), par. 201-208.
[44] *Ibid*., par. 4.
[45] *Ibid*., par. 13.

mars 2000, puisque, contrairement à ce que prétend l'appelant, la Chambre d'appel a, par sa Décision du 14 septembre 2000, rejeté la demande en réexamen sur le fond[46].

18. En réplique, l'appelant précise que dans la Décision du 14 septembre 2000, la Chambre d'appel ne s'est pas prononcée sur la Requête du 28 juillet 2000 et qu'elle a seulement dirigé l'appelant vers la Chambre de première instance pour contester la compétence *rationae personae* du Tribunal alors que ladite Requête visait selon l'appelant l'admission de faits nouveaux. Il soutient que seule la Chambre d'appel avait compétence pour se prononcer sur des faits nouveaux et, le cas échéant, réviser ou réexaminer son Arrêt du 31 mars 2000 et que, dès lors, l'appelant n'était pas tenu de présenter d'abord sa requête sollicitant l'admission de faits nouveaux à la Chambre de première instance[47]. L'appelant ajoute que le précédent de l'affaire *Semanza* indiquait clairement qu'une Chambre de première instance n'avait pas compétence pour réviser une décision de la Chambre d'appel[48]. Il soumet également que, dans la mesure où la question des faits nouveaux n'a pas été soulevée pendant le procès, elle ne peut constituer un moyen d'appel, à moins de s'inscrire « dans la question plus vaste de l'abus de procédure »[49].

(2) Analyse

19. Dans sa Requête du 26 septembre 2005, l'appelant requiert l'examen de sa Requête du 28 juillet 2000 en vue d'obtenir le réexamen de l'Arrêt du 31 mars 2000[50]. Cela étant, la Requête du 26 septembre 2005 renvoie à la Requête du 28 juillet 2000 qui sollicite la révision et/ou le réexamen de l'Arrêt du 31 mars 2000[51]. En outre, l'appelant s'appuie sur une série de faits prétendument nouveaux[52] réfutant selon lui l'authenticité de ceux admis par la Chambre d'appel dans son Arrêt du 31 mars 2000. Dès lors, la nature même de sa demande ainsi que des arguments développés par l'appelant au soutien de sa Requête du 26 septembre 2005 portent la Chambre d'appel à considérer également la question de la révision de l'Arrêt du 31 mars 2000[53].

20. Pour les besoins de l'analyse, la Chambre d'appel souhaite distinguer et clarifier les notions de révision et de réexamen. Pour obtenir la révision conformément aux articles 25 du Statut et 120 à 123 du Règlement, la partie intéressée doit au préalable satisfaire quatre conditions:

1) un fait nouveau doit avoir été découvert,
2) ce fait nouveau ne doit pas avoir été connu de la partie intéressée lors de la procédure initiale,
3) la non-découverte de ce fait nouveau ne doit pas être due à un manque de diligence de la partie intéressée, et
4) le fait nouveau aurait pu être un élément décisif de la décision initiale[54].

21. La Chambre d'appel réitère en outre que

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[46] *Ibid*., par. 8, 9, 11.
[47] *Ibid*., par. 1-8.
[48] *Ibid*., par. 3, 9.
[49] *Ibid*., par. 2.
[50] Requête du 26 septembre 2005, par. 3, 40
[51] Requête du 28 juillet 2000, voir en particulier par. 1, 2 (b), (h), 48.
[52] La Chambre d'appel relève que, parmi les faits prétendument nouveaux avancés par l'Appelant au soutien de sa Requête du 26 septembre 2005, seuls quatre d'entre eux sont portés pour la première fois à la connaissance de la Chambre d'appel dans cette affaire, à savoir la décision du Tribunal de première instance de Yaoundé du 26 janvier 2001, celle du Tribunal de première instance de Buéa du 15 février 2001, l'*Affidavit* et la déclaration sous serment complémentaire de M. Nyaberi; tous les autres éléments ayant été soumis à l'appréciation de la Chambre d'appel dans le cadre de la Requête du 28 juillet 2000.
[53] Cette compréhension est celle qui doit s'imposer à la lecture du paragraphe 6 de la Réponse de l'Appelant qui précise que l'*Affidavit* de M. Nyaberi « n'a pas été déposé à l'appui d'une procédure d'appel [mais plutôt] sous l'empire de l'article 25 du Statut du TPIR et a donc enclenché la procédure de révision » de l'Arrêt du 31 mars 2000.
[54] *Le Procureur c. Duško Tadić*, affaire n°IT-94-1-R, Arrêt relatif à la demande en révision, 30 juillet 2002 (« Affaire *Tadić*, Décision »), par. 20.

« seul un jugement définitif peut être révisé en vertu des articles 25 du Statut et 120 du Règlement, et [qu']un jugement définitif est une décision qui met fin à une procédure »[55].

22. Pour ce qui est du réexamen, la Chambre d'appel rappelle que

> the Appeals Chamber ordinarily treats its prior interlocutory decisions as binding in continued proceedings in the same case as to all issues definitively decided by those decisions. This principle prevents parties from endlessly relitigating the same issues, and is necessary to fulfil the very purpose of permitting interlocutory appeals: to allow certain issues to be finally resolved before proceedings continue on other issues.[56]

Ce nonobstant la Chambre d'appel dispose, dans des circonstances exceptionnelles, du pouvoir inhérent de réexaminer toute décision interlocutoire lorsqu'une erreur manifeste de raisonnement a été mise en évidence ou si la décision dont on sollicite le réexamen a donné lieu à une injustice[57].

23. La Chambre d'appel rappelle que la Décision du 14 septembre 2000 a rejeté la révision ainsi que le réexamen de la Requête du 28 juillet 2000 aux motifs que l'Arrêt du 31 mars 2000 n'avait pas mis fin à la procédure, que le réexamen de ladite requête ne pouvait être utilisé comme pouvoir de révision dans les cas où celle-ci n'était pas prévue et qu'il n'était pas justifié en l'espèce ; elle a dirigé l'appelant vers la Chambre de première instance en vue de lui soumettre, le cas échéant, des faits nouveaux de nature à établir l'incompétence du Tribunal[58].

24. Pour répondre aux arguments du Procureur selon lesquels l'appelant aurait dû présenter à la Chambre de première instance les prétendus faits nouveaux[59] et demander à la Chambre d'appel le réexamen de la Décision du 14 septembre 2000 avant de requérir celui de l'Arrêt du 31 mars 2000, l'appelant soumet que la question des faits nouveaux relevait de la compétence de la Chambre d'appel et que la Décision du 14 septembre 2000 n'est « pas pertinente » puisque la Requête du 28 juillet 2000 ne traitait pas de la compétence personnelle du Tribunal[60]. Or, la Chambre d'appel a précisé dès son Arrêt du 3 novembre 1999 que

> « la règle de l'abus de procédure […] est un processus par lequel des juges peuvent refuser de se déclarer compétents lorsqu'au vu des violations graves et flagrantes dont les droits de l'accusé font l'objet, l'exercice d'une telle compétence pourrait s'avérer préjudiciable à l'intégrité du tribunal »[61].

Elle a par suite signalé que les faits nouveaux présentés par le Procureur avaient trait à l'application de la doctrine de l'abus de procédure et à la solution que la Chambre d'appel avait donnée dans son Arrêt du 3 novembre 1999[62]. Il ressort clairement de ce qui précède que la Requête du 28 juillet 2000 avait pour objet la contestation de l'authenticité de faits nouveaux ayant conduit la Chambre d'appel à rétablir la compétence du Tribunal vis-à-vis de l'appelant en modifiant la

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[55] Affaire *Semanza*, Arrêt (Requête en révision de la décision de la Chambre d'appel du 31 mai 2000), 4 mai 2001, p. 4. Voir également, *le Procureur c. Imanishimwe*, affaire n°ICTR-97-36-AR72, Arrêt (Requête en révision), 12 juillet 2000, p. 2 ; *le Procureur c. Bagilishema*, affaire n°ICTR-95-1A-A, Arrêt (Requête en demande de révision des ordonnances rendues par le Juge de la mise en état les 30 novembre et 19 décembre 2001), 6 février 2002, p. 2 ; Décision du 14 septembre 2000, p. 3 ; Arrêt du 31 mars 2000, par. 49. Voir également, affaire *Tadić*, Décision, par. 22 ; *le Procureur c. Hazim Delić*, Affaire n°IT-96-21-R-R119, Décision relative à la requête en révision, 25 avril 2002 (« Affaire *Delić*, Décision »), par. 8.
[56] Arrêt *Kajelijeli*, par. 202.
[57] Confidential Decision on "Prosecutor's Motion for Reconsideration of the Appeals Chamber's Decision Regarding the Timeliness of the Filing of the Prosecutor's Response to 'Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Witness AEU'", 7 April 2006, p. 3; Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005, p. 2; Arrêt Kajelijeli, par. 203.
[58] Décision du 14 septembre 2000, p. 3.
[59] Réponse du Procureur, par. 2, 7, 10, 11.
[60] Réplique de l'Appelant, par. 1, 2.
[61] Arrêt du 3 novembre 1999, par. 74.
[62] Arrêt du 31 mars 2000, par. 17.

réparation de l'abus de procédure constaté; et que, contrairement à ce que soutient l'appelant, la Requête visait *in fine* la compétence du Tribunal sur la base de prétendus faits nouveaux.

25. Dès avant la Décision du 14 septembre 2000, le conseil de l'appelant à cette période souscrivait manifestement à une telle prémisse lorsqu'il précisa à l'attention des Juges de première instance :

> cette requête [du 28 juillet 2000], inévitablement, devrait disposer de la juridiction de cette Chambre. Alors, dans un pareil contexte, je vous soumets que la requête en révision qui est déposée devant la Chambre d'appel, devrait être entendue préalablement à tout déroulement qui devrait intervenir devant cette Chambre de première instance[63].

26. Ledit conseil signifia lors de la conférence préalable au procès du 19 septembre 2000 que la compétence de la Chambre de première instance était en jeu et qu'il entendait donner suite à la Décision du 14 septembre 2000 par voie de recours en ces termes :

> [l]a Chambre d'Appel dit, à un de ses derniers « Considérant » [de la Décision du 14 septembre 2000] ce qui suit : « Considérant que si le requérant connaît des faits nouveaux de nature à établir l'incompétence du Tribunal, il lui revient, s'il le souhaite, de les soulever devant la Chambre de première instance.
>
> […] les recours appropriés seront exercés par Monsieur Barayagwiza. A savoir, est-ce que ce recours sera devant la Chambre d'Appel ou encore devant la Chambre de Première instance ? […] Evidemment, vous êtes certainement au courant de cette décision [du 14 septembre 2000], et, étant donné que cela relève de votre compétence, cela relève de votre juridiction, et que ce débat-là, évidemment, comme tous les autres lorsqu'ils relèvent de votre juridiction, devrait être débattu « *in limine litis* »[64].

27. La Chambre d'appel considère que, dès lors que le jugement de première instance est prononcé, toute demande de réexamen d'une décision prise dans le cadre de la procédure de première instance doit être exclusivement adressée *via* l'acte d'appel et le mémoire de l'appelant. De l'avis de la Chambre d'appel, le jugement clôt et endosse la procédure de première instance ; pour des raisons évidentes d'économie judiciaire et dans le but d'empêcher les parties de remettre en cause constamment des questions déjà tranchées, il appartient à l'appelant qui souhaite faire réexaminer une partie ou l'ensemble de cette procédure d'en faire état dans le cadre de son appel au fond.

28. La Chambre d'appel relève qu'en l'espèce l'Arrêt du 31 mars 2000 ainsi que la Décision du 14 septembre 2000 ont été rappelés aux paragraphes 17 et 18 du Jugement et que la Chambre de première instance a pris en considération, aux paragraphes 1106 et 1107 du Jugement, la réparation ordonnée par l'Arrêt du 31 mars 2000 afin de déterminer la sentence.

29. En conséquence, la Chambre d'appel considère que l'appelant ne peut solliciter le réexamen de l'Arrêt du 31 mars 2000 par voie de requête au stade de la mise en état de l'affaire en appel et qu'une telle demande devrait être articulée dans le cadre de son appel du Jugement au fond.

30. Pour étayer sa demande de révision de l'Arrêt du 31 mars 2000, l'appelant argue que la décision du 31 mai 2000 de la Chambre de première instance dans l'affaire *Semanza* confirme clairement qu'une Chambre de première instance n'a pas compétence pour réviser[65] une décision de la

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[63] CRA du 11 septembre 2000, pp. 125 et s.

[64] CRA du 19 septembre 2000, pp. 180, 181. Le lendemain, le conseil de l'Appelant annonçait : « nous allons faire valoir les droits de monsieur Barayagwiza, suite à la décision qui a été rendue par la Chambre d'appel, dernièrement », CRA du 20 septembre 2000, pp. 112-113.

[65] L'Appelant affirme au paragraphe 9 de sa Réplique de l'Appelant que, dans l'affaire *Semanza*, « [l]a Chambre de première instance s'est toutefois déclarée incompétente pour réviser *ou réexaminer* une décision de la Chambre d'appel» (non souligné dans l'original, note de bas de page omise). La Chambre d'appel relève néanmoins que le réexamen n'a pas été mis en jeu

Chambre d'appel[66]. La Chambre d'appel ne peut souscrire à cette interprétation du précédent évoqué. Dans l'affaire *Semanza* comme dans la présente affaire, la Chambre d'appel a invité le requérant à soulever devant la Chambre de première instance des faits nouveaux de nature à établir l'incompétence du Tribunal[67]. Elle relève que le requérant dans l'affaire *Semanza* a par la suite présenté à la Chambre de première instance une requête aux fins que celle-ci se déclare compétente pour trancher sa précédente requête en révision de la décision de la Chambre d'appel du 31 mai 2000 et non, ainsi que la Chambre d'appel l'y avait invité, une nouvelle requête contestant la compétence du Tribunal sur la base de faits nouveaux allégués. La Chambre de première instance a rejeté cette requête en considérant qu'elle procédait d'une interprétation erronée de la Décision du 4 mai 2001[68] et, de l'avis de la Chambre d'appel, elle a dûment estimé qu'elle n'était saisie d'aucune requête en révision de l'une de ses propres décisions[69].

31. Quant à la question plus générale de savoir si l'appelant peut valablement réclamer la révision de l'Arrêt du 31 mars 2000, la Chambre d'appel réitère que seul un jugement définitif peut être révisé[70]. Or, la Chambre d'appel considère que l'Arrêt du 31 mars 2000 est une décision faisant droit à l'appel interjeté par le Procureur contre l'Arrêt du 3 novembre 1999. Ainsi que la Chambre d'appel l'a déjà affirmé[71], l'Arrêt du 31 mars 2000 n'a pas statué définitivement sur le fond ; il a uniquement modifié la réparation ordonnée par la Chambre d'appel dans son Arrêt du 3 novembre 1999[72] sans préjudice de l'examen au fond de l'affaire par la Chambre de première instance.

32. Pour ces raisons, l'appelant ne peut requérir la révision de l'Arrêt du 31 mars 2000.

B. ABUS DE PROCÉDURE

(1) Arguments des parties

33. Dans sa Requête du 26 septembre 2005, l'appelant demande à la Chambre d'appel de juger que postérieurement à l'Arrêt du 3 novembre 1999, l'instance, en particulier l'Arrêt du 31 mars 2000, a constitué un abus de procédure exigeant une réparation adéquate. Il soumet que la Chambre d'appel a indûment ordonné le sursis à exécution de l'Arrêt du 3 novembre 1999 (i) *ultra vires*[73] et (ii) sans que l'appelant ait eu l'occasion d'être entendu[74], le privant dès lors de son droit à un procès équitable et impartial[75]. L'appelant conteste sa détention postérieure à l'Arrêt du 3 novembre 1999 bien que « sa liberté lui ait été légalement restituée » et en dépit de sa requête en habeas corpus[76] et il affirme que les arguments présentés par le Procureur et le Gouvernement rwandais au soutien de la demande en

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dans l'affaire *Semanza* et que dans les précédents évoqués la Chambre d'appel comme la Chambre de première instance ne se sont prononcées que sur la question de la révision.

[66] Réplique de l'Appelant, par. 3, 9 se référant à l'affaire Semanza, Decision on the Defence Motion for Trial Chamber III to Declare Itself Competent to Hear and Determine Defence Motion for Review of the Judgement of the Appeals Chamber Dated 31 May 2000 Pursuant to Article 25 of the Statute, Rules 120 and 121 of the Rules of Procedure and Evidence Filed on March 2 2001 Pursuant to the Appeals Chamber Decision Dated 4 May 2001 Rule 54, 5 October 2001 (« Décision sur la requête en revision »), par. 5, 6.

[67] Affaire *Semanza*, Arrêt (Requête en révision de la décision de la Chambre d'appel du 31 mai 2000), 4 mai 2001 (« Décision du 4 mai 2001 »), p. 4.

[68] Affaire Semanza, Décision sur la requête en révision, par. 7: "[t]he Appeals Decision of 4 May 2001 […] merely states that the Defence may request this Chamber of first instance to review the Trial Chamber III Decision".

[69] Affaire *Semanza*, Décision sur la requête en révision, par. 5-8.

[70] Voir, *supra*, par. 24.

[71] Décision du 14 septembre 2000, p. 3.

[72] Arrêt du 31 mars 2000, par. 74.

[73] *Ibid*., par. 31.

[74] *Ibid*., par. 32.

[75] *Ibid*., par. 30.

[76] *Ibid*., par. 33.

révision de l'Arrêt du 3 novembre 1999, en postulant la culpabilité de l'appelant, ont violé son droit à la présomption d'innocence[77].

34. En réponse, le Procureur soumet que la prétention de l'appelant correspond en réalité à l'allégation d'une erreur de droit, devant à ce titre être adressée à la Chambre d'appel dans le cadre de son examen au fond de l'appel[78]. Il relève que l'appelant n'a prouvé ni la prétendue partialité du Procureur ni l'apparence de partialité de la Chambre d'appel[79]. La Chambre d'appel n'a, de l'avis du Procureur, pris la décision de surseoir à l'exécution de l'Arrêt du 3 novembre 1999 ni *ultra vires* ni *ex parte*[80]. Il précise encore que l'appelant n'a jamais dûment saisi la Chambre d'appel d'une requête en habeas corpus[81].Concernant la violation prétendue de la présomption d'innocence, le Procureur affirme qu'un juste équilibre doit être maintenu entre les droits fondamentaux de l'accusé et l'intérêt primordial de la communauté internationale à poursuivre les personnes présumées responsables de violations graves du droit international humanitaire[82]. Le Procureur fait valoir en outre qu'il est habilité à soumettre des arguments suggérant la culpabilité de l'accusé et soutient qu'aucune de ses déclarations à l'époque n'a eu un quelconque impact sur le raisonnement de la Chambre d'appel[83].

35. En réplique, l'appelant avance que l'intention de déposer une requête en révision exprimée par le Procureur n'équivalait pas à un dépôt formel[84]. De plus, il fait valoir que la correspondance avec les Juges datée du 6 janvier 2000[85] atteste de la régularité de sa requête en *habeas corpus*. Enfin, l'appelant renvoie à deux déclarations, l'une du porte-parole du Secrétaire Général des Nations Unies et l'autre du représentant du Gouvernement du Rwanda, pour soutenir que le Tribunal a violé son droit à la présomption d'innocence[86].

(2) Analyse

36. La Chambre d'appel observe que l'appelant développe la même requête, qu'il fonde sur les mêmes arguments, dans la première partie de son acte et de son mémoire d'appel[87]. Au vu des considérations qui précèdent[88], la Chambre d'appel estime qu'une telle contestation relative à une ou plusieurs décisions prises dans le cadre de la procédure de première instance doit être adressée à la Chambre d'appel dans le cadre de la procédure d'appel en cours.

C. REQUÊTE DU 20 OCTOBRE 2005 TENDANT À OBTENIR LE REJET DE L'*AFFIDAVIT* ET DE LA DÉCLARATION SOUS SERMENT COMPLÉMENTAIRE DE M. NYABERI

(1) Arguments des parties

37. Pour solliciter le rejet de l'*Affidavit* de M. Nyaberi, le Procureur soutient qu'une telle déclaration aurait dû être présentée à la Chambre d'appel au titre de moyen de preuve supplémentaire

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[77] *Ibid*., par. 35, 36.
[78] Réponse du Procureur, par. 18.
[79] *Ibid*., par. 19, 20.
[80] *Ibid*., par. 21, 22.
[81] *Ibid*., par. 23.
[82] *Ibid*., par. 24 évoquant l'Arrêt *Kajelijeli*, par. 206 ; *le Procureur c. Dragan Nikolić*, affaire n°IT-94-2-AR73, Décision relative à l'appel interlocutoire concernant la légalité de l'arrestation, 5 juin 2003, par. 30.
[83] *Ibid*., par. 25.
[84] Réplique de l'Appelant, par. 12.
[85] *Ibid*., par. 13.
[86] *Ibid*., par. 14-16, se référant – sans les annexer à sa Réplique – à une déclaration du porte-parole du Secrétaire Général des Nations Unies rapportée par le *National Post (Canadian Newspaper),* Saturday 6 November 1999 ainsi qu'à une déclaration du représentant du Gouvernement du Rwanda lors d'une audience en première instance dans cette affaire, T. 22 February 2000, pp. 287-291.
[87] Acte d'appel modifié, 12 Octobre 2005, p. 1; *Appellant's Appeal Brief*, 12 October 2005, par. 46-50.
[88] Voir, *supra*, par. 27, 31.

conformément à l'Article 115 du Règlement[89]. Il ajoute que pour autant qu'elle ait été valablement présentée, ladite déclaration ne satisferait pas les critères prévus par l'Article 115 du Règlement[90]. Le Procureur précise par ailleurs que l'*Affidavit* de M. Nyaberi correspond à une nouvelle prétention se rapportant à l'interprétation des arguments développés par le précédent conseil de l'appelant lors des audiences du 22 février 2000 devant la Chambre d'appel, et non à des éléments de fait nouveaux présentés à l'appui de la Requête du 26 septembre 2005[91].

38. L'appelant joint en annexe de sa Réponse une déclaration sous serment « complémentaire » de Justry Patrick Lumumba Nyaberi datée du 31 octobre 2005 et demande à la Chambre d'appel (i) de l'examiner avec l'*Affidavit* de M. Nyaberi[92] ; (ii) au surplus, d'inviter M. Nyaberi à comparaître[93]. Il signale que de l'Arrêt du 31 mars 2000. Il conteste l'argument du Procureur selon lequel l'*Affidavit* de M. Nyaberi tendrait à présenter des moyens de preuve supplémentaires en contournant la procédure prévue par l'article 115 du Règlement[94] et il souligne que « l'*affidavit* de Nyaberi n'a pas été déposé à l'appui d'une procédure d'appel [mais plutôt] sous l'empire de l'article 25 du Statut du TPIR et a donc enclenché la procédure de révision »[95]. L'appelant fait valoir que l'*Affidavit* de M. Nyaberi pourrait avoir des conséquences directes sur l'Arrêt du 31 mars 2000, dans lequel la Chambre d'appel s'est basée exclusivement sur les arguments présentés par le Procureur[96].

39. Le Procureur signale dans sa réplique qu'en annexant la seconde déclaration sous serment de Justry Patrick Lumumba Nyaberi à la Réponse de l'appelant, ce dernier « soulève […] un nouveau point qui déborde le cadre de la requête initiale »[97]. Il s'oppose au dépôt des deux déclarations sous serment de Justry Patrick Lumumba Nyaberi et il argue l'inapplicabilité tant de l'article 115[98] que de l'article 120 du Règlement[99]. Le Procureur argue également que la réparation sollicitée par l'appelant est disproportionnée[100].

(2) Analyse

40. L'appelant affirme avoir déposé l'*Affidavit* de M. Nyaberi dans le cadre d'une procédure de révision de l'Arrêt du 31 mars 2000, conformément à l'article 25 du Statut[101]. La Chambre d'appel considère toutefois que l'*Affidavit* et la déclaration sous serment complémentaire de M. Nyaberi ne sauraient être déposés dans le cadre d'une procédure de révision qui n'a pas valablement été engagée.

III. Dispositif

41. Par ces motifs, la Chambre d'appel, REJETTE la Requête du 26 septembre 2005, FAIT DROIT à la Requête du 20 octobre 2005.

Fait en français et en anglais, le texte français faisant foi.

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[89] Requête du 20 octobre 2005, par. 2.
[90] *Ibid*., par. 3.
[91] *Ibid*., par. 4, 5.
[92] Réponse de l'Appelant, par. 1.
[93] *Ibid*., par. 18.
[94] *Ibid*., par. 3-7.
[95] *Ibid*., par. 6.
[96] *Ibid*., par. 13 ; voir également, par. 9, 14.
[97] *Ibid*., par. 14.
[98] *Ibid*., par. 17.
[99] *Ibid*., par. 3, 4, voir également, par. 13.
[100] *Ibid*., par. 15, 16.
[101] Réponse de l'Appelant, par. 6. Une lecture conjointe de ce paragraphe avec le paragraphe 1 du même document permet de conclure que cet argument est également avancé pour justifier le dépôt de la déclaration sous serment complémentaire de M. Nyaberi.

Fait le 23 juin 2006, à La Haye, Pays-Bas.

[Signé] : Fausto Pocar

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Corrigendum à la décision relative à la requête de l'appelant Jean-Bosco Barayagwiza demandant l'examen de la requête de la défense datée du 28 juillet 2000 et réparation pour abus de procédure
28 juin 2006 (ICTR-99-52-A)

(Original : Français)

Chambre d'appel

Juges : Fausto Pocar, Président de Chambre ; Mohamed Shahabuddeen ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron

Jean Bosco Barayagwiza – Corrigendum, Modification de la décision

NOUS, FAUSTO POCAR, Président de la Chambre d'appel du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 dans la présente affaire,

VU la Décision relative à la Requête de l'Appelant Jean-Bosco Barayagwiza demandant l'examen de la requête de la Défense datée du 28 juillet 2000 et réparation pour abus de procédure, rendue par la Chambre d'appel le 23 juin 2006 dans la présente affaire (« Décision »),

ATTENDU que le paragraphe 4, lignes 1 et 2, de la Décision est ainsi rédigé :

> « La Chambre d'appel note que la Réponse de l'Appelant a été déposée onze jours après la date limite prévue au paragraphe 12 de la Directive pratique. »

alors qu'il devrait être rédigé dans les termes suivants :

> « La Chambre d'appel note que la Réponse de l'Appelant a été déposée onze jours après le dépôt de la Requête du 20 octobre 2005. »

ATTENDU que la note de bas de page 52 est ainsi rédigée :

> « La Chambre d'appel relève que, parmi les faits prétendument nouveaux avancés par l'Appelant au soutien de sa Requête du 26 septembre 2005, seuls quatre d'entre eux sont portés pour la première fois à la connaissance de la Chambre d'appel dans cette affaire, à savoir la décision du Tribunal de première instance de Yaoundé du 26 janvier 2001, celle du Tribunal de première instance de Buea du 15 février 2001, l'Affidavit et la déclaration sous serment complémentaire de M. Nyaberi; tous les autres éléments ayant été soumis à l'appréciation de la Chambre d'appel dans le cadre de la Requête du 28 juillet 2000. »

alors qu'elle devrait être rédigée dans les termes suivants :

> « La Chambre d'appel relève que, parmi les faits prétendument nouveaux avancés par l'Appelant au soutien de sa Requête du 26 septembre 2005, au moins quatre d'entre eux sont portés pour la première fois à la connaissance de la Chambre d'appel dans cette affaire, à savoir la décision du Tribunal de première instance de Yaoundé du 26 janvier 2001, celle du Tribunal de première instance de Buea du 15 février 2001, l'Affidavit et la déclaration sous serment complémentaire de M. Nyaberi. »

ATTENDU que la note de bas de page 70 est ainsi rédigée :

« Voir, *supra*, par. 24. »

alors qu'elle devrait être rédigée dans les termes suivants :

« Voir, *supra*, par. 21. »

ATTENDU que le paragraphe 38, ligne 4, de la Décision est ainsi rédigé :

« … Il signale que de l'Arrêt du 31 mars 2000. Il conteste l'argument du Procureur… »

alors qu'il devrait être rédigé dans les termes suivants :

« … Il conteste l'argument du Procureur… »

PAR CES MOTIFS,

ORDONNONS, avec l'accord de la Chambre d'appel, que la Décision soit modifiée en tenant compte des corrections précitées.

Fait en français et en anglais, le texte français faisant foi.

Fait le 28 juin 2006, à La Haye, Pays-Bas.

[Signé] : Fausto Pocar

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Décision sur la requête de Ferdinand Nahimana aux fins de communication d'éléments de preuve disculpatoires et d'investigations sur l'origine et le contenu de la pièce à conviction P 105
12 septembre 2006 (ICTR-99-52-A)

(Original : Français)

Chambre d'appel

Juges : Fausto Pocar, Président de Chambre ; Mohamed Shahabuddeen ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron

Ferdinand Nahimana – Obligation du Procureur de communiquer ses éléments de preuve à décharge subordonnée à leur possession, Devoir du Procureur d'assister le Tribunal aux fins d'établir la vérité et de rendre justice aux accusés, Présentation éventuelle de moyens de preuve supplémentaires, Démonstration d'un motif judiciaire légitime – Requête rejetée

Instrument international cité :

Règlement de Procédure et de preuve, art. 54, 68 (B), 107 et 115 ; Statut, art. 28

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative à la requête de la Défense aux fins de la délivrance d'une ordonnance enjoignant aux témoins à charge de produire, lors de leur comparution, leurs agendas ou autres écrits datant de 1992 à 1994 et leurs déclarations faites devant des autorités judiciaires rwandaises, 24 novembre 2003 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. André Rwamakuba et consorts, Décision relative aux requêtes de la Défense : aux fins d'être autorisée à faire appel des décisions rejetant ses requêtes pour

contre-interroger les témoins sur des déclarations antérieures contradictoires et aux fins d'une ordonnance enjoignant aux autorités rwandaises de donner accès à certains dossiers judiciaires et de mettre à la disposition de la Défense une copie authentifiée des pièces pertinentes dans ces dossiers, 4 février 2004 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Aloys Simba, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68, 4 octobre 2004 (ICTR-2001-76) ; Chambre de première instance, Le Procureur c. Aloys Simba, Decision on the Defence Request for the Cooperation of Rwandan Government pursuant to Article 28, 28 October 2004 (ICTR-2001-76) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la demande de coopération et d'assistance adressée au Royaume des Pays-Bas, 7 février 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative à la requête de Joseph Nzirorera aux fins de solliciter la coopération d'un gouvernement, 19 avril 2005 (ICTR-98-44) ; Chambre d'appel, Le Procureur c. Ferdinand Nahimana et consorts, Décision relative à la requête de l'appelant Ferdinand Nahimana aux fins de mesures d'assistance du Greffe en phase d'appel, 3 mai 2005 (ICTR-99-52) ; Chambre d'appel, Le Procureur c. Juvénal Kajelijeli, Arrêt, 23 mai 2005 (ICTR-98-44A) ; Chambre d'appel, Le Procureur c. Jean Bosco Barayagwiza, Decision on Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator, 4 October 2005 (ICTR-99-52) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders, 13 février 2006 (ICTR-98-44) ; Chambre d'appel, Le Procureur c. Jean Bosco Barayagwiza et consorts, Decision on Appellant Hassan Ngeze's Six Motions for Admission of Additional Evidence on Appeal and /or Further Investigation, 23 février 2006 (ICTR-99-52) ; Chambre de première instance, Le Procureur c. Augustin Bizimungu et consorts, Décision sur la requête de Nzuwonemeye intitulée Request of Cooperation from the Kingdom of Belgium pursuant to Article 28 of the Statute, 7 Juin 2006 (ICTR-2000-56) ; Chambre de première instance, Le Procureur c. Hassan Ngeze, Decision on Appellant Hassan Ngeze's Motions for Approval of Further Investigations on Specific Information Relating to the Additional Evidence of Potential Witnesses, 20 juin 2006

T.P.I.Y. : Chambre d'appel, Le Procureur c. Tihomir Blaškić, Arrêt relatif à la Requête de la République de Croatie aux fins d'examen de la Décision de la Chambre de première instance II du 18 juillet 1997, 29 octobre 1997 (IT-95-14) ; Chambre d'appel, Le Procureur c. Tihomir Blaškić, Arrêt relatif aux requêtes de l'appelant aux fins de production de documents, de suspension ou de prorogation du délai de dépôt du mémoire et autres, 26 septembre 2000 (IT-95-14) ; Chambre d'appel, Le Procureur c. Dario Kordić et Mario Čerkez, Décision [confidentielle] relative à la requête aux fins d'adresser une ordonnance contraignante à la Bosnie-Herzégovine et à la Fédération de Bosnie-Herzégovine, et d'accéder aux pièces actuellement en la possession de l'Accusation, 15 novembre 2001 (IT-95-14/2) ; Chambre de première instance, Le Procureur c. Radoslav Brđanin, Decision on Interlocutory Appeal, 11 décembre 2002 (IT-99-36) ; Chambre d'appel, Le Procureur c. Radislav Krstić, Arrêt relative à la demande d'injonction, 1er juillet 2003 (IT-98-33) ; Chambre d'appel, Le Procureur c. Sejér Halilović; Décision de la relative aux citations à comparaître, 21 Juin 2004 (IT-01-48) ; Chambre d'appel, Le Procureur c. Tihomir Blaškić, Jugement, 29 juillet 2004 (IT-95-14) ; Chambre de première instance, Le Procureur c. Milan Milutinović et consorts, Décision relative à la Requête de Dragoljub Ojdanić aux fins de délivrance d'ordonnances contraignantes en application de l'article 54 bis du Règlement, 23 mars 2005 (IT-05-87) ; Chambre de première instance, Le Procureur c. Slobodan Milošević, Décision [confidentielle] relative aux demandes présentées par l'Accusation et la Serbie-et-Monténegro en application de l'article 54 bis du Règlement, 9 mars 2006 (IT-02-54)

1. La Chambre d'appel du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 (ci-après « Chambre d'appel » et « Tribunal », respectivement) est saisie par l'Appelant Ferdinand Nahimana

(ci-après « Appelant ») de la « Requête aux fins de communication d'éléments de preuve disculpatoires et d'investigations sur l'origine et le contenu de la pièce à conviction P 105 » (ci-après « Requête ») déposée confidentiellement le 10 avril 2006[1]. La Chambre d'appel n'est pas convaincue qu'il existe des raisons apparentes justifiant la classification confidentielle de la Requête, car elle ne se réfère pas à des témoins protégés et l'appelant n'a présenté aucun argument en faveur d'un tel niveau de classification. Par conséquent, la Requête et la présente décision doivent être publiques.

2. Le Procureur a déposé sa réponse le 18 avril 2006[2]. L'appelant n'a pas répliqué.

I. Rappel de la procédure

3. Le 20 mars 2002, lors de la présentation des preuves à charge en première instance, le Procureur versait au dossier l'enregistrement d'une interview donnée par l'appelant le 24 avril 1994 à un journaliste de Radio Rwanda et diffusée le 25 avril 1994. Cet enregistrement fut admis par la Chambre de première instance en tant que pièce à conviction P105[3]. La Chambre d'appel note également que sept copies de cette cassette audio furent communiquées aux accusés dans cette affaire le 14 juin 2001[4].

4. Le 13 mai 2003, l'appelant demandait la suspension des procédures en première instance au motif qu'il n'avait pas été en mesure d'obtenir, du Rwanda en particulier, des documents et des enregistrements sonores d'émissions et de discours à l'appui de sa cause[5]. Par sa décision du 5 juin 2003[6], la Chambre de première instance avait rejeté cette demande, n'étant pas convaincue que les droits de l'accusé à un procès équitable avaient été violés par un quelconque manque de coopération de la part des autorités rwandaises[7]. L'appelant n'a pas interjeté appel de cette décision.

5. Le 3 décembre 2003, la Chambre de première instance rendait son jugement dans la présente affaire[8]. L'appelant interjetait appel du Jugement et déposait son acte d'appel le 4 mai 2004 et son Mémoire d'appel le 27 septembre 2004[9]. La Chambre d'appel relève que dans son mémoire d'appel, l'appelant conteste la recevabilité de la pièce P105 en raison de son caractère incomplet[10]. La présente

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[1] La Chambre d'appel note que la version amendée de la Requête déposée le 10 avril 2006 a remplacé la version précédente déposée le 7 avril 2006 (« Preuve de notification », 10 avril 2006).

[2] "*Prosecutor's Response to the Appellant Nahimana's* 'Requête aux fins de communication d'éléments de preuve disculpatoires et d'investigations sur l'origine et le contenu de la pièce à conviction P 105'", 18 April 2006 (ci-après « Réponse »).

[3] Pièce à conviction P105 : « *FOUR TAPES NO. 0271, AV/933, AV/942 AND 1044* ». Cette pièce a été admise provisoirement le 11 mars 2002 au cours de la déposition du Témoin Kaiser Rizvi, enquêteur du Procureur. Elle contient notamment la cassette AV/933, K0149117-K0149119, dont la pièce à conviction P105/2A est la transcription en kinyarwanda. L'interview de l'Appelant se trouve à la page 24 de cette transcription. La pièce à conviction P105/2B contient la traduction anglaise d'un extrait de la transcription précitée, extrait relatif à l'interview de l'Appelant (CRA du 11 mars 2002, p. 96-97 ; CRA du 20 mars 2002, p. 162-164, 187, 189 ; *voir infra,* par. 0).

[4] « Disclosure of Witnesses' Statements, Audio-Cassette and Video-Cassette », 22 January 2001, « Preuve de notification », 14 juin 2001.

[5] The Prosecutor v. Ferdinand Nahimana et al., Case N°ICTR-99-52-T, Skeleton Argument for Defence Application to Stay Proceedings, 8 May 2003; The Prosecutor v. Ferdinand Nahimana et al., Case N°ICTR-99-52-T, Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, 13 May 2003.

[6] The Prosecutor v. Ferdinand Nahimana et al., Case N°ICTR-99-52-T, Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, 5 June 2003 (« Décision du 5 juin 2003 »).

[7] Décision du 5 juin 2003, par. 19. La Chambre de première instance soulignait notamment que l'Appelant faisait allusion à une grande quantité de documents auxquels il demandait accès sans fournir d'informations suffisantes concernant leur identification et leur pertinence, et relevait que sa demande de coopération équivalait à demander aux autorités rwandais elles-mêmes de localiser et identifier ces documents (*Ibid*., par. 12). Enfin, elle rappelait les efforts déployés par la Chambre de première instance pour l'aider à obtenir des documents (*Ibid*., par. 14 et 17).

[8] *Le Procureur c. Ferdinand Nahimana et consorts*, affaire n°ICTR-99-52-T, Jugement et sentence, 3 décembre 2003 (« Jugement »).

[9] « Acte d'appel », 4 mai 2004 (« Acte d'appel »); « Mémoire d'appel (révisé) », 27 septembre 2004 (version confidentielle) et 1 octobre 2004 (version publique) (« Mémoire d'appel »).

[10] Mémoire d'appel, par. 120, 121, 132-135, 148, 276-279.

décision ne préjuge pas de l'appréciation ultérieure par la Chambre d'appel de ces moyens d'appel au stade de l'analyse sur le fond.

II. Discussion

Arguments des parties

6. L'appelant fait valoir qu'en dépit de ses multiples protestations lors du procès en première instance, il n'a jamais réussi à obtenir une copie intégrale de l'interview correspondant à la pièce à conviction P105(AV/933) [11] ni d'explications du Procureur relatives à l'« amputation de l'enregistrement de cette interview issu [*sic*] des archives du FPR »[12]. Il ajoute que la production de cet enregistrement dans son intégralité

> « est de nature à réfuter l'une des affirmations essentielles des juges relativement à l'intention criminelle attribuée à l'appelant, et à confirmer la position constante et sans équivoque de l'appelant […] selon laquelle seul le FPR-Inkotanyi peut être considéré comme l'ennemi du peuple rwandais »[13].

En d'autres termes, la Chambre de première instance aurait commis une erreur de fait en concluant que

> « l'appelant aurait entretenu une confusion entre le FPR-Inkotanyi et la communauté tutsie dans son ensemble »[14].

Il ajoute que la copie intégrale de cette interview « est également de nature à conforter la crédibilité et la consistance de la déposition de l'appelant » lors du procès en première instance[15].

7. L'appelant affirme également que

> « [f]aute d'avoir été informée en temps utile de l'utilisation de cet élément de preuve, la défense n'a pas disposé en cours de procès du temps nécessaire à ces investigations, qui, en tout état de cause, se seraient heurtées à l'obstruction des autorités rwandaises »[16].

En conséquence, c'est « dans l'intérêt supérieur de la justice »[17] qu'il demande à la Chambre d'appel d'ordonner au Procureur de s'expliquer sur le caractère incomplet de l'interview et d'ordonner aux autorités rwandaises de transmettre au Greffe du Tribunal l'intégralité de l'enregistrement de l'interview précitée conformément à l'article 28 du Statut du Tribunal (ci-après « Statut ») et des articles 54 et 107 du Règlement de procédure et de preuve (ci-après « Règlement »)[18].

8. Le Procureur soutient que la Requête est inappropriée et mal fondée[19]. Il souligne que l'appelant avait connaissance de la nature incomplète de l'enregistrement dès le mois de janvier 2001 et qu'il n'a pris aucune mesure visant à obtenir ce qu'il sollicite maintenant de la Chambre d'appel jusqu'au dépôt de la présente Requête, que le Procureur estime tardive[20]. Il affirme par ailleurs que le fait que la pièce à conviction P105(AV/933) ne correspond pas à l'intégralité de l'interview était connu lors du procès en première instance[21]. Il affirme avoir d'ores et déjà communiqué toutes les explications sollicitées

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[11] Requête, par. 2, 5-8. L'Appelant se réfère notamment aux audiences des 27 mars, 24 septembre et 14 octobre 2002 dont il joint les comptes-rendus en annexes 2 à 4.
[12] *Ibid*., par. 8.
[13] *Ibid*., par. 18.
[14] *Ibid*., par. 19.
[15] *Ibid*., par. 20.
[16] *Ibid*., par. 16.
[17] *Ibid*., par. 14, 21.
[18] *Ibid*., par. 17 et p. 6.
[19] Réponse, par. 3.
[20] *Ibid*., par. 3-4, 14.
[21] *Ibid*., par. 7-11.

par l'appelant[22] et relève en ce sens que, au stade de la présentation des éléments de preuve à charge, les Témoins Kaiser Rizvi, enquêteur du Procureur, et Mathias Ruzindana, expert, ont, dans le cadre de leur déposition, fourni des informations sur la manière dont l'enregistrement de l'interview avait été recueilli, ainsi que sur son caractère incomplet[23]. Il ajoute que l'Accusation a présenté les éléments qu'elle avait en sa possession[24].

9. En tout état de cause, d'après le Procureur, l'appelant n'a pas démontré en quoi davantage d'explications de la part du Bureau du Procureur pourraient avoir un impact sur les conclusions de la Chambre de première instance concernant cette émission[25]. A cet égard, le Procureur constate que l'Appelant a fait référence dans sa déposition au caractère incomplet de l'enregistrement, tout en décrivant le contenu du reste de l'interview, et a également inclus des arguments y relatifs dans sa plaidoirie[26]. En conséquence, la Chambre de première instance était informée de la substance alléguée de l'intégralité de l'interview lorsqu'elle a rendu le Jugement en exerçant son pouvoir discrétionnaire quant au poids à accorder à cet élément de preuve. Selon le Procureur, la production de l'intégralité de l'interview au stade actuel de la procédure ne pourrait affecter les conclusions factuelles de la Chambre de première instance[27].

10. Le Procureur argue que l'appelant cherche de manière inappropriée l'assistance de la Chambre d'appel pour procéder à un complément d'enquête sans satisfaire au test applicable dans de telles circonstances, ni démontrer qu'un déni de justice surviendrait si ces nouvelles enquêtes n'étaient pas autorisées[28]. Le Procureur ajoute que l'appelant ne démontre pas qu'il n'aurait pu obtenir l'intégralité de l'interview de lui-même en exerçant la diligence requise, ni que ses propres efforts ont échoué, ni même que l'intégralité de l'interview existe au Rwanda[29]. Enfin, le Procureur soutient que la suggestion de l'appelant selon laquelle l'enregistrement a été délibérément abrégé est abusive et sans fondement[30].

Analyse

11. La Chambre d'appel note que l'appelant lui demande en premier lieu d'ordonner au Procureur de s'expliquer sur le caractère incomplet de l'enregistrement de l'interview. Or, la Chambre d'appel relève qu'au stade de la présentation des éléments de preuve à charge, le Témoin Kaiser Rizvi, enquêteur du Bureau du Procureur du Tribunal, a expliqué précisément comment cet enregistrement avait été obtenu. Il a indiqué avoir enregistré cette cassette avec ses collègues au secrétariat des archives du FPR. A cette occasion, ils ont reproduit 259 des 263 cassettes conservées audit secrétariat et datées de la fin du mois de décembre 1993 à l'arrêt des émissions de Radio Rwanda, en avril 1994[31]. La Chambre de première instance, ayant pris en compte le fait que M. Ruzindana, témoin-expert à charge, détaillerait le contenu de l'émission lors de son témoignage, a provisoirement admis l'enregistrement en cause[32]. Le 27 mars 2002, M. Ruzindana a été contre interrogé par le Conseil de l'appelant sur le caractère incomplet de l'enregistrement. Il a indiqué qu'il n'était pas en mesure de préciser davantage les circonstances de l'enregistrement de cette cassette et a exprimé son regret quant

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[22] *Ibid*., par. 3, 9.
[23] *Ibid*., par. 5-8.
[24] *Ibid*., par. 3, 9.
[25] *Ibid*., par. 9.
[26] *Ibid*., par. 10.
[27] *Ibid*., par. 11.
[28] *Ibid*., par. 3, 17.
[29] *Ibid*., par. 13, 15, 18-19.
[30] *Ibid*., par. 12.
[31] CRA du 11 mars 2002, pp. 86-89, 93. La Chambre d'appel note que le chiffre 273 est mentionné dans le compte-rendu de l'audience en français. Cependant, l'audience s'étant déroulée en anglais, la Chambre d'appel considère la version anglaise du compte-rendu, se référant aux 263 casettes, comme faisant foi (*T. 11 March 2002, p. 83*).
[32] CRA du 11 mars 2002, pp. 96 : « Le document est provisoirement admis, car le Procureur nous dit qu'il va faire déposer des gens qui présenteront des éléments de preuve détaillés, s'agissant de ces quatre cassettes. »

à son caractère incomplet[33]. La Chambre d'appel note par ailleurs que le Procureur réitère ces explications dans son Mémoire unique de l'Intimé[34] ainsi que dans sa Réponse[35].

12. Il ressort clairement de l'article 68 (B) du Règlement que l'obligation du Procureur de communiquer des éléments de preuve à décharge est subordonnée à sa possession de tels éléments[36]. Or, à la lumière de ce qui précède, la Chambre d'appel constate que le Procureur s'est suffisamment expliqué sur la manière dont l'enregistrement de l'interview a été recueilli ainsi que sur son caractère incomplet, en précisant qu'il s'agissait de la seule version en sa possession. La demande de l'appelant tendant à ce que la Chambre d'appel ordonne au Procureur de s'expliquer sur le caractère incomplet de l'enregistrement de l'interview et de le verser au dossier ne peut donc prospérer.

13. En ce qui concerne la demande de l'appelant d'ordonner aux autorités rwandaises de transmettre au Tribunal l'intégralité de l'enregistrement en question, la Chambre d'appel rappelle qu'une demande similaire a fait l'objet d'une décision de la Chambre de première instance[37]. La Chambre d'appel note d'emblée que l'appelant ne formule pas sa demande, contrairement à ce que soutient le Procureur[38] et malgré le titre de la Requête, dans le cadre d'une enquête complémentaire menée par la Défense aux fins de la présentation éventuelle de moyens de preuve supplémentaires au titre de l'article 115 du Règlement, seul moyen admis par la jurisprudence de la Chambre d'appel pour se voir autoriser de mener des enquêtes au stade de l'appel[39]. Il fonde en réalité sa Requête sur les articles 54 et 107 du Règlement qui donnent à la Chambre d'appel le pouvoir de délivrer des ordonnances « nécessaires aux fins de l'enquête, de la préparation ou de la conduite du procès ». A cet égard, il convient de rappeler que la Chambre d'appel ne saurait accéder à une requête en délivrance d'une telle ordonnance que si la partie requérante a démontré un motif judiciaire légitime à cet effet[40]. La Chambre d'appel jouit en l'occurrence d'un pouvoir discrétionnaire pour déterminer si le requérant

> « a bien rapporté les preuves requises, ce pouvoir étant essentiel pour veiller à ce que la mesure coercitive […] ne soit pas appliquée de façon inconsidérée »[41].

14. Dans certains cas, une fois que les difficultés rencontrées par la Défense ont été portées à l'attention de la Chambre compétente, il se peut que le Procureur, conformément à son devoir

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[33] CRA du 27 mars 2002, pp. 175-177 : « j'ai déjà indiqué que nous ne savons pas exactement… plutôt, précisément comment ces cassettes ont été enregistrées. Il n'est pas clair que cette personne essayait d'enregistrer le discours de Nahimana, c'est pour cela qu'au début, le discours… ce n'est pas le discours de Nahimana, c'est quelque chose d'autre, donc. […] ce n'est pas moi qui ai enregistré la cassette, c'est triste que nous n'ayons pas l'enregistrement de tout ce qu'il a dit. ».
[34] Mémoire unique de l'Intimé, 22 novembre 2005, par. 110-112, 342-343.
[35] Réponse, par. 5-9.
[36] Voir, e.g., Juvénal Kajelijeli v. The Prosecutor, Case. N°ICTR-98-44-A, Judgement, 23 May 2005, para. 262; Le Procureur c. Tihomir Blaškić, affaire n°IT-95-14-A, Arrêt, 29 juillet 2004, par. 268; Le Procureur c. Tihomir Blaškić, affaire n°IT-95-14-A, Arrêt relatif aux requêtes de l'Appelant aux fins de production de documents, de suspension ou de prorogation du délai de dépôt du mémoire et autres, 26 septembre 2000, par. 31, 40.
[37] Décision du 5 juin 2003, par. 7-17. Voir *supra*, par. 0.
[38] Réponse, par. 17.
[39] La Chambre d'appel a réitéré à plusieurs reprises dans cette affaire que les enquêtes doivent être menées au stade de la mise en état de l'affaire ou lors du procès en première instance – voir e.g. *Decision on Appellant Hassan Ngeze's Motions for Approval of Further Investigations on Specific Information Relating to the Additional Evidence of Potential Witnesses, 20 June 2006*, note de bas de page 6 ; *confidential Decision on Appellant Hassan Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage, 23 February 2006*, par. 5 ; *Decision on Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator, 4 October 2005*, p. 4 ; *Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, 3 May 2005*, p. 3 ; *Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase, 3 May 2005*, par. 2.
[40] *Le Procureur c. Joseph Nzirorera et consorts,* affaire n°ICTR-98-44-I, Décision relative à la Requête de la Défense aux fins de la Délivrance d'une Ordonnance enjoignant aux témoins à charge de produire, lors de leur comparution, leurs agendas ou autres écrits datant de 1992 à 1994 et leurs déclarations faites devant des autorités judiciaires rwandaises, 24 novembre 2003, par. 6 ; *Le Procureur c. Radislav Krstić*, affaire n°IT-98-33-A, Arrêt relatif à la demande d'injonctions, 1er juillet 2003 (ci-après « Arrêt *Krstić* »), par. 10.
[41] *Le Procureur c. Sefer Halilović*, affaire n°IT-01-48-AR73, Décision relative à la délivrance d'injonctions, 21 juin 2004, par. 6 ; *Le Procureur c. Brđanin et Talić,* affaire n°IT-99-36-AR73.9, Décision relative à l'appel interlocutoire, 11 décembre 2002, par. 31.

d'assister le Tribunal aux fins d'établir la vérité et de rendre justice aux accusés[42], utilise ses propres ressources et pouvoirs afin de faciliter l'obtention de l'information nécessaire[43]. Cependant, l'obligation faite à la Défense d'informer la Chambre qu'elle ne peut obtenir la coopération escomptée des autorités étatiques constitue la première étape dans l'exercice de la diligence voulue[44]. La Chambre d'appel constate que l'appelant n'a pas fait montre d'une telle diligence en l'espèce au stade actuel du procès.

15. Il appartient dès lors à l'appelant d'entreprendre des démarches indépendantes pour se procurer des éléments de preuve à décharge qui ne sont pas en possession du Procureur, et de démontrer qu'en dépit de l'exercice de la diligence requise, il n'a pas réussi à obtenir l'enregistrement en question[45]. Or, dans sa Requête, l'appelant se contente de dire que ses investigations « se *seraient* heurtées à l'obstruction des autorités rwandaises »[46] et ne donne aucun élément d'information sur les actions concrètes qu'il aurait engagées en ce sens depuis le début de son procès en appel. Il n'apporte pas non plus de preuve d'un manque de coopération de la part des autorités rwandaises en ce qui concerne l'accès aux archives dans lesquelles serait contenu l'enregistrement recherché. En conséquence, la demande de l'appelant tendant à ce que la Chambre d'appel ordonne aux autorités rwandaises de transmettre au Greffe du Tribunal l'intégralité de l'interview doit être rejetée.

III. Dispositif

16. Par ces motifs, la Chambre d'appel, REJETTE la Requête dans son intégralité.

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[42] Règlement interne du Procureur n°2 (1999), Règles de déontologie pour les représentants de l'Accusation, 14 septembre 1999, par. 2. h).
[43] Arrêt *Krstić*, par. 13.
[44] *Ibid*., par. 14.
[45] *Ibid*., par. 5, 9-10 ; voir, par analogie, *Le Procureur c. Augustin Bizimungu et consorts*, affaire n°ICTR-00-56-T, Décision sur la requête de Nzuwonemeye intitulée Request of Cooperation from the Kingdom of Belgium pursuant to Article 28 of the Statute, 7 Juin 2006, par. 6; *Le Procureur c. Théoneste Bagosora et consorts*, affaire n°ICTR-98-41-T, Décision relative à la Demande de Coopération et d'Assistance Adressée au Royaume des Pays-Bas, 7 février 2005, par. 5; *Le Procureur c. André Rwamakuba et consorts,* affaire n°ICTR-98-44-T, Décision relative aux requêtes de la Défense : aux fins d'être autorisée à faire appel des décisions rejetant ses requêtes pour contre-interroger les témoins sur des déclarations antérieures contradictoires et aux fins d'une ordonnance enjoignant aux autorités rwandaises de donner accès à certains dossiers judiciaires et de mettre à la disposition de la Défense une copie authentifiée des pièces pertinentes dans ces dossiers, 4 février 2004, par. 18 ; *The Prosecutor v. Aloys Simba, Case N°ICTR-01-76-T, Decision on the Defence Request for the Cooperation of Rwandan Government pursuant to Article 28, 28 October 2004,* par. 3-5 ; *The Prosecutor v. Aloys Simba, Case N°ICTR-01-76-T, Decision on Defence Motion to Obtain Judicial Records pursuant to Rule 68, 4 October 2004,* par. 11. La Chambre d'appel note par ailleurs que l'article 54 *bis* (A) du Règlement du Tribunal international chargé de poursuivre les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991 (ci-après « TPIY ») spécifie les éléments qui doivent être identifiés par la partie sollicitant la délivrance à un Etat d'une ordonnance aux fins de productions de documents ou d'informations, ces conditions étant obligatoires et cumulatives. Ainsi, le requérant « (i) identifie autant que possible les documents ou les informations visés par la requête, (ii) indique dans quelle mesure ils sont pertinents pour toute question soulevée devant le juge ou la Chambre de première instance et nécessaires au règlement équitable de celle-ci, et (iii) expose les démarches qui ont été entreprises par le requérant en vue d'obtenir 1'assistance de 1'Etat ». Voir, *Le Procureur c. Slobodan Milošević,* affaire n°IT-02-54-T, Décision [*confidentielle*] relative aux demandes présentées par l'Accusation et la Serbie-et-Monténegro en application de l'article 54 *bis* du Règlement, 9 mars 2006, par. 13 ; *Le Procureur c. Milan Milutinović et consorts,* affaire n°IT-99-37-PT, Décision relative à la Requête de Dragoljub Ojdanić aux fins de délivrance d'ordonnances contraignantes en application de l'article 54 *bis* du Règlement, 23 mars 2005, pp. 3-8 ; *Le Procureur c. Dario Kordić et Mario Čerkez*, affaire n°IT-95-14/2-A, Décision [*confidentielle*] relative à la requête aux fins d'adresser une ordonnance contraignante à la Bosnie-Herzégovine et à la Fédération de Bosnie-Herzégovine, et d'accéder aux pièces actuellement en la possession de l'Accusation, 15 novembre 2001, p. 6 ; voir aussi *Le Procureur c. Tihomir Blaškić*, affaire n°IT-95-14-AR108*bis*, Arrêt relatif à la requête de la République de Croatie aux fins d'examen de la Décision de la Chambre de première instance II rendue le 18 juillet 1997, 29 octobre 1997, par. 32. La Chambre d'appel note que les mêmes critères ont été appliqués par les Chambres de première instance du Tribunal de céans dans le contexte des requêtes au titre de l'article 28 du Statut. Voir, *The Prosecutor v. Edouard Karemera et al., Case N°ICTR-98-44-T, Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders, 13 February 2006,* par. 7-8; *The Prosecutor v. Edouard Karemera et al., Case N°ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation, 19 April 2005,* par. 6-9.
[46] Requête, par. 16 (non souligné dans l'original).

Fait en français et en anglais, le texte français faisant foi.

Fait le 12 septembre 2006, à La Haye, Pays-Bas.

[Signé] :Fausto Pocar

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Décision sur la requête de Ferdinand Nahimana aux Fins de Traduction d'enregistrements d'émissions RTLM contenus dans la pièce à conviction C7 20 novembre 2006 (ICTR-99-52-A)

(Original : Français)

Chambre d'appel

Juges : Fausto Pocar, Président de Chambre ; Mohamed Shahabuddeen ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron

Ferdinand Nahimana – Demande de révision de la traduction de pièces à conviction déposées en première instance, Allégation touchant au caractère incomplet ou erroné des traductions des enregistrements contenus dans la pièce à conviction, Stade avancé de la procédure d'appel, Conditions de la révision :démonstration que des doutes légitimes existent quant à l'exactitude de la traduction, démonstration d'un intérêt pour la justice, démonstration d'un risque de déni de justice, démonstration de diligence de la part de la Défense, Argument portant sur une erreur alléguée d'interprétation doit être soulevé lors de l'appel au fond et ne peut être tranchée dans le cadre de la procédure de mise en état, Pas de modification possible de la conclusion de la Chambre de première instance vu la traduction proposée par l'appelant – Abus de procédure – Emissions de la RTLM – Requête partiellement sans objet – Requête rejetée

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Ferdinand Nahimana et consorts, Decision on the Prosecution's Application to Admit Translations of RTLM Broadcasts and Kangura Articles, 3 juin 2003 (ICTR-99-52) ; Chambre d'appel, Le Procureur c. Elizaphan Ntakirutimana et Gérard Ntakirutimana, Decision on Defence Motion to Strike Annex B from the Prosecution Response Brief and for Re-Certification of the Record, 24 juin 2004 (ICTR-96-10 et ICTR-96-17)

1. La Chambre d'appel du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 (ci-après « Chambre d'appel » et « Tribunal », respectivement) est saisie par l'Appelant Ferdinand Nahimana (ci-après « Appelant ») de la « Requête aux fins de traductions d'enregistrements d'émissions RTLM contenus dans la pièce à conviction C7 » déposée confidentiellement le 7 avril 2006 (ci-après « Requête »), par laquelle il demande à la Chambre d'appel de désigner un expert traducteur ayant pour mission d'identifier, de transcrire et de traduire dans les langues de travail du Tribunal des extraits d'émissions contenues dans la pièce à conviction C7 et visées par l'appelant dans la présente Requête[1]. La Chambre d'appel n'est pas convaincue qu'il existe des raisons apparentes justifiant la

[1] Requête, p. 12 ; *voir* également par. 11.

classification confidentielle de la Requête, cette dernière ne se référant pas à des témoins protégés et l'appelant n'ayant donné aucun argument pour justifier ce niveau de classification. Par conséquent, la Requête et la présente décision doivent être publiques.

2. Le Procureur a déposé sa réponse le 18 avril 2006[2]. La Chambre d'appel note que cette Réponse excède le nombre limite de dix pages[3]. Le Procureur prie la Chambre d'appel d'autoriser ce dépassement, en invoquant le nombre d'enregistrements d'émissions concernés[4]. La Chambre d'appel estime que, dans les circonstances de l'espèce, le dépassement des limites fixées est justifié et considère la Réponse comme validement déposée.

3. L'appelant n'a pas déposé de réplique.

I. Rappel de la procédure

4. En juillet 2000 débutait une série de communications entre les parties et le Tribunal relatives aux enregistrements de la « Radio Télévision Libre des Mille Collines » (ci-après « RTLM »)[5]. Le 10 janvier 2001, le Bureau du Procureur communiquait au Greffier, pour transmission à la Défense, vingt-et-un documents et une boîte contenant cinquante-neuf cassettes de la RTLM obtenues du témoin GO[6]. Ces éléments furent transmis à la Défense le 15 janvier 2001[7]. Le 20 décembre 2001, le Procureur communiquait confidentiellement la liste des transcriptions de 273 enregistrements de la RTLM diffusés entre octobre 1993 et juillet 1994, indiquant qu'ils étaient inclus dans les 345 enregistrements de la RTLM communiqués précédemment aux conseils de l'appelant (ci-après « Défense ») sous les numéros d'Index 1-345[8]. La liste faisait état de la traduction, dans au moins l'une des langues de travail du Tribunal, de 92 enregistrements. Le Procureur s'engageait à communiquer de nouvelles traductions dès qu'elles seraient disponibles[9]. Dans sa Requête, l'appelant se réfère plus spécifiquement aux 135 enregistrements d'émissions diffusées entre octobre 1993 et le 6 avril 1994[10].

5. Le 9 janvier 2002, le Procureur communiquait à la Défense et à la Chambre de première instance I (ci-après « Chambre de première instance »), un CD-Rom contenant 273 fichiers informatiques comprenant les transcriptions en kinyarwanda des émissions diffusées par la RTLM en 1993 et 1994. Cette communication avait pour objet de faciliter l'accès au contenu des émissions[11] et l'audition du Témoin Expert M. Ruzindana[12], le Procureur ayant précisé que ces documents avaient été communiqués antérieurement à la Défense[13]. Le 8 mars 2002, lors de la déposition du Témoin Expert

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[2] *Prosecutor's Response to Appellant Nahimana's* 'Requête aux Fins de Traductions et d'Enregistrements d'Emissions RTLM Contenus dans la Pièce à Conviction C7', 18 avril 2006 (ci-après « Réponse »).
[3] Directive pratique relative à la longueur des mémoires et des requêtes en appel, 16 septembre 2002, par. 3.
[4] Réponse, par. 2.
[5] Voir, e.g., *Disclosure of Media Material,* Mémorandum du 18 juillet 2000 de M. Elvis K. Bazawule communiquant au Greffe et aux accusés neuf classeurs contenant, entre autres, les transcriptions des cassettes audio ; *Document Disclosure Binders 54-57*, 18 juillet 2000 contenant en tout 48 transcriptions d'émissions de la RTLM en kinyarwanda, certaines avec des passages en anglais et en français.
[6] Voir Memorandum from Simone Monasebian, Assistant Trial Attorney regarding transmission of material in the Media Case déposé à titre confidentiel le 10 janvier 2001.
[7] Dispatch of the Disclosures in the Media Case ICTR-99-52-T, 15 janvier 2001.
[8] Disclosure of Updated List of RTLM Tape Transcriptions and Translations, 20 décembre 2001 ("Communication du 20 décembre 2001").
[9] Communication du 20 décembre 2001, par. 6; pour un exemple d'une telle communication, voir Memorandum from Stephen Rapp, Senior Trial Attorney regarding Translation of Radio Broadcasts and the Testimony of Expert-Witness Jean-Pierre Chrétien, 19 juin 2002.
[10] Requête, par. 2. La Chambre d'appel note que selon la liste du Procureur, 31 d'entre eux avaient été traduits dans l'une des langues de travail du Tribunal, voir aussi Requête, par. 3.
[11] Communication du 20 décembre 2001, par. 6.
[12] CRA du 14 mars 2002, pp. 241-244.
[13] *Ibid*., pp. 243, 246, 248. La Chambre d'appel note que la Défense n'a pas contesté que ces documents lui aient été communiqués antérieurement, mais elle a cependant signalé la difficulté potentielle dans la conduite du contre-interrogatoire

M. Rizvi, la Chambre de première instance a admis au dossier les pièces à conviction P102 et P103 consistant respectivement en la liste des transcriptions des émissions de la RTLM et en 210 cassettes de la RTLM[14].

6. Le 29 octobre 2003, après la clôture des débats, le Président de la Chambre instruisait le Greffe d'enregistrer le CD-Rom communiqué par le Procureur le 9 janvier 2002, en tant que pièce à conviction C7 et d'informer les parties de ce dépôt[15].

7. Le 3 décembre 2003, la Chambre de première instance rendait son jugement dans la présente affaire[16]. L'appelant interjetait appel du Jugement et déposait son Acte d'appel le 4 mai 2004 et son Mémoire d'appel le 27 septembre 2004[17]. La Chambre d'appel relève que dans son Acte d'appel – mais non dans son Mémoire d'appel – l'appelant soutient que la Chambre de première instance a commis des erreurs de droit en retenant une définition erronée des éléments constitutifs du crime d'incitation directe et publique à commettre le génocide,

> « en particulier en retenant le caractère criminel d'émissions sur la base de traductions partielles, erronées ou incomplètes »[18].

Par ailleurs, la Chambre d'appel constate que l'ensemble de ses écritures sur le fond de l'appel contient d'autres allégations relatives à la traduction et/ou l'interprétation des enregistrements des émissions de la RTLM.[19] La Chambre d'appel tient à préciser que la présente décision ne préjuge en rien de l'appréciation ultérieure qu'elle fera de ces moyens d'appel au moment de les analyser sur le fond.

8. Lors de la Conférence de mise en état du 9 mars 2005, l'Appelant sollicitait la traduction d'un court extrait d'émission de la RTLM issu de la pièce à conviction C7 mentionné dans le paragraphe 358 du Jugement. La Juge de la mise en état faisait droit à cette demande[20] et la traduction en langues anglaise et française fut communiquée aux parties le 8 avril 2005[21].

II. Discussion

ARGUMENTS DES PARTIES

9. Notant le caractère incomplet des traductions des enregistrements contenus dans la pièce à conviction C7, l'appelant fait valoir que le Jugement retient à charge plusieurs extraits de ces émissions sélectionnées par le Procureur alors que ces extraits ont fait l'objet soit d'une traduction erronée, soit d'amputations dénaturant leur sens[22]. Il affirme par ailleurs qu'il existe un nombre

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sur la base des documents en kinyarwanda et a demandé à être avertie des passages qui seraient utilisés par le Procureur lors de l'audience (*Ibid*., p. 257).

[14] Cassettes numérotées de 0001 à 0344 ; voir CRA du 8 mars 2002, p. 28 (P102) et p. 89 (P103).

[15] Voir Mémorandum intérieur de la Juge Navanethem Pillay, Président de Chambre, 29 octobre 2003, reproduit à l'annexe 7 du Mémoire en réplique de l'Appelant Nahimana du 21 avril 2006. Ce mémorandum précisait par ailleurs : (i) que le CD-Rom en question avait été mentionné lors de la déposition d'Alison Des Forges le 23 mai 2002 ainsi que dans son rapport d'expert admis en tant que pièce à conviction P158A et, (ii) qu'une liste des bandes audio incluant les émissions contenues dans le CD-Rom avait été présentée en tant que pièce à conviction P102 lors de la dépositon de M. Kaiser Rizvi.

[16] *Le Procureur c. Ferdinand Nahimana et consorts*, affaire n°ICTR-99-52-T, Jugement et sentence, 3 décembre 2003 (« Jugement »).

[17] « Acte d'appel », 4 mai 2004 (« Acte d'appel); « Mémoire d'appel (révisé) », 27 septembre 2004 (version confidentielle) et 1 octobre 2004 (version publique) (« Mémoire d'appel »).

[18] Acte d'appel, p. 13.

[19] Voir notamment Mémoire d'appel, par. 194, 203, 237-241, 567-569 ; Réplique de la Défense, 21 avril 2006 (« Mémoire en réplique »), par. 61-62, 64-70 et Annexe 8 « Langue des transcrits des émissions de la radio RTLM jusqu'au 6 avril 1994 (Chambers exh. C7) ».

[20] CRA du 9 mars 2005, pp. 11-13.

[21] Communication de la Section de l'Administration des Chambres du 8 avril 2005, pp. 2107/A et 2106/A.

[22] Requête, par. 7.

significatif de transcriptions n'ayant pas fait l'objet de traductions mais qui ont été néanmoins admises comme éléments de preuve faisant partie de la pièce C7, et qui confirmeraient que la radio RTLM diffusait avant le 6 avril 1994 « des émissions visant à éviter toute confrontation à caractère ethnique »[23]. Enfin, il allègue que « la datation de certains extraits retenus à charge par les juges est fausse »[24].

10. L'appelant soutient que c'est « par un travail d'une grande complexité et d'une extrême longueur » qu'il a pu enfin prendre connaissance des transcriptions contenues dans la pièce C7[25] et qu'

> « [à] la différence des juges de première instance qui n'ont pu statuer qu'au vu d'une infime sélection effectuée par le Bureau du procureur, l'appelant dispose aujourd'hui, pour la première fois, d'une vision représentative des émissions diffusées »[26].

En conséquence, il requiert la désignation d'un expert aux fins d'assurer la rectification des traductions contestées, la traduction des

> « émissions identifiées par l'appelant, admises comme éléments de preuve dont le contenu n'a pu être examiné par les juges »,

ainsi que la rectification de la datation de certaines émissions[27].

11. Dans sa Réponse, le Procureur soutient que la Requête doit être rejetée car elle constitue un abus de procédure et une tentative inacceptable de pallier les défaillances de l'appelant lors du procès en première instance[28]. Il affirme que les émissions en cause ayant été communiquées à l'appelant dès 2000[29], avant et pendant son procès, l'appelant aurait pu et du présenter sa demande au stade de la première instance ou dans le cadre de son appel au fond[30]. De plus, une telle requête ne peut être déposée qu'en démontrant l'importance ou l'impact, le cas échéant, des erreurs alléguées de traduction sur le verdict en appel[31].

12. En tout état de cause, le Procureur rappelle que la procédure d'appel n'est pas destinée à permettre à un accusé de soulever des arguments relatifs aux preuves qui étaient devant la Chambre de première instance ou à l'évaluation de ces preuves par celle-ci.[32] Il soutient que dans la mesure où l'appelant soulève non pas de simples erreurs de traduction ou d'enregistrement, mais des questions relatives à l'interprétation ou à l'évaluation des éléments de preuves par la Chambre de première instance, celles-ci doivent faire l'objet d'un appel au fond plutôt que d'une requête au stade de la mise en état en appel[33].

ANALYSE

13. Pour justifier, au stade de l'appel, une demande de révision de la traduction de pièces à conviction déposées en première instance, l'appelant doit démontrer que des doutes légitimes existent quant à l'exactitude de la traduction et qu'il est dans l'intérêt de la justice de clarifier la question à ce

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[23] *Id*.
[24] Id.
[25] *Ibid*., par. 5.
[26] *Ibid*., par. 6.
[27] *Ibid*., par. 8.
[28] Réponse, par. 1, 3-11.
[29] *Ibid*., par. 6, qui évoque, sans plus de précision, une communication en juillet 2000.
[30] *Ibid*., par. 1, 5-6, 14, 19.
[31] *Ibid*., par. 3.
[32] *Ibid*., par. 13.
[33] *Ibid*., par. 1, 13.

stade de la procédure[34]. Considérant le stade avancé de la procédure d'appel en l'espèce, la Chambre d'appel n'accordera une telle demande que si elle considère, au vu des traductions visées par l'appelant, que l'exclusion de ces documents conduirait à un déni de justice. S'agissant de la demande aux fins de traduction d'enregistrements et de passages d'émissions non traduits lors du procès en première instance, la Chambre d'appel n'y donnera suite que si l'appelant démontre qu'il n'a pu obtenir leur traduction en dépit de la diligence exercée ou que le défaut de traduction de ces documents entraînerait un déni de justice[35]. Enfin, la contestation de l'interprétation retenue par la Chambre de première instance s'agissant d'un document traduit, ainsi que les allégations selon lesquelles la Chambre de première instance n'a pas pris en considération des documents que l'appelant estime pertinents, y compris les documents non traduits, relèvent de l'appel au fond et ne seront donc pas examinées dans la présente décision.

a. Traductions prétendument erronées

14. L'appelant fait valoir que les extraits des émissions des 30 novembre 1993[36], 6 janvier 1994[37] et du 31 mars au 1er avril 1994[38] pris en compte par la Chambre de première instance ont fait l'objet d'une traduction manifestement erronée. Le Procureur affirme que l'appelant a eu en sa possession depuis de nombreuses années les transcriptions en kinyarwanda desdites émissions ainsi que leurs traductions contestées et qu'il aurait donc du soulever ces arguments durant son procès en première instance ou dans son Mémoire d'appel[39]. Il soutient que l'appelant n'a soulevé aucune véritable erreur de traduction nécessitant correction[40] et que même si les traductions et interprétations proposées par l'appelant étaient retenues, elles ne modifieraient en rien les conclusions de la Chambre de première instance. Plus spécifiquement, concernant l'émission du 30 novembre 1993, le Procureur maintient que les sanctions envisagées visent les Tutsis, aucune raison ne justifiant la traduction et l'interprétation suggérée par l'Appelant[41]. En ce qui concerne l'émission du 6 janvier 1994, le Procureur précise que la source de la traduction de cet enregistrement est l'*International Monitor Institute* qui a produit des résumés des émissions radio et non pas des traductions exactes de leurs

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[34] Voir, par analogie, The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Cases N°ICTR-96-10-A and ICTR-96-17-A, Decision on Defence Motion to Strike Annex B from the Prosecution Response Brief and for Re-Certification of the Record, 24 June 2004, p. 3.

[35] Voir, par ailleurs, la Conférence de mise en état du 9 mars 2005 où Mme le Juge de mise en état en appel a fait remarquer à l'appelant, en réponse à l'une de ses questions concernant la traduction des mémoires de première instance, que « lorsque vous déposez le mémoire de l'appelant, nous ne pouvons plus revenir à une demande de traduction de documents relevant de la première instance » (CRA du 9 mars 2005, p. 11).

[36] *Ibid*., par. 12 avec référence au par. 358 du Jugement. L'appelant conteste l'exactitude de la traduction prise en compte par la Chambre de première instance aussi bien que de celle communiquée par le Greffe le 8 avril 2005. Il affirme que les sanctions envisagées visent « les méchants », c'est-à-dire les combattants *Inkotanyi*, et non « les tutsis », comme retenu dans le Jugement, ou « ceux-là qui soutiennent les méchants » (phrase figurant dans la traduction du 8 avril 2005).

[37] *Ibid*., par. 13 avec référence aux par. 352-356 du Jugement. Selon l'appelant, la traduction de cet extrait du kinyarwanda vers l'anglais est erronée, car la phrase retenue par la Chambre de première instance – « on sent vraiment qu'ils veulent également accéder au pouvoir » – ne figure pas dans le texte original.

[38] *Ibid*., par. 14 avec référence aux paragraphes 381-383 du Jugement. L'Appelant soutient que la conclusion de la Chambre de première instance, selon laquelle les propos de Hitimana invitaient à prendre des mesures de représailles à l'encontre du Docteur André Ngirabanyiginya et de sa famille, procède d'une erreur de traduction.

[39] Réponse, par. 14, 19, 21, 23.

[40] *Ibid*., par. 12.

[41] *Ibid*., par. 16. Le Procureur soutient notamment que, de toutes façons, les mots « ces derniers » dans la partie non contestée de la traduction se réfère clairement aux mots « les Tutsis » dans la phrase précédente. Par conséquent, le sens du passage reste intact dans la mesure où la phrase « ils seront découverts et […] recevront une sanction appropriée » concerne *les Tutsis* qui prétendument soutenaient les *Inkotanyi*. Il ajoute par ailleurs, que cette émission a été analysée par la Chambre de première instance dans le cadre des éléments de preuve relatifs à la période antérieure au 6 avril 1994, c'est-à-dire à l'époque où la population tutsie dans son ensemble était associée ou même assimilée aux termes «*Inyenzi* » et « *Inkotanyi* ».

transcriptions *verbatim*[42]. Enfin, pour ce qui est de l'émission du 31 mars au 1er avril 1994, le Procureur note que l'Appelant allègue une erreur d'interprétation et non de traduction[43].

15. S'agissant de l'émission du 30 novembre 1993[44], la Chambre d'appel note que la traduction corrigée, complétée et communiquée par le Greffe le 8 avril 2005[45] fait partie du dossier en appel et sera dûment prise en compte par la Chambre d'appel lors de l'examen de l'appel au fond.[46] En ce qui concerne cette version corrigée, la Chambre d'appel est d'avis que l'interprétation proposée par l'appelant ne soulève pas de doutes légitimes quant à l'exactitude de la traduction et n'établit pas qu'une clarification de la traduction à cette étape des procédures soit nécessaire dans l'intérêt de la justice.

16. Quant à l'émission diffusée les 5 et 6 janvier 1994, la Chambre d'appel note que ni la pièce à conviction C7, ni la pièce à conviction P103/45[47], ne sont explicitement citées dans les paragraphes 352 à 356 du Jugement. La conclusion de la Chambre de première instance relative à l'opinion exprimée par Kantano Habimana découle en réalité de son analyse de la pièce à conviction 1D9 déposée par la Défense et admise comme élément de preuve le 1er novembre 2000[48] et non pas de la pièce à conviction C7, comme le prétend l'appelant. A cet égard, la Chambre d'appel relève que les traductions vers l'anglais et le français de la transcription de l'émission en question figurant dans la pièce à conviction 1D9 contiennent la phrase « On sent vraiment qu'ils veulent également accéder au pouvoir » ou «*You can really feel that they want also to get to power* »[49]. Cette pièce à conviction comprend également le « Certificat de Traducteur » en date du 9 juin 1997 signé par M. Gaudence Mukakigeli, traducteur qualifié et reconnu par le Tribunal « pour interpréter du kinyarwanda vers le français/anglais et du français/anglais vers le kinyarwanda »[50]. Compte tenu de ce qui précède, la Chambre d'appel estime que la demande de l'Appelant visant à réviser la traduction d'un document faisant partie de la pièce à conviction C7 est sans fondement.

17. Enfin, pour ce qui est de l'émission diffusée du 31 mars au 1er avril 1994, la Chambre d'appel observe que la phrase du Jugement contestée par l'appelant se lit comme suit :

> « La Chambre prend acte de la demande invitant les voisins, si les rumeurs selon lesquelles le docteur Ngirabanyigina soutient les *Inkotanyi* sont vraies, à 'nous téléphoner à nouveau pour

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[42] *Ibid*., para. 21. Il ajoute que l'Appelant était en possession de l'enregistrement, de la transcription originale en kinyarwanda et de la traduction française et qu'en tout état de cause, l'interprétation proposée par l'Appelant ne changerait rien dans les conclusions de la Chambre de première instance y relatives (Réponse, par. 21 et 22).
[43] *Ibid*., par. 24.
[44] Admise comme pièce à conviction P36/5A (version en kinyarwanda) le 20 mars 2002 (CRA du 20 mars 2002, pp. 151-153 et 189) et comme P36/5B et C (versions anglaise et française) le 5 juillet 2002 (CRA du 5 juillet 2002, p. 111, et 112).
[45] Voir *supra,* par. 0.
[46] La Chambre d'appel note à cet égard que l'Appelant conteste les conclusions pertinentes de la Chambre de première instance relatives aux émissions de la RTLM dans le cadre de son appel au fond (Mémoire d'appel, par. 194, 203).
[47] La pièce à conviction P103/45A (version en kinyarwanda) contenant l'enregistrement en question, a été admise comme élément de preuve le 20 mars 2002 (CRA du 20 mars 2002, p. 155).
[48] Jugement, par. 351-355. La pièce à conviction 1D9 (versions en anglais et français) a été admise comme élément de preuve le 1er novembre 2000 (CRA du 1er novembre 2001, pp. 91-92). La pièce à conviction 1D9 et C7-044E (pp. K198097 et *seq*.) sont issus du même texte en kinyarwanda, et portent sur un extrait de l'émission diffusée les 5 et 6 janvier 1994. Ils contiennent la même traduction/résumé anglais, mais la traduction française comprise dans la pièce C7-044F diffère de celle contenue dans la pièce 1D9 : la phrase « On sent vraiment qu'ils veulent également accéder au pouvoir » figure dans le texte français contenu dans la pièce à conviction 1D9, mais pas dans la traduction contenue dans la pièce C7-044F. Dans la version française du Jugement, la Chambre de première instance cite la traduction française de la pièce 1D9. Dans leurs écritures, l'Appelant cite la traduction française contenue dans la pièce C7-044F, p. K0169341, tandis que le Procureur fait plus généralement référence à la pièce C7-044K.
La Chambre d'appel relève également une divergence de référencement : le CD 44 (décliné en enregistrements 44-K, 044-E et 044-F pour les version en kinyarwanda, anglais et français) inclus dans la pièce à conviction C7 porte l'identification « RTLM 0045 du 05/06/94, Radio Rwanda » ; la pièce à conviction P103/45A a pour références « RTLM 0045 du 05/06/94, Radio RTLM » ; la pièce à conviction 1D9 est référencée comme « RTLM 05-06/01/94 ».
[49] Pièce à conviction 1D9, p. 6 (version française) et p. 3352*bis* (version anglaise).
[50] *Ibid*., pp. 3345*bis* – 3344*bis*.

nous dire que le docteur et sa famille ne sont plus chez eux', demande qui, selon elle, invite à prendre des mesures à l'encontre du docteur et de sa famille. »[51]

La Chambre d'appel observe que ce passage du Jugement porte sur une analyse de la pièce à conviction P103/189C admise le 23 mai 2002[52] et citée au paragraphe 381 du Jugement, et non pas sur la pièce à conviction C7. L'argument de l'Appelant selon lequel une erreur proviendrait du fait que la phrase en question a été isolée de son contexte est donc dépourvu de tout fondement, puisque la pièce à conviction P103/189C comportait la totalité du propos pertinent. Par ailleurs, la Chambre d'appel relève que l'Appelant n'identifie pas précisément en quoi la traduction qu'il propose serait différente de celle figurant dans la pièce à conviction P103/189C, ni quel impact sa correction éventuelle aurait sur la conclusion de la Chambre de première instance. En tout état de cause, la Chambre d'appel convient avec le Procureur qu'un argument portant sur une erreur alléguée d'interprétation, et non de traduction, doit être soulevé lors de l'appel au fond et n'est pas une question pouvant être tranchée dans le cadre de la procédure de mise en état[53].

b. Extraits dont la traduction est incomplète

18. L'appelant soutient que des « passages significatifs » ont été amputés de la traduction des extraits des émissions des 25 et 26 octobre 2003[54] et du 14 mars 1994[55] citées dans les paragraphes 363 et 377 à 379 du Jugement, respectivement. Il affirme que ces amputations dénaturent le sens des enregistrements en question, ce qui expliquerait l'analyse erronée de la Chambre de première instance.

19. Le Procureur argue que les allégations de l'appelant relatives aux amputations délibérées d'extraits sont sans fondement et vexatoires[56]. Concernant l'émission du 25 octobre 1993, il note que l'Appelant se réfère à la traduction française officielle versée au dossier par la Défense comme pièce 1D49 et soutient que l'emploi des crochets dans le Jugement signale une omission de la Chambre de première instance, non du traducteur[57]. Par ailleurs, le Procureur relève que des traductions françaises et anglaises de l'émission du 14 mars 1994 ont été admises en juillet 2002 et juin 2003[58] et que l'appelant avait alors la possibilité de soulever tout problème y relatif. Il ajoute qu'en tout état de

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[51] Jugement, para. 383. La Chambre d'appel note que dans sa Requête l'Appelant cite la traduction française du Jugement en date du 5 avril 2004 remplacée par la « version officielle » le 2 mars 2006.

[52] P. K0162236-38, Le passage litigieux de ce document se lit comme suit: « Parlons maintenant de la mort de Katumba qui suscite beaucoup d'inquiétude... L'on rapporte qu'hier, la ville de Kigali a été paralysée suite à sa mort ... A part que les gens trompent l'opinion publique, était-ce seulement KATUMBA qui est mort dans cette ville de Kigali ? Ou n'est-ce pas au contraire suite à la mort du Tutsi Maurice? Est-ce vraiment la mort de Katumba, un Hutu, qui a provoqué l'arrêt de toutes les activités à Kigali ? La mort d'un Tutsi ne peut-elle pas provoquer une telle situation ? Qu'ils ne trompent personne. Les assassins de KATUMBA ne sont-ils pas les mêmes que ceux qui ont tué Maurice pour semer la confusion, c'est-à-dire pour donner l'impression qu'un Tutsi et un Hutu ont perdu leurs vies dans les mêmes conditions. On n'est pas dupe, qu'ils ne sèment pas la confusion car des rumeurs qui viennent de me parvenir disent que le Docteur NYIRABANYIGINYA André, un radiologue qui travaille à l'hôpital Roi Fayçal hum, l'hôpital le plus moderne du pays ... Il travaille même de temps en temps à mi-temps au C.H.K. hum... Et les gens de dire : 'Du reste, tel que nous le connaissions, ha !' Il n'a jamais cessé de dire, même quand il était encore à Bruxelles, qu'il serait 'le sympathisant des Inkotanyi'. On dit 'qu'il a pris toute sa famille, qu'ils ont fui et qu'ils ont rejoint les Inkotanyi'. Il se pourrait que ce soit des rumeurs mais si c'est vrai, ses voisins peuvent maintenant nous téléphoner à nouveau pour nous dire que le Docteur et sa famille ne sont plus chez eux. »

[53] La Chambre d'appel relève par ailleurs qu'au paragraphe 569 de son Mémoire d'appel l'Appelant conteste déjà, de manière générale, la conclusion de la Chambre de première instance sur l'existence d'un « lien causal » entre le massacre des civils tutsis et le message visant à l'extermination ethnique qui a été diffusé par la RTLM.

[54] Requête, par. 16. L'Appelant soutient qu'une traduction complète de ce passage établirait que l'auteur des propos cités dans le Jugement n'était pas le journaliste de la RTLM, mais un tiers.

[55] *Ibid*., par. 17. Selon l'Appelant, le caractère incomplet de la traduction de cet émission a conduit la Chambre de première instance à conclure de manière erronée que « le journaliste Gahigi aurait énuméré sur les antennes de la radio RTLM 'les noms de l'ensemble des membres' de la famille d'un *Inkotanyi* appelé Manzi Sudi », alors que la phrase « amputée » éclaire, selon lui, le reste des propos et « souligne que toutes les personnes citées étaient membres à part entière d'une même brigade clandestine du FPR dans le quartier de Biryogo, sans aucunement avoir des liens de parenté avec Manzi Sudi Fadi ».

[56] Réponse, par. 28-35 avec une référence à la Requête, par. 15-17.

[57] *Ibid*., par. 29-30.

[58] *Ibid*., par. 33 se référant aux pièces P36/54A, B, C et E.

cause, la traduction proposée par l'appelant ne pourrait en aucun cas modifier la conclusion de la Chambre de première instance[59].

20. L'émission de la RTLM en date du 25 octobre 1993 a été citée, parmi d'autres, par la Chambre de première instance pour illustrer le fait que

> « [l]es émissions de la RTLM se sont mises à véhiculer des stéréotypes ethniques d'ordre aussi bien économique que politique »[60],

et conclure que ces émissions « témoign[ai]ent d'une interaction complexe entre les dynamiques ethnique et politique »[61]. La Chambre d'appel relève que la transcription de cette même émission figure dans la pièce à conviction 1D49C versée au dossier par la Défense le 24 mai 2001. Le passage litigieux de cette émission est traduit dans son intégralité, y compris les phrases identifiées par l'appelant comme étant « délibérément omis[es] par le traducteur ». Par conséquent, même s'il est vrai que la Chambre de première instance se réfère dans le Jugement à la pièce à conviction C7 et non pas à la pièce 1D49C, il apparaît que l'intégralité de la traduction était à la disposition de la Chambre de première instance. La Chambre d'appel considère par ailleurs que l'emploi des crochets dans la citation litigieuse par la Chambre de première instance[62] témoigne du fait que c'est cette dernière, et non le traducteur, qui a volontairement omis de citer les passages relevés par l'appelant, et qu'elle a donc rendu ses conclusions en connaissance de cause. La Chambre d'appel note enfin que l'appelant conteste les conclusions pertinentes de la Chambre de première instance dans le cadre de son appel au fond[63].

21. En ce qui concerne l'émission du 14 mars 1994, la Chambre d'appel relève d'emblée que la Chambre de première instance se réfère à la pièce à conviction P36/54C admise le 1er juillet 2002 et non pas à la pièce C7. La Chambre d'appel constate en effet que cette pièce à conviction consistait uniquement en la traduction française des deux paragraphes invoqués par l'appelant.[64] Cependant, le 3 juin 2003, la Chambre de première instance a admis la pièce à conviction P36/54E qui contenait la traduction française intégrale de l'enregistrement en question[65]. L'appelant n'ayant pas contesté l'exactitude de cette traduction, la Chambre d'appel considère que sa demande est désormais sans objet[66].

22. Au vu de ce qui précède, la demande de l'appelant visant à faire traduire par un expert désigné par la Chambre d'appel des extraits prétendument non traduits est rejetée.

c. Emissions non traduites

23. L'appelant soutient qu'

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[59] *Ibid*., par. 33.
[60] Jugement, par. 363. La Chambre de première instance a précisé à cet égard qu'au cours de cette émission "Noël Hitimana a évoqué le nombre disproportionné de Tutsis propriétaires de taxis".
[61] *Ibid*., par. 468.
[62] *Ibid*., par. 363.
[63] Voir, *e.g.,* Mémoire d'appel, par. 194, 203.
[64] Le texte intégral de l'enregistrement en kinyarwanda est contenu dans la pièce à conviction P36/54A admise le 20 mars 2002.
[65] Prosecutor v. Ferdinand Nahimana et al., Decision on the Prosecution's Application to Admit Translations of RTLM Broadcasts and Kangura Articles, 3 juin 2003, admettant la traduction française de la pièce P36/54E (voir spec. p. K0249617).
[66] La Chambre d'appel constate par ailleurs que l'Appelant conteste les conclusions de la Chambre de première instance relatives à l'émission du 14 mars 1994 dans le cadre de son appel au fond, Mémoire d'appel, par. 237-241 et 567-569.

> « un nombre significatif de transcriptions n'ayant pas fait l'objet de traduction, admises comme éléments de preuve, confirment que la radio RTLM diffus[ait] avant le 6 avril 1994 des émissions visant à éviter toute confrontation à caractère ethnique »[67]

et demande leur traduction. Le Procureur affirme que la requête de l'appelant concernant les émissions non traduites s'analyse en un abus de procédure, dans la mesure où elle constitue une tentative de l'appelant de se servir, au stade de l'appel, de preuves qui étaient à sa disposition ou avaient été déposées lors du procès en première instance, et qu'il a sciemment choisi de ne pas utiliser[68]. Le Procureur relève que certaines des émissions visées par l'appelant avaient déjà été traduites dans l'une des langues de travail du Tribunal[69]. En tout état de cause, il souligne que même si les émissions non traduites avaient été retenues en première instance, elles n'auraient pas eu pour effet de modifier de manière décisive les conclusions de la Chambre de première instance[70].

24. L'appelant mentionne tout d'abord un extrait d'émissions des 29 et 30 novembre et du 1er décembre 1993 comprenant les propos de Gaspard Gahigi, rédacteur en chef de la RTLM, à l'occasion d'assassinats commis dans la commune de Mutura à la fin du mois de novembre 1993[71]. La Chambre d'appel note que le passage cité par l'appelant et qu'il prétend être non traduit, correspond *verbatim* au passage contenu dans la pièce à conviction C7,[72] ainsi que dans la pièce à conviction P36/5C admise le 5 juillet 2002[73]. L'appelant invoque ensuite un extrait d'une émission des 17 et 18 mars 1994, contenant un échange entre deux journalistes de la RTLM, Rucogoza et Mbilizi[74]. La Chambre d'appel note que cet extrait cité par l'appelant correspond mot pour mot aux passages en français contenus dans la pièce à conviction C7[75], ainsi que dans la pièce à conviction P103/170C admise le 3 juin 2003[76]. Dès lors, la demande de l'appelant concernant la traduction de ces transcriptions est dépourvue de tout fondement.

25. Ensuite, l'appelant propose la traduction des extraits d'émissions non traduites dont les transcriptions en kinyarwanda sont contenues dans la pièce à conviction C7. La Chambre d'appel constate cependant que tous ces enregistrements ont été communiqués à l'appelant lors du procès en première instance et ont été admis comme pièces à conviction bien avant la clôture du procès. Il en est ainsi des extraits des émissions diffusées :

i. les 2 et 4 décembre 1993, dans lesquels Gaspard Gahigi invite notamment les auditeurs à « dénoncer toute provocation à caractère ethnique »[77] ;
ii. les 3, 6 et 7 décembre 1993, dans lesquels Gaspard Gahigi parle du rôle de l'Eglise[78] ;
iii. les 18 et 19 mars 1994 dans lesquels l'orateur affirme, selon l'Appelant, que « [l]es Rwandais doivent cultiver l'esprit de tolérance, vivre en paix »[79] ;

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[67] Requête, par. 7.
[68] Réponse, par. 1, 36-37.
[69] *Ibid*., par. 41-42.
[70] *Ibid*., par. 38-52 se référant à la Requête, par. 18-27.
[71] Requête, par. 18 se référant à la pièce C7, 104F, K0159516.
[72] Fichier 104F, p. K0159516.
[73] K0159516 ; la pièce à conviction P36/5A (version en kinyarwanda) a été admise le 20 Mars 2002 (CRA du 20 mars 2002, p. 189) alors que ses traductions en anglais (P36/5B) et en français (P36/5C) ont été admises le 5 juillet 2002 (CRA du 5 juillet 2002, p. 112).
[74] Requête, par. 21.
[75] Fichier 131K, pp. K0216692 à K0216698.
[76] Pièce à conviction P103/170C, pp. K0249880 et seq. ; Voir Prosecutor v. Ferdinand Nahimana et al., Case N°ICTR-99-52-T, Decision on the Prosecution's Application to Admit Translations of RTLM Broadcasts and Kangura Articles, 3 June 2003
[77] Requête, par. 19 se référant à la pièce C7, 218K, p. K0224385-K0224386.
[78] *Ibid*., par. 20 se référant à la pièce C7, 219K, p. K0224367.
[79] *Ibid*., par. 22, se référant à la pièce C7, fichiers 80, 85, 133. La Chambre d'appel note que l'Appelant n'identifie pas de manière précise les parties des traductions manquantes et relève que le fichier 85F est entièrement en français et qu'une partie du fichier 80K et du fichier 133K est également en français.

iv. les 14 et 15 décembre 1994 dans lesquels, selon l'Appelant, le journaliste Kantano « dénonce les gens qui provoquent les autres ou qui recherchent la violence même lors des matches de football » et « demande d'éviter la violence »[80] ;
v. les 21 et 22 décembre 1993, dans lesquels Kantano Habimana affirme, selon l'Appelant, « qu'une bonne cohabitation entre les Inkotanyi et d'autres Rwandais est nécessaire »[81] ;
vi. des 22, 23 et 24 décembre 1993, dans lesquels Kantano Habimana contredit, selon l'Appelant, ceux qui accusent la radio RTLM d'avoir été contre l'application de paix d'Arusha[82] ;
vii. le 5 mars 1994 dans lequel, d'après l'Appelant, Noël Hitimana met en garde les responsables du FPR contre une guerre à l'intérieur du Rwanda[83] ;
viii. les 7 et 8 mars 1994, dans lequel Kantano invite les auditeurs à « cultiver sans cesse [l'unité entre Tutsis, Hutus et Twas] et répudier les considérations qui divisent les Rwandais »[84]

Ces extraits correspondent aux enregistrements en kinyarwanda contenus dans les pièces à conviction P103/287A, P103/288A, P36/68A, P36/12A, P36/15A, P103/316A, P103/335A et P36/50A, respectivement, admises au dossier le 20 mars 2002.[85]

26. S'agissant d'éléments de preuve versés au dossier bien avant la clôture du procès en première instance (contrairement à la pièce C7), la Chambre d'appel considère qu'il appartenait à l'appelant de faire une demande de traduction avant la fin du procès en première instance. En l'espèce, la Chambre d'appel observe que l'appelant a formulé cette demande plus de deux ans après le prononcé du Jugement et qui plus est, après le dépôt de son Mémoire d'appel. Par conséquent, la Chambre d'appel n'est pas satisfaite que l'appelant ait fait preuve de la diligence exigée.

27. De ce fait, la Chambre n'accordera une telle demande que si elle considère, au vu des traductions proposées par l'appelant, que l'exclusion de ces documents conduirait à un déni de justice.[86] De manière générale, la Chambre d'appel constate que l'appelant se contente de soumettre des passages dont la traduction est prétendument absente des documents composant la pièce à conviction C7 sans se référer aux conclusions de la Chambre de première instance auxquelles ils se rapporteraient.[87] Par ailleurs, il appartient à l'appelant de démontrer, dans le cadre de son appel au fond, si certains extraits de la pièce à conviction C7 démontrent que la Chambre de première instance a commis une erreur de fait[88]. Il n'y a pas lieu à ce stade d'ordonner la traduction sollicitée car l'Appelant, maîtrisant les langues kinyarwandaise et française, dispose de tous les éléments nécessaires à la préparation de sa défense ; il est notamment en mesure de proposer sa version des traductions en articulant ses arguments en appel. Si, en se prononçant sur ces arguments, la Chambre d'appel conclut à l'existence d'une erreur ayant entraîné un déni de justice,[89] elle ordonnera, *proprio motu,* le cas échéant, la traduction des passages pertinents.

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[80] *Ibid*., par. 23 se référant à la pièce C7, 240K, p. K0139154.
[81] *Ibid*., par. 24 se référant à la pièce C7, 243K, p. K0164349-K0164351.
[82] *Ibid*., par. 25 se référant à la pièce C7, 244K, K0139293. L'appelant précise que « la partie entre crochets [de sa traduction] n'a pas été transcrite ; l'appelant l'a repérée sur l'élément audio ». Dès lors, la Chambre d'appel considère que la demande de l'appelant va au-delà d'une demande de traduction, car il y inclut des éléments qui ne faisaient pas partie du dossier devant la Chambre de première instance. Cette demande ne sera donc pas examinée.
[83] *Ibid*., par. 26 se référant à la pièce C7, 263K, K0168798.
[84] *Ibid*., par. 27 se référant à la pièce C7, 264K, K0169029.
[85] CRA du 20 mars 2002, pp. 155, 189.
[86] Voir *supra,* au par. 0.
[87] Requête, par. 18-27 sous le titre commun « Emissions non traduites démontrant le souci du rédacteur en chef de la RTLM et de ses journalistes d'éviter toute confrontation ethnique ».
[88] La Chambre d'appel relève que ces arguments sont déjà inclus dans les écritures de l'Appelant relatives au fond de son appel – voir notamment, Mémoire en réplique, par. 64-70 et Annexe 8 « Langue des transcrits des émissions de la radio RTLM jusqu'au 6 avril 1994 (Chambers exh. C7) ».
[89] Voir l'article 24 (1) (b) du Statut.

d. Datation contestée

28. L'appelant soutient que l'erreur de datation d'une émission citée dans le Jugement[90]

> « confirme la nécessité de réexaminer les extraits retenus à charge par les juges, sans les séparer de leur contexte et en vérifiant scrupuleusement la traduction et l'interprétation qui en a été faite »[91].

Le Procureur affirme que l'erreur alléguée concernant la date d'une émission de la RTLM, n'affecte pas les conclusions de la Chambre de première instance, qui sont fondées sur une transcription correcte de l'enregistrement[92].

29. La Chambre d'appel constate que la transcription citée par la Chambre de première instance est en effet datée du 12 avril 1994 et non pas du 4 décembre 1993 comme indiqué dans le Jugement.[93] Cependant, vu le fait que la transcription en question est disponible dans les langues de travail du Tribunal, la prétention de l'appelant est, depuis son versement au dossier, sans rapport avec une demande touchant à l'exactitude de la traduction et relève clairement de l'appel au fond[94]. La Chambre d'appel considère également que sa demande générale visant à « réexaminer les extraits retenus à charge » basée sur l'exemple de cette erreur est dépourvue de tout fondement : au stade de l'appel, il appartient à l'appelant d'identifier les erreurs de fait qui ont entraîné un déni de justice en incluant des arguments y relatifs dans son acte et son mémoire d'appel.

III. Dispositif

30. Par ces motifs, la Chambre d'appel, REJETTE la Requête.

Fait en français et en anglais, le texte français faisant foi.

Fait le 20 novembre 2006, à La Haye, Pays-Bas.

[Signé] : Fausto Pocar

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[90] Requête, par. 28. L'appelant relève que la Chambre de première instance, au paragraphe 360 du Jugement, « dat[e] du 4 décembre 1993 une émission diffusée en réalité le 12 avril 1994, c'est-à-dire après le début des massacres, durant une période où l'appelant n'entretient plus aucun contact avec la radio et très précisément le jour où, évacué en avion sur Bujumbura, il ne peut capter aucune émission ».
[91] *Ibid*., par. 30.
[92] Réponse, par. 53-54.
[93] Pièce à conviction C7, fichier 0004F p. K0161629 et fichier 004E p. K0163179-80.
[94] La Chambre d'appel note à cet égard qu'un des argument de l'appelant sur le fond de l'appel consiste précisément à affirmer que « [l]e contexte historique et politique exclut de considérer les émissions antérieures au 6/4/1994 comme des appels l'extermination de la population tutsie. » (Mémoire d'appel, p. 40). Voir aussi, Mémoire en réplique, par. 61-62 et 67).

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Décision sur les requêtes de Ferdinand Nahimana aux fins de divulgation d'éléments en possession du Procureur et nécessaires à la défense de l'appelant et aux fins d'assistance du Greffe pour accomplir des investigations complémentaires en phase d'appel
8 décembre 2006 (ICTR-99-52-A)

(Original : Français)

Chambre d'appel

Juges : Fausto Pocar, Président de Chambre ; Mohamed Shahabuddeen ; Mehmet Güney ; Andrésia Vaz ; Theodor Meron

Ferdinand Nahimana – Joseph Serugendo – Obligation de communication du Procureur, Obligation permanente qui subsiste après le procès en première instance, Eléments de preuve de nature à disculper en tout ou en partie l'accusé ou à porter atteinte aux éléments de preuve du Procureur, Charge du Procureur de déterminer les éléments qu'il doit communiquer, Présomption de bonne foi dans le chef du Procureur, Pas d'établissement par la Défense d'un commencement de preuve de nature du caractère disculpatoire des éléments de preuve requis et de leur détention par le Procureur, Pièces exclusivement à charge pas nécessairement inutiles à la préparation de la défense, Obtention des documents via EDS, Droit de chaque partie de chercher à obtenir des documents de n'importe quelle source pour préparer son dossier à condition d'identifier les documents et de démontrer l'existence d'un but légitime juridiquement pertinent, Convention de plaidoyer de Joseph Serugendo [décédé] : compétence de la Chambre d'appel, aucune Chambre saisie de l'affaire – Accès à des archives rwandaises, Evaluation de la diligence de la Défense, Demande d'autorisation d'enquête complémentaire au stade de l'appel, Critère de l'indisponibilité de la pièce lors du procès en première instance, Présence de circonstances exceptionnelles – Requête partiellement acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 54, 66, 66 (B), 68, 68 (A), 68 (B), 75 (G) (ii), 75 (H), 107 et 115

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Alfred Musema c. Le Procureur, Arrêt (« Defence Motion under Rule 68 requesting the Appeals Chamber to Order the Disclosure of Exculpatory Material and for Leave to File Supplementary Grounds of Appeal »), 18 mai 2001 (ICTR-96-13) ; Chambre d'appel, Georges Rutaganda c. Le Procureur, Décision (« Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66 (B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions »), 28 juin 2002 (ICTR 96-3) ; Chambre de première instance, Le Procureur c. Ferdinand Nahimana, Demande de coopération adressée à la République Rwandaise en application de l'article 28 du Statut, 24 septembre 2002 (ICTR-99-52) ; Chambre d'appel, Le Procureur c. Georges Rutaganda, Décision relative à la requête urgente de la defence en communication et admission de moyens de preuves supplémentaires et ordonnance portant calendrier, 12 décembre 2002 (ICTR-96-3) ; Chambre de première instance, Le Procureur c. Ferdinand Nahimana et consorts, Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, 5 juin 2003 (ICTR-99-52) ; Chambre d'appel, Le Procureur c. Ferdinand Nahimana et consorts, Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, 3 mai 2005 (ICTR-99-52) ; Chambre d'appel, Le Procureur c. Juvénal Kajelijeli, Arrêt, 23 mai 2005 (ICTR-98-44A) ; Chambre d'appel, Le Procureur c. Jean Bosco Barayagwiza, Decision on Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator, 4 octobre 2005 (ICTR-99-52) ; Chambre d'appel, Le Procureur c. Hassan Ngeze, [Confidential] Decision on Appellant Hassan Ngeze's Six Motions for

Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage, 23 février 2006 (ICTR-99-52) ; Chambre d'appel, Le Procureur c. Edouard Karemera et consorts, Décision relative à la requête interlocutoire de Joseph Nzirorera, 28 avril 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Joseph Serugendo, Decision on Motion for Protection of Witnesses, 1 June 2006 (ICTR-2005-84) ; Chambre de première instance, Le Procureur c. Joseph Serugendo, Judgement and Sentence, 12 juin 2006 (ICTR-2005-84) ; Chambre de première instance, Le Procureur c. Hassan Ngeze, Decision on Appellant Hassan Ngeze's Motions for Approval of Further Investigations on Specific Information Relating to the Additional Evidence of Potential Witnesses, 20 juin 2006 (ICTR-99-52) ; Appeals Chamber, Le Procureur c. Edouard Karemera et consorts, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Jean Bosco Barayagwiza, Decision on Appellant Jean-Bosco Barayagwiza's Motion Requesting That the Prosecution Disclosure of the Interview of Michel Bagaragaza Be Expunged from the Record, 30 octobre 2006 (ICTR-99-52) ; Chambre d'appel, Le Procureur c. Hassan Ngeze, Decision on Motions Relating to the Appellant Hassan Ngeze's and Prosecution's Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EB, 27 novembre 2006 (ICTR-99-52) ; Chambre d'appel, Le Procureur c. Jean Bosco Barayagwiza, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 décembre 2006 (ICTR-99-52)

T.P.I.Y. : Chambre d'appel, Le Procureur c. Duško Tadić, Décision relative à la requête de l'appelant aux fins de prorogations de délais et d'admissions de moyens de preuve supplémentaire, 15 octobre 1998 (IT-94-1) ; Chambre d'appel, Le Procureur c. Tihomir Blaškić, Arrêt relatif aux requêtes de l'appelant aux fins de production de documents, de suspension ou de prorogation du délai de dépôt du mémoire et autres, 26 septembre 2000 (IT-95-14) ; Chambre d'appel, Le Procureur c. Zoran Kupreškić, Arrêt, 23 octobre 2001 (IT-95-16) ; Chambre d'appel, Le Procureur c. Tihomir Blaškić, Décision relative à la Requête des Appelants Dario Kordić et Mario Čerkez aux fins de consultation de Mémoires d'appel, d'écritures et de comptes rendus d'audience confidentiels postérieurs à l'appel déposés dans l'affaire Le Procureur c. Blaškić, 16 mai 2002 (IT-95-14) ; Chambre de première instance, Le Procureur c. Milan Milutinović et consorts, Décision relative à la Requête de Dragoljub Ojdanić aux fins de communication de conclusions ex parte, 8 novembre 2002 (IT-99-37) ; Chambre d'appel, Le Procureur c. Miroslav Kvočka et consorts, Décision relative à la requête des Momćilo Gruban aux fins d'accéder à des pieces, 13 janvier 2003 (IT-98-30/1) ; Chambre d'appel, Le Procureur c. Dario Kordić et Mario Čerkez, Decision on Motion by Hadžihasanović, Alagić and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the Kordić and Čerkez Case, 23 janvier 2003 (IT-95-14/2) ; Chambre d'appel, Le Procureur c. Radislav Krstić, Décision [confidentielle] relative à la Requête de l'Accusation aux fins d'être dispensée de son obligation de communiquer des informations sensibles en application de l'article 66 (C) du Règlement, 27 mars 2003 (IT-98-33) ; Chambre d'appel, Le Procureur c. Mladen Naletilić, alias "Tuta", et Vinko Martinović, alias"Stela", Décision relative à la Requête conjointe déposée par la Défense de Enver Hadžihasanovic et Amir Kubura aux fins d'accès à tous les documents, écritures, comptes rendus d'audience et pièces à conviction confidentiels de l'affaire Naletilić et Martinović, 7 novembre 2003 (IT-98-34) ; Chambre d'appel, Le Procureur c. Tihomir Blaškic, *Décision relative à la requête de Dario Kordic et Mario Cerkez aux fins d'obtenir copie de la quatrième requête déposée par Tihomir Blaskic en vertu de l'article 115 du règlement, et aux documents y afférents*, 28 janvier 2004 (IT-95-14) ; Chambre d'appel, Le Procureur c. Tihomir Blaškić, Decision on Prosecution's Application to Seek Guidance from the Appeals Chamber regarding Redaction of the Statement of "Witness Two" for the purposes of Disclosure to Dario Kordić under Rule 68, 4 mars 2004 (IT-95-14) ; Chambre d'appel, Le Procureur c. Miroslav Kvočka et consorts, Décision, 22 mars 2004 (IT-98-30/1) ; Chambre d'appel, Le Procureur c. Tihomir Blaškić, [confidential] Decision on Prosecution's Application to Seek Guidance from the Appeals Chamber regarding Redaction of the Statement of "Witness Two" for the purposes of Disclosure to Paško Ljubičić under Rule 68, 30 mars 2004 (IT-95-14) ; Chambre d'appel, Le Procureur c. Radislav Krstić, Jugement, 19 avril 2004 (IT-98-33) ; Chambre d'appel, Le Procureur c. Tihomir Blaškić, Jugement, 29 juillet 2004 (IT-95-14) ; Chambre de première instance,

Le Procureur c. Radoslav Brđanin, Décision relative aux requêtes par lesquelles l'appelant demande que l'accusation s'acquitte de ses obligations de communication en application de l'article 68 du Règlement et qu'une ordonnance impose au Greffier de communiquer certains documents, 7 décembre 2004 (IT-99-36) ; Chambre d'appel, Momir Nikolic c. Le Procureur, Décision relative à la Requête urgente aux fins d'obtenir l'accès à des documents confidentiels, 4 février 2005 (IT-02-60/1) ; Chambre d'appel, Le Procureur c. Blagoje Simić, Decision on Defence Motion by Franko Simatović for Access to Transcripts, Exhibits, Documentary Evidence and Motion Filed by the Parties in the Simic et al. Case, 13 avril 2005 (IT-95-9) ; Chambre d'appel, Le Procureur c. Vidoje Blagojević et Dragan Jokić, Decision on Motions for Access to Confidential Materials, 16 novembre 2005 (IT-02-60) ; Chambre d'appel, Le Procureur c. Vidoje Blagojević et Dragan Jokić, [Confidential] Decision on Prosecution request for Redactions, 17 janvier 2006 (IT-02-60) ; Chambre d'appel, Le Procureur c. Vidoje Blagojević et Dragan Jokić, Decision on Momčilo Perišić Motion Seeking Access to Confidential Material in the Blagojević and Jokić Case, 18 janvier 2006 (IT-02-60) ; Chambre d'appel, Le Procureur c. Blagoje Simić, Order Proprio Motu Granting Access to Confidential Material, 3 février 2006 (IT-95-9) ; Chambre d'appel, Le Procureur c. Stanislav Galić, http://www.icty.org/x/cases/galic/acdec/fr/060216.htm*Décision relative à la demande d'accès aux documents confidentiels déposés dans l'affaire Galic présentée par* Momčilo Perišić , 16 février 2006 (IT-98-29) ; Chambre d'appel, Le Procureur c. Vidoje Blagojević et Dragan Jokić, Décision [confidentielle] relative à la Requête de l'Accusation aux fins d'expurger les documents confidentiels communiqués à Momčilo Perišić, 9 mars 2006 (IT-02-60) ; Chambre d'appel, Miroslav Bralo c. Le Procureur, Decision on Motion of Miroslav Bralo for Access to Certified Trial Record, 2 mai 2006 (IT-95-17) ; Chambre d'appel, Le Procureur c. Tihomir Blaškić, Decision on "Defence Motion on Behalf of Rasim Delić Seeking Access to all Confidential Material in the Blaškić Case", 1 juin 2006 (IT-95-14) ; Chambre d'appel, Le Procureur c. Miroslav Bralo, Decision on Motions for Access to Ex Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 août 2006 (IT-95-17) ; Chambre d'appel, Le Procureur c. Fatmir Limaj et consorts, Decision on Ojdanić's application for access to exhibit P92, 3 novembre 2006 (IT-03-66)

1. La Chambre d'appel du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 (ci-après « Chambre d'appel » et « Tribunal », respectivement) est saisie par l'Appelant Ferdinand Nahimana (ci-après « Appelant ») des deux requêtes suivantes :

- « Requête aux fins de divulgation d'éléments en possession du Procureur et nécessaires à la Défense de l'appelant » déposée le 10 juillet 2006 (ci-après « Requête du 10 juillet 2006 ») ;
- « Requête urgente de la Défense aux fins d'assistance du Greffe pour accomplir des investigations complémentaires en phase d'appel » déposée le 10 octobre 2006 (ci-après « Requête du 10 octobre 2006 »).

2. Le Procureur a respectivement répondu à ces Requêtes les 20 juillet 2006[1] et 20 octobre 2006[2]. Les Répliques de l'appelant ont été déposées, respectivement, les 21 juillet 2006[3] et 25 octobre 2006[4].

[1] Réponse du Procureur à la « Requête aux fins de divulgation d'éléments en possession du Procureur et nécessaires à la Défense de l'Appelant », 20 juillet 2006 (ci-après « Réponse à la Requête du 10 juillet 2006 »).
[2] *Prosecutor's Response to the Appellant Nahimana's* « Requête urgente de la Défense aux fins d'assistance du Greffe pour accomplir des investigations complémentaires en phase d'appel », 20 octobre 2006 (ci-après « Réponse à la Requête du 10 octobre 2006»).
[3] (Requête aux fins de divulgation d'éléments en possession du Procureur et nécessaires à la Défense de l'Appelant) – Réplique de la Défense-, 21 juillet 2006 (ci-après « Réplique à la Réponse à la Requête du 10 juillet 2006»).
[4] Réponse de la Défense à la Réplique du Procureur (Requête urgente de la Défense aux fins d'assistance du Greffe pour accomplir des investigations complémentaires en phase d'appel), 25 octobre 2006 (ci-après « Réplique à la Réponse à la Requête du 10 octobre 2006 »).

3. Pour rappel, la Chambre de première instance rendait son jugement dans la présente affaire le 3 décembre 2003[5]. L'appelant interjetait appel du Jugement et déposait son Acte d'appel le 4 mai 2004 et son Mémoire d'appel le 27 septembre 2004[6]. Le Mémoire en réplique était déposé le 21 avril 2006[7].

I. Requête du 10 juillet 2006

Arguments des parties

4. L'appelant demande à la Chambre d'appel[8] d'ordonner au Procureur de communiquer à la Défense, conformément aux articles 66 (B) et 68 (A) et (B) du Règlement de procédure et de preuve du Tribunal (ci-après « Règlement »), les documents suivants[9]:

- tous les documents compris entre les références K050 2000 et K050 5000 d'une part, et L0020 200 et L0020 600 d'autre part, figurant dans les dossiers « MINALOC ou MRND », dossiers que l'Appelant considère « directement en relation avec les accusations portées contre l'Appelant » et « nécessaires à [s]a défense […] en ce qu'ils permettent d'identifier les causes réelles des massacres survenus en mars 1992 [dans la région de Bugesera], d'en désigner les véritables responsables et de [le] mettre hors de cause »[10]. Il ajoute que ces documents auraient dû être communiqués en première instance mais que leur divulgation demeure nécessaire en appel afin de lui permettre de soutenir utilement ses moyens d'appel au fond[11];
- la convention de plaidoyer conclue entre Joseph Serugendo et le Bureau du Procureur et l'ensemble des déclarations faites par Joseph Serugendo auprès du Bureau du Procureur, accompagnées des enregistrements vidéo[12] : l'Appelant maintient que ces documents « contiennent des éléments à décharge et sont nécessaires à sa défense »[13] en ce que le jugement de Joseph Serugendo[14] fait apparaître qu'il a été condamné sur le fondement des émissions de la RTLM et de ses activités au sein de cette radio et sur la base d'une convention de plaidoyer où il aurait fait des déclarations concernant ses activités, les émissions, le fonctionnement interne et le rôle tenu par chacun des membres de la RTLM[15].

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[5] *Le Procureur c. Ferdinand Nahimana et consorts*, affaire n°ICTR-99-52-T, Jugement et sentence, 3 décembre 2003 (« Jugement »).

[6] « Acte d'appel », 4 mai 2004 (« Acte d'appel ») ; « Mémoire d'appel (révisé) », 27 septembre 2004 (version confidentielle) et 1 octobre 2004 (version publique) (« Mémoire d'appel »).

[7] « Réplique de la Défense », 21 avril 2004 (« Mémoire en réplique »).

[8] L'Appelant souligne qu'il s'adresse à la Chambre d'appel parce qu'il a déjà demandé la communication de ces documents au Procureur par courriers. Il rappelle ses demandes de communication du dossier « MINALOC et MRND » datées des 31 mars 2006 et 20 juin 2006, le second courrier réitérant la même demande en précisant les documents recherchés et ajoutant la demande de divulgation de la convention de plaidoyer de Joseph Serugendo ainsi que la transcription de l'ensemble de ses déclarations. Il mentionne la réponse négative du Procureur dans un courrier du 10 avril 2006 et l'absence de réponse à son courrier du 20 juin 2006 (Requête du 10 juillet 2006, par. 1, 3-6).

[9] Requête du 10 juillet 2006, par. 8 et p. 5.

[10] *Ibid.,* par. 8 et 14. L'Appelant affirme que la Chambre de première instance a apprécié « [s]a personnalité […] et la valeur de son témoignage au regard de son implication supposée dans des événements survenus dans la région de Bugesera au cours du mois de mars 1992 » (*ibid*., par. 9). Il cite le paragraphe 691 du Jugement selon lequel l'appelant « a ordonné la diffusion sur les ondes de Radio Rwanda […] [d'un] communiqué […] qui a provoqué la peur chez les Hutus et les a conduit à commettre des actes de violence contre la population tutsie parce qu'ils avaient été amenés faussement à croire qu'ils étaient sur le point d'être attaqués » (*ibid.,* par. 10). L'appelant précise que ces dossiers sont nécessaires à la Défense en ce qu'ils permettent d'apprécier la matérialité de certains faits qui lui sont reprochés et leur contexte (Réplique à la Réponse à la Requête du 20 juillet 2006, par. 7).

[11] *Ibid*., par. 15 et 16.

[12] *Ibid*., par. 8.

[13] *Ibid*., par. 18.

[14] *The Prosecutor v. Joseph Serugendo*, Case N°ICTR-2005-84-I, *Judgement and Sentence*, 12 juin 2006 (ci-après « Jugement Serugendo »).

[15] *Ibid*., par. 3 et 18.

5. Le Procureur soutient que la Requête du 10 juillet 2006 doit être rejetée dans son intégralité[16]. Premièrement, il prétend que ladite Requête est mal fondée en droit car l'Appelant n'a pas démontré en quoi l'article 66 (B) est applicable à ce stade de la procédure. A cet égard, le Procureur relève que les documents « MINALOC et MRND » ne pouvaient être communiqués en première instance puisqu'ils n'ont été introduits dans la base de données du Procureur qu'en octobre 2004[17]. Il ajoute que l'Appelant n'a pas démontré dans cette procédure d'appel la nécessité pour sa défense de documents relatifs aux événements de mars 1992 à Bugesera ni leur éventuel impact sur les conclusions de la Chambre de première instance[18]. Deuxièmement, le Procureur maintient que la référence à l'article 68 (A) du Règlement est sans fondement et s'apparente à une recherche exploratoire inacceptable en ce qu'elle couvre 3400 pages de documents dont toutes ne portent pas sur les événements de Bugesera[19]. Le Procureur souligne que l'Appelant n'a pas apporté la démonstration *prima facie* que le Procureur est en possession de documents susceptibles de mettre l'Appelant hors de cause[20]. Enfin, le Procureur affirme que les documents MINALOC et MRND et les déclarations de Joseph Serugendo sont accessibles sur le répertoire du système de communication électronique (ci-après « EDS »). Il ajoute que le plaidoyer de culpabilité a été déposé au Greffe confidentiellement et ne relève pas de l'article 68 (A)[21]. Le Procureur argue par ailleurs que l'appelant ne démontre pas en quoi l'article 68 (B) s'applique puisqu'il se contente de dire que ces documents sont « pertinents » et « intéressent » l'appelant[22].

6. L'appelant réplique qu'il prend acte de la disponibilité sur EDS des dossiers MINALOC et MRND et des déclarations de Joseph Serugendo mais qu'il n'est pas en mesure à la date de sa Réplique d'en vérifier l'exactitude[23]. Faisant valoir que rien ne justifie que la convention de plaidoyer reste confidentielle, il demande à la Chambre d'appel de dire et juger qu'elle est dépourvue de tout caractère confidentiel et d'ordonner au Greffier de la rendre accessible au public[24]. Il ajoute que ce document est nécessaire à la préparation de son appel, car il contiendrait « d'abondantes précisions sur le fonctionnement interne de la radio RTLM, en particulier durant les mois d'avril à juillet 1994 », ainsi que « des indications sur le rôle joué au sein de la radio RTLM par les milices armées à partir du 6 avril 1994, tant sur le plan technique que sur le plan moral »[25].

Analyse

7. La Chambre d'appel rappelle que les éléments de preuve relevant de l'article 68 du Règlement sont ceux de nature à disculper en tout ou en partie l'accusé ou à porter atteinte aux éléments de preuve du Procureur[26] et que l'obligation de communiquer ces éléments est une obligation permanente qui subsiste après le procès en première instance, y compris durant la procédure d'appel[27]. Etant donné

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[16] Réponse à la Requête du 10 juillet 2006, par. 3. Notant que l'Appelant réitère, sous forme de requête, ses demandes, mal fondées, faites par courrier, le Procureur maintient toutes les positions exprimées dans son courrier en réponse du 10 avril 2006 (*ibid*, par. 2-3).
[17] *Ibid*., par. 3, 6.
[18] *Ibid*., par. 7.
[19] *Ibid*., par. 3, 14 et 20.
[20] *Ibid*., par. 13.
[21] *Ibid*., par. 18. Le Procureur note qu'il « semble que les conseils de l'appelant n'ont pas […] jugés utiles de souscrire au EDS » (*ibid*., par. 19).
[22] *Ibid*., par. 17.
[23] *Ibid*., par. 3 et 10. La Chambre d'appel note que, depuis le dépôt de la Réplique à la Réponse à la Requête du 10 juillet 2006, l'Appelant n'a pas précisé si il a réussi à avoir accès à ces documents sur EDS.
[24] Réplique à la Réponse à la Requête du 10 juillet 2006, par. 11-12, p. 3.
[25] Réplique à la Réponse à la Requête du 10 juillet 2006, par. 13-15.
[26] Le Procureur c. Radislav Krstić, affaire n°IT-98-33-A, Arrêt, 19 avril 2004 (ci-après « Arrêt Krstić »), par. 178. See also Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 décembre 2006 (« Décision Barayagwiza du 8 décembre 2006 »), par. 34.
[27] Decision on Appellant Jean-Bosco Barayagwiza's Motion Requesting that the Prosecution Disclosure of the Interview of Michel Bagaragaza Be Expunged from the Record, 30 octobre 2006, (ci-après "Décision Barayagwiza du 30 octobre 2006"), par. 6; Decision on Motions Relating to the Appellant Hassan Ngeze's and Prosecution's Requests for Leave to Present

que c'est au Procureur qu'il appartient de déterminer quels sont les documents qui répondent aux critères énoncés par l'article 68 du Règlement, la Chambre d'appel présume que le Procureur agit de bonne foi et elle n'intervient pas dans l'exercice de cette appréciation discrétionnaire à moins qu'il ne soit démontré que le jugement du Procureur en la matière est abusif[28]. Lorsque la Défense estime qu'une violation de l'article 68 du Règlement a été commise, il lui appartient de soumettre à la Chambre tout commencement de preuve de nature à rendre vraisemblable le caractère disculpatoire des éléments de preuve en question ainsi que leur détention par le Procureur[29]. Même si un appelant démontre que sa demande a été suffisamment précise et que le Procureur ne s'est pas acquitté de ses obligations, la Chambre d'appel n'envisagera d'émettre une ordonnance de communication que s'il est démontré que ces manquements ont porté préjudice à l'appelant[30].

8. La Chambre d'appel prend note de la déclaration du Procureur selon laquelle il est

> « conscient des obligations qui lui sont faites, par l'article 68 (A) du Règlement, de rechercher activement, et, s'il y a lieu, communiquer, à tous les stades de la procédure, les éléments dont il disposerait, et dont il sait effectivement qu'ils seraient de nature à disculper un accusé ou à atténuer sa culpabilité »[31].

La Chambre d'appel relève que le Procureur a déterminé que les documents demandés ne répondaient pas aux critères énoncés par l'article 68 du Règlement[32] et que l'appelant n'a pas démontré en quoi le jugement du Procureur, selon lequel ces documents ne contiennent pas de moyens de preuve disculpatoires, est abusif en l'espèce. A cet égard, la Chambre d'appel relève notamment que l'appelant se réfère lui-même à ces documents comme étant « pertinents » à son affaire et « nécessaires à la défense » et se contente d'affirmer qu'ils « contiennent des éléments à décharge »[33] sans expliquer davantage en quoi ils peuvent le « mettre hors de cause »[34] ou atténuer sa responsabilité individuelle.

Additional Evidence of Witnesses ABC1 and EB, 27 novembre 2006 (« Décision Ngeze du 27 novembre 2006 »), par. 11; Le Procureur c. Radoslav Brdjanin, affaire n°IT-99-36-A, Décision relative aux requêtes par lesquelles l'Appelant demande que l'Accusation s'acquitte de ses obligations de communication en application de l'article 68 du Règlement et qu'une ordonnance impose au Greffier de communiquer certains documents, 7 décembre 2004 (ci-après « Décision Brđanin du 7 décembre 2004 »), p. 3 ; Prosecutor v. Miroslav Bralo, Case N°IT-95-17-A, Decision on Motions for Access to Ex Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 août 2006 (ci-après "Décision Bralo du 30 août 2006"), par. 29.

[28] Décision Barayagwiza du 8 décembre 2006, par. 34 ; Décision Barayagwiza du 30 octobre 2006, par. 6 ; Georges Rutaganda v. The Prosecutor, Case N°ICTR-96-3-A, Decision on Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, 12 décembre 2002, pp 4-5 ; Alfred Musema v. The Prosecutor, Case N°ICTR-96-13-A, Decision on the Appellant's Motions for the Production of Material, Suspension of Extension of the Briefing Schedule, and Additional Filings, 18 mai 2001, p. 4; Décision Brđanin du 7 décembre 2004, p. 3 ; Décision Bralo du 30 août 2006, par. 30-31 ; Prosecutor v. Edouard Karemera et al., Case N°ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 avril 2006, par. 16; Décision Brđanin du 7 décembre 2004 , p. 3-4; Le Procureur c. Tihomir Blaškić, affaire n°95-14-A, Arrêt, 29 juillet 2004 ("Arrêt Blaškić"), par. 264 ; Prosecutor v. Tihomir Blaškić, Case N°IT-95-14-A, Decision on Prosecution's Application to Seek Guidance from the Appeals Chamber regarding Redaction of the Statement of "Witness Two" for the purposes of Disclosure to Dario Kordić under Rule 68, 4 mars 2004, (« Décision Blaškić du 4 mars 2004 »), par. 44 ; Prosecutor v. Tihomir Blaškić, Case N°IT-95-14-A, [Confidential] Decision on Prosecution's Application to Seek Guidance from the Appeals Chamber regarding Redaction of the Statement of "Witness Two" for the purposes of Disclosure to Paško Ljubičić under Rule 68, 30 mars 2004 (« Décision Blaškić du 30 mars 2004 »), par. 31-32 ; Prosecutor v. Tihomir Blaškić, Case N°IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 septembre 2000 (« Décision Blaškić du 26 septembre 2000 »), par. 38, 39 et 45 ; Prosecutor v. Miroslav Kvočka et al., Case N°IT-98-30/1-A, Decision, 22 mars 2004, p. 3.

[29] Décision *Barayagwiza* du 8 décembre 2006, par. 34 ; Décision *Brđanin* du 7 décembre 2004, p. 3 ; Décision *Bralo* du 30 août 2006, par. 31; *Juvénal Kajelijeli v. The Prosecutor,* Case N°ICTR-98-44A-A, *Judgement*, 23 mai 2005 (« Arrêt *Kajelijeli* »), par. 262.

[30] Décision *Barayagwiza* du 8 décembre 2006, par. 34 ; Décision *Bralo* du 30 août 2006, para. 31; Arrêt *Kajelijeli*, para. 262; Arrêt *Krstić*, par. 153.

[31] Réponse à la Requête du 10 juillet 2006, par. 11.

[32] *Ibid*., par. 11.

[33] Requête du 10 juillet 2006, par. 18.

[34] Requête du 10 juillet 2006, par. 14.

9. La Chambre d'appel rappelle que l'article 66 (B) du Règlement s'applique en appel à la condition que les éléments de preuve visés par la demande d'examen de la Défense aient été indisponibles lors du procès[35]. L'applicabilité de l'article 66 (B) à la procédure d'appel implique que le Procureur doive permettre à la Défense de prendre connaissance des éléments qui

> « soit sont nécessaires à la préparation de la défense de l'accusé, soit seront utilisés par le Procureur comme moyens de preuve au procès, soit ont été obtenus de l'accusé ou lui appartiennent »[36].

A cet égard, la Chambre d'appel rappelle que les pièces exclusivement à charge ne sont pas nécessairement inutiles à la préparation de la défense de l'accusé et que le Procureur devrait déterminer si « les questions auxquelles se rapportent les pièces en question sont […] l'objet d'un motif d'appel » ou si

> « les pièces en question peuvent raisonnablement permettre à la Défense de faire de nouvelles investigations et donner lieu à la découverte de moyens supplémentaires admissibles en vertu de l'article 115 du Règlement »[37].

Par conséquent, il appartient au Procureur de permettre à l'appelant de prendre connaissance de

> « tout élément susceptible d'être admis en appel ou qui pourrait donner lieu à la découverte d'éléments de preuve susceptibles de l'être »[38].

10. La Chambre d'appel prend note du fait que le Procureur a informé la Défense de la disponibilité des dossiers MINALOC et MRND et des déclarations de Joseph Serugendo après le dépôt de la Requête de l'appelant alors qu'il aurait pu le faire plus tôt[39]. Cependant, l'appelant n'a pas fait état, jusqu'à ce jour, de difficultés dans l'obtention des documents via EDS[40]. En conséquence, la Chambre d'appel considère que la demande de communication sur la base de l'article 66 du Règlement relative à ces documents est sans objet.

11. Concernant l'accord de plaidoyer de Joseph Serugendo, la Chambre d'appel note que l'appelant fonde erronément sa Requête sur les articles 66 et 68 du Règlement. La Chambre d'appel considérera néanmoins cette demande, telle que précisée dans la Réplique à la Réponse à la Requête du 10 juillet 2006[41], comme une demande d'accès à une pièce confidentielle.

12. La Chambre d'appel a affirmé de manière constante qu'une partie a toujours le droit de chercher à obtenir des documents provenant de n'importe quelle source afin de l'aider à préparer son dossier, à condition d'identifier les documents recherchés, ou de décrire leur nature générale, et de

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[35] Georges Anderson Nderumbumwe Rutaganda c. Le Procureur, affaire n°ICTR-96-3-A, Décision, sur "Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66 (B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions", 28 juin 2002, p. 3.
[36] *Le Procureur c. Radislav Krstić,* affaire n°IT-98-33-A, Décision [confidentielle] relative à la Requête de l'Accusation aux fins d'être dispensée de son obligation de communiquer des informations sensibles en application de l'article 66 (C) du Règlement, 27 mars 2003, p. 4.
[37] Ibid., p. 5.
[38] Id.
[39] Voir note de bas de page 8 *supra*.
[40] En même temps et vu que le Procureur semble se référer aux articles 66 et 68 du Règlement en invoquant le fait que les documents en question sont disponibles sur EDS (Réponse à la Requête du 10 octobre 2006, par. 17-19), la Chambre d'appel tient à rappeler que le simple fait pour le Procureur d'introduire une pièce dans EDS ne revient pas nécessairement à s'acquitter de ses obligations au titre de l'article 68 du Règlement et à donner à un accusé la possibilité d'y « avoir aisément accès » (*The Prosecutor v. Édouard Karemera et al.*, Case N°ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 juin 2006 (« Décision *Karemera* du 30 juin 2006 »), par. 15 ; Décision *Bralo* du 30 août 2006, par. 35).
[41] Réplique à la Réponse à la Requête du 10 juillet 2006, p.3.

démontrer l'existence d'un but légitime juridiquement pertinent justifiant l'obtention de cet accès[42]. La pertinence des pièces demandées par une partie peut être établie du fait de l'existence d'un lien entre l'affaire de ladite partie et la ou les affaires dans le cadre desquelles ces pièces ont été présentées, par exemple, lorsque ces affaires découlent d'événements qui auraient eu lieu dans la même région et à la même époque ou s'il existe d'autres recoupements[43]. Il suffit que la partie requérante démontre que l'accès à ces pièces est susceptible de l'aider de manière substantielle à présenter sa cause ou, tout au moins, qu'il existe de bonnes chances pour qu'il en soit ainsi[44]. En se prononçant sur une telle demande, il appartient à la Chambre d'appel de trouver un juste équilibre entre le respect du droit d'une partie à avoir accès à des pièces nécessaires à la préparation de sa cause et l'obligation du Tribunal de garantir la protection et la préservation d'informations confidentielles[45].

13. La Chambre d'appel considère qu'elle est compétente, en vertu de l'article 75 (G) (ii), pour statuer sur la demande relative à la convention de plaidoyer de Joseph Serugendo, puisque aucune Chambre n'est saisie de la première affaire[46], la procédure ayant été terminée par le prononcé du Jugement le 12 juin 2006 et le décès de Joseph Serugendo le 22 août 2006. Ainsi, la Chambre d'appel se voit habilitée à modifier le niveau de classification des documents protégés[47].

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[42] Prosecutor v. Blagoje Simić, Case N°IT-95-9-A, Decision on Defence Motion by Franko Simatovic for Access to Transcripts, Exhibits, Documentary Evidence and Motion Filed by the Parties in the Simic et al. Case, 13 avril 2005 (« Décision Simić du 13 avril 2005 »), p. 3 ; Momir Nikolic c. Le Procureur, affaire n°IT-02-60/1-A, Décision relative à la Requête urgente aux fins d'obtenir l'accès à des documents confidentiels, 4 février 2005, p. 6 ; Prosecutor v. Tihomir Blaškic, Case N°IT-95-14-A, Decision on Dario Kordić and Mario Čerkez's Request for Access to Tihomir Blaškic's Fourth Rule 115 Motion and Associated Documents, 28 janvier 2004, p. 4; Le Procureur c. Mladen Naletilić, alias "Tuta", et Vinko Martinović, alias"Stela", Affaire n°IT-98-34-A, Décision relative à la Requête conjointe déposée par la Défense de Enver Hadžihasanovic et Amir Kubura aux fins d'accès à tous les documents, écritures, comptes rendus d'audience et pièces à conviction confidentiels de l'affaire Naletilić et Martinović, 7 novembre 2003, p. 3-4.

[43] Prosecutor v. Tihomir Blaškić, Case N°IT-95-14-R, Decision on "Defence Motion on Behalf of Rasim Delić Seeking Access to all Confidential Material in the Blaškić Case", 1 juin 2006 (« Décision Blaškić du 1 juin 2006 »), p. 9 ; Prosecutor v. Stanislav Galić, Case N°IT-98-29-A, Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the Galić Case, 16 février 2006 (« Décision Galić du 16 février 2006 »), par. 3 ; Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case N°IT-02-60-A, Decision on Momčilo Perišić Motion Seeking Access to Confidential Material in the Blagojević and Jokić Case", 18 janvier 2006 (« Décision Blagojević du 18 janvier 2006 »), par. 4 ; Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case N°IT-02-60-A, Decision on Motions for Access to Confidential Materials, 16 novembre 2005, par. 8 ; Prosecutor v. Dario Kordić and Mario Čerkez, Case N°IT-95-14/2-A, Decision on Motion by Hadžihasanović, Alagić and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the Kordić and Čerkez Case, 23 janvier 2003, pp. 4-5 ; Le Procureur c. Tihomir Blaškić, affaire n°IT-95-14-A, Décision relative à la Requête des Appelants Dario Kordić et Mario Čerkez aux fins de consultation de Mémoires d'appel, d'écritures et de comptes rendus d'audience confidentiels postérieurs à l'appel déposés dans l'affaire Le Procureur c. Blaškić, 16 mai 2002 (« Décision Blaškić du 16 mai 2002 »), par. 15.

[44] *The Prosecutor v. Fatmir Limaj et al*., Case N°IT-03-66-A, *Decision on Ojdanić's application for access to exhibit P92*, 3 novembre 2006, par. 6; Décision *Blaškić* du 1 juin 2006, p. 9 ; Décision *Galić* du 16 février 2006, par. 3 ; Décision *Blagojević* du 18 janvier 2006, par. 4 ; Décision *Blagojević* du 16 novembre 2005, par. 8 ; Décision *Simić* du 13 avril 2005, p. 3 ; *Le Procureur c. Miroslav Kvočka et al*., affaire n°IT-98-30/1-A, Décision relative à la requête des Momćilo Gruban aux fins d'accéder à des pièces, 13 janvier 2003 (« Décision du 13 janvier 2003 »), par. 5 ; *Le Procureur c. Milan Milutinović et consorts*, affaire n°IT-99-37-I, Décision relative à la Requête de Dragoljub Ojdanić aux fins de communication de conclusions ex parte, 8 novembre 2002, par. 18 ; Décision *Blaškić* du 16 mai 2002, par. 14.

[45] Miroslav Bralo v. The Prosecutor, Case N°IT-95-17-A, Decision on Motion of Miroslav Bralo for Access to Certified Trial Record, 2 mai 2006, p. 4 ; Le Procureur c. Vidoje Blagojević et Dragan Jokić, affaire n°IT-02-60-A, Décision [confidentielle] relative à la Requête de l'Accusation aux fins d'expurger les documents confidentiels communiqués à Momčilo Perišić, 9 mars 2006, p. 2 ; Décision Galić du 16 février 2006, par. 10 ; Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case N°IT-02-60-A, [Confidential] Decision on Prosecution request for Redactions, 17 janvier 2006, p. 1 ; Décision Blaškić du 16 mai 2002, par. 29.

[46] Prosecutor v. Blagoje Simić, Case N°IT-95-9-A, Order Proprio Motu Granting Access to Confidential Material, 3 février 2006, p. 1.

[47] La Chambre d'appel considère qu'il convient d'appliquer *mutatis mutandis* la même procédure que celle prévue pour la modification des mesures de protection accordées à des témoins en vertu de l'article 75 du Règlement dans le cas de documents protégés, tel l'accord sur le plaidoyer; à ce sujet voir *Le Procureur c. Slobodan Milosević*, affaire n°IT-02-54-T, Décision aux fins de lever la confidentialité de l'accord sur le plaidoyer conclu dans l'affaire *Erdemović*, 26 août 2003, p. 2. L'article 75 (G) du Règlement est rédigé en des termes similaires à celui du Règlement du TPIY : « (…) Une partie à la deuxième affaire, qui souhaite obtenir l'annulation, la modification ou le renforcement de mesures ordonnées dans la

14. La Chambre d'appel est satisfaite que l'Appelant a, d'une part, décrit avec suffisamment de précision la pièce demandée comme il lui incombait de le faire et, d'autre part, démontré l'existence d'un but légitime juridiquement pertinent justifiant la consultation de ladite pièce. Conformément à l'article 75 (H) du Règlement, la Chambre d'appel a obtenu toutes les informations nécessaires des Juges composant la Chambre de première instance I qui a prononcé le Jugement dans l'affaire *Serugendo* et décide d'accorder à l'Appelant l'accès à la convention de plaidoyer de Joseph Serugendo.

15. La Chambre d'appel accorde au Procureur quatorze (14) jours à compter de la date de la présente décision pour déposer une requête aux fins d'expurgation, s'il peut établir l'existence de motifs suffisants justifiant l'expurgation de certaines informations contenues dans ledit document. Les mesures de protection que la Chambre de première instance a adoptées s'agissant de cette pièce restent en vigueur.

II. Requête du 10 octobre 2006

Arguments des parties

16. Dans sa Requête du 10 octobre 2006, l'appelant demande à la Chambre d'appel d'

> « [o]rdonner au Greffe d'offrir son assistance à la défense de l'appelant sur le plan logistique et financier, afin que celle-ci procède à des investigations sur le territoire rwandais, en particulier à Kigali, aux fins de tenter d'entrer en possession de l'intégralité de l'enregistrement d'une interview donnée par l'Appelant à 'Radio Rwanda' le 24 avril 1994, diffusée le 25 avril 1994 »[48]

conformément à l'article 20 (4) (b) du Statut du Tribunal (ci-après « Statut »), aux articles 73, 107, 108 *bis* et 115 du Règlement et à la « Décision sur la requête de Ferdinand Nahimana aux fins de communication d'éléments de preuve disculpatoires et d'investigations sur l'origine et le contenu de la pièce à conviction P105 » du 12 septembre 2006 (ci-après « Décision du 12 septembre 2006 »)[49]. L'appelant affirme que dans sa Décision du 12 septembre 2006, la Chambre d'appel

> « met à la charge de la défense le soin de mettre en œuvre les investigations nécessaires à l'obtention de l'enregistrement intégral de l'interview donnée par l'Appelant le 24 avril 1994, retenu à charge contre l'appelant »[50].

A cet égard, l'appelant fait valoir qu'en dépit des multiples tentatives déjà accomplies par la Défense en première instance, il n'a jamais réussi à obtenir l'intégralité de l'interview[51].

17. Il ajoute que la production de cet enregistrement dans son intégralité

> « est de nature à réfuter l'une des affirmations essentielles des juges relativement à l'intention criminelle attribuée à l'appelant, et à confirmer la position constante et sans équivoque de

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première affaire, doit soumettre sa demande : (i) à toute Chambre encore saisie de la première affaire, quelle que soit sa composition, ou (ii) à la Chambre saisie de la deuxième affaire, si aucune Chambre n'est plus saisie de la première affaire. ».

[48] Requête du 10 octobre 2006, p. 5. L'Appelant précise que ces investigations nécessitent la participation du conseil principal, du co-conseil et d'un assistant et détaille le programme nécessaire totalisant 8 jours (2 jours pour le déplacement à Arusha, la coordination avec le Greffe et les entretiens avec l'Appelant à l'UNDF ; 5 jours pour le déplacement à Kigali portant sur les investigations auprès de l'ORINFOR, du centre de documentation du FPR et de toutes autres autorités ou organisations qui seraient compétentes ; 1 jour pour le retour à Arusha et les entretiens avec l'Appelant à l'UNDF pour rendre compte du déroulement de l'enquête) (*ibid*., par. 18).

[49] *Ibid*., p. 5.

[50] *Ibid*., par. 19. L'Appelant souligne que « le Procureur ne propose aucune assistance sur ce point et n'envisage aucune démarche auprès des autorités rwandaises pour tenter d'obtenir l'intégralité de cet enregistrement » (*ibid*., par. 20).

[51] Requête du 10 octobre 2006, par. 1-3 et 25. L'Appelant renvoie à l'Annexe 3 de son Mémoire d'appel (révisé), en particulier la « *Chronology of efforts made by the differents teams to obtain listed material* ».

l'appelant […] selon laquelle seul le FPR-*Inkotanyi* peut être considéré comme l'ennemi du peuple rwandais »[52].

Il argue également que la copie intégrale de cette interview est également de nature à conforter la crédibilité et la consistance de sa déposition lors du procès en première instance[53].

18. Le Procureur soutient que la Requête du 10 octobre 2006 doit être rejetée car elle est mal fondée et constitue un abus de procédure justifiant le non paiement des honoraires du Conseil[54]. Il affirme qu'elle constitue, en grande partie, la répétition de la « Requête aux fins de communication d'éléments de preuve disculpatoires et d'investigations sur l'origine et le contenu de la pièce à conviction P 105 » (ci-après « Requête du 10 avril 2006 ») – qui demandait à la Chambre d'appel d'ordonner aux autorités rwandaises de communiquer l'intégralité de l'interview, et qui a été rejetée par la Décision du 12 septembre 2006. Selon le Procureur, ces deux requêtes visent fondamentalement le même objectif, l'assistance de la Chambre d'Appel aux fins d'obtenir l'intégralité de l'enregistrement de l'interview[55]. Il argue en conséquence que l'appelant n'a pas satisfait les critères justifiant des enquêtes complémentaires au stade de l'appel[56].

19. D'une part, le Procureur souligne que l'appelant doit prouver qu'il a exercé la diligence requise en première instance tant pour une demande d'ordonnance aux fins d'enquêtes en vertu des articles 54 et 107 (Requête du 10 avril 2006) que pour une demande de financement d'enquêtes complémentaires au stade de l'appel (présente Requête)[57]. Dès lors, la Décision du 12 septembre 2006 ayant rejeté la Requête du 10 avril 2006 au motif que l'appelant n'avait pas rapporté la preuve de l'exercice de la diligence requise, la Requête du 10 octobre 2006 devrait être rejetée sur le même fondement[58]. Le Procureur constate que l'Appelant se réfère dans les Requêtes des 10 octobre et 10 avril 2006 au même document – la Requête du 13 mai 2003 – pour démontrer les difficultés qu'il aurait rencontrées pendant son procès pour obtenir des éléments de preuve du Rwanda[59]. Le Procureur réitère que cette Requête du 13 mai 2003 tendait seulement à l'arrêt des procédures et non à l'assistance de la Chambre de première instance aux fins d'obtenir des éléments de preuve, et que la requête ne mentionnait pas spécifiquement l'enregistrement de l'interview du 24 avril 1994[60]. Le Procureur maintient que la Chambre d'appel a déjà pris ce document en compte dans sa Décision du 12 septembre 2006 et a refusé de le considérer comme démontrant l'exercice de la diligence requise de la part de l'Appelant[61].

20. D'autre part, le Procureur fait valoir que l'appelant n'a pas démontré l'existence de circonstances exceptionnelles justifiant le financement d'enquêtes supplémentaires en appel, dans la mesure où il n'a pas établi l'absence d'enquêtes complémentaires entraînerait un déni de justice[62]. A cet égard, le Procureur constate que s'il était fait droit à la requête de l'appelant, il s'engagerait dans une simple recherche à l'aveuglette – ce que, d'après lui, la Chambre d'appel a toujours refusé – puisque ce dernier ne peut même pas démontrer que l'intégralité de cette interview existe[63]. Il ajoute

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[52] *Ibid*., par. 21. En d'autres termes, la Chambre de première instance aurait commis une erreur de fait en concluant que « l'Appelant aurait entretenu une confusion entre le FPR-Inkotanyi et la communauté tutsie dans son ensemble » (*Ibid*., para. 22).
[53] *Ibid*., par. 23.
[54] Réponse à la Requête du 10 octobre 2006, par. 7.
[55] *Ibid*., par. 3.
[56] *Ibid*., par. 8-23.
[57] *Ibid*., par. 5.
[58] *Ibid*., par. 4, 5 et 19.
[59] The Prosecutor v. Ferdinand Nahimana et al., Case N°ICTR-99-52-T, Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, 13 mai 2003 («Requête du 13 mai 2003»).
[60] Réponse à la Requête du 10 octobre 2006, par. 16, renvoyant au par. 15 de sa Réponse à la Requête du 10 avril 2006.
[61] *Ibid*., par. 18.
[62] *Ibid*., par. 8-14.
[63] *Ibid*., par. 6, 14.

que la question de la nature incomplète de l'émission a été soulevée pendant le procès[64], que la Chambre de première instance était informée de la substance alléguée de l'intégralité de l'interview[65] et qu'elle a exercé son pouvoir discrétionnaire quant au poids à accorder à cet élément de preuve[66]. Dès lors, la communication de l'intégralité de l'interview n'apporterait rien de nouveau au contexte factuel de l'affaire et ne peut être qualifiée de circonstances exceptionnelles[67]. Le Procureur argue que l'appelant essaye de soulever la question *de novo* au stade de l'appel, ce qui n'est pas autorisé[68]. Enfin, il relève que l'Appelant n'a expliqué dans aucune de ses requêtes la raison pour laquelle il a attendu presque deux ans et demi depuis le Jugement pour introduire la Requête du 10 octobre 2006[69].

21. L'appelant réplique que les enquêtes envisagées par la Défense ne constituent pas des « *fishing expeditions* » puisqu'elles visent l'obtention d'un élément de preuve précisément identifié dont l'existence et le contenu ne sont pas contestés par le Procureur et dont les détenteurs sont connus[70]. Il maintient que la Défense a exercé la diligence requise en temps utile en ne cessant de réclamer la communication de l'intégralité de l'enregistrement chaque fois que l'occasion se présentait en première instance[71]. De manière générale, il fait valoir que le Procureur tente abusivement de s'opposer à la manifestation de la vérité, alors qu'il dispose de toutes les facilités nécessaires à Kigali, pour tenter d'obtenir la partie manquante de l'enregistrement[72].

Analyse

22. La Chambre d'appel rappelle que, par sa Décision du 12 septembre 2006, elle a rejeté la Requête du 10 avril 2006, au motif principal que l'appelant n'avait pas démontré qu'en dépit de l'exercice de la diligence requise, il n'avait pas réussi à obtenir l'enregistrement en question. Ce motif reposait sur la constatation que l'appelant : s'était limité, dans ses écrits, à dire que ses investigations « se *seraient* heurtées à l'obstruction des autorités rwandaises » ; n'avait donné aucun élément d'information sur les démarches concrètes qu'il aurait entreprises depuis le début de son procès en appel en vue de se procurer l'enregistrement litigieux ; et n'avait pas apporté non plus de preuve d'un manque de coopération de la part des autorités rwandaises en ce qui concerne l'accès aux archives dans lesquelles serait contenu l'enregistrement recherché[73]. Ayant été saisie d'une requête fondée sur les articles 54 et 107 du Règlement, la Chambre d'appel avait évalué la diligence exercée par l'appelant au stade de la procédure d'appel en examinant s'il avait entrepris des démarches concrètes depuis le début du procès en appel en vue d'obtenir la pièce litigieuse[74].

23. La Requête du 10 octobre 2006 vise l'autorisation d'une enquête complémentaire au stade de l'appel au titre de l'article 115 du Règlement. Dans ce cas, le requérant doit démontrer que la preuve recherchée était indisponible lors du procès en première instance, bien qu'il ait alors exercé la diligence requise[75]. La Chambre d'appel rappelle également que ce n'est que dans des circonstances

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[64] Le Procureur rappelle que les circonstances dans lesquelles le Bureau du Procureur a obtenu l'émission et son admission comme pièce à conviction ont été données dans sa Réponse à la Requête du 10 avril 2006 (voir *ibid*., par. 10).
[65] Au soutien de cet argument, le Procureur cite le paragraphe 48 du Jugement (*ibid*., par. 13, note de bas de page 17).
[66] *Ibid*., par. 9 et 12. Le Procureur précise que l'Appelant a témoigné au sujet de la nature incomplète de l'émission en donnant sa version de la partie manquante (*ibid*., par.11).
[67] *Ibid*., par. 12.
[68] *Ibid*., par. 9 et 13.
[69] *Ibid*., par. 22.
[70] Réplique à la Réponse à la Requête du 10 octobre 2006, par. 1-4.
[71] *Ibid*., par. 7-9.
[72] *Ibid*., par. 10-14.
[73] Décision du 12 septembre 2006, par. 15.
[74] *Id*.; Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, 3 mai 2005 («Décision *Ngeze* du 3 mai 2005»), pp. 3-4.
[75] Décision du 12 septembre 2006, par. 13; Decision on Appellant Hassan Ngeze's Motions for Approval of Further Investigations on Specific Information Relating to the Additional Evidence of Potential Witnesses, 20 juin 2006, par. 4-5; [Confidential] Decision on Appellant Hassan Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage, 23 février 2006 («Décision Ngeze du 23 février 2006»), par. 5 et 9; Decision on

exceptionnelles, qu'elle ordonnera au Greffe de prendre en charge les frais afférents aux enquêtes lors de la procédure d'appel. De telles circonstances pourront être constatées, par exemple, si la partie requérante établit qu'elle est en possession d'une information spécifique, qui n'était pas disponible au moment du procès et n'aurait pu être découverte malgré l'exercice de la diligence requise, nécessitant une enquête plus approfondie afin d'éviter un déni de justice[76]. Or, en l'espèce la Chambre d'appel considère que l'appelant n'a pas démontré qu'il existe de telles circonstances exceptionnelles justifiant l'autorisation de l'enquête sollicitée.

24. Premièrement, le critère de l'indisponibilité de la pièce lors du procès en première instance et de diligence requise en vue de se la procurer, implique nécessairement que la partie en question doit démontrer avoir cherché à utiliser à bon escient tous les mécanismes de protection et de contrainte prévus par le Statut et le Règlement afin de pouvoir présenter les moyens de preuve à la Chambre de première instance[77]. A cet égard, la Chambre d'appel relève que l'appelant a effectué différentes démarches auprès des autorités rwandaises en 2000, 2001, 2002 et 2003 concernant un grand nombre d'éléments d'informations et de preuves auxquels il souhaitait accéder, sans pour autant introduire une demande spécifique concernant l'enregistrement litigieux[78]. Toutefois, la Chambre d'appel constate que même si l'appelant n'a pas expressément demandé à la Chambre de première instance d'ordonner aux autorités rwandaises de lui transmettre l'intégralité de l'enregistrement en question, il a cependant obtenu de la Chambre de première instance qu'elle requière la coopération du Rwanda, notamment en ce qui concerne l'accès aux

> « cassettes sonores de Radio Rwanda (en lien avec les dépositions des témoins à charge), ainsi que de la RTLM et de Radio Muhabura pour la période 1990-1994 »[79].

En outre, suite à d'autres démarches infructueuses auprès de ces mêmes autorités, l'appelant a sollicité, après la clôture des débats le 9 mai 2003, l'arrêt de la procédure engagée contre lui[80], demande rejetée par la Chambre de première instance au motif principal que les documents recherchés n'étaient pas précisément identifiés et que leur pertinence n'était pas démontrée[81]. Dans ces conditions, quand bien même la Chambre d'appel considère que les démarches de l'appelant en première instance manquaient de précision et de promptitude, elle est satisfaite que l'enregistrement en question était indisponible au procès en dépit de la diligence exercée à l'époque par l'appelant.

25. Toutefois, la Chambre d'appel n'est pas convaincue que l'appelant justifie de circonstances exceptionnelles permettant de faire droit à sa demande. En effet, l'appelant ne fait état d'aucune démarche ultérieure auprès des autorités rwandaises en vue d'obtenir l'enregistrement litigieux et ce n'est que le 10 avril 2006, soit presque deux ans après le dépôt de son Acte d'appel, qu'il a introduit sa première demande, depuis le prononcé du Jugement, visant à ordonner aux autorités rwandaises de

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Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator, 4 octobre 2005, p. 4 ; Décision Ngeze du 3 mai 2005, p. 3 ; Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase, 3 mai 2005 («Décision Nahimana du 3 mai 2005»), par. 2.

[76] Décision *Nahimana* du 3 mai 2005, par. 3 ; Décision *Ngeze* du 3 mai 2005, pp. 3-4. Voir *Sylvestre Gacumbitsi v. The Prosecutor*, Case N°ICTR-01-64-A, Decision on the Appellant's Rule 115 Motion and Related Motion by the Prosecution, 21 octobre 2005, par. 13.

[77] Voir à ce sujet *Le Procureur c. Duško Tadić*, affaire n°IT-94-1-A, Décision relative à la requête de l'Appelant aux fins de prorogation de délai et d'admission de moyens de preuve supplémentaires, 15 octobre 1998, par. 40, 44, 45 et 47 ; *Le Procureur c. Zoran Kupreškić et consorts*, affaire n°IT-95-16-A, Arrêt, 23 octobre 2001, par. 50.

[78] Requête du 10 octobre 2006, par. 1-2. L'Appelant renvoie à son Annexe 3 du Mémoire d'appel (révisé) correspondant à son Annexe II de sa Requête du 13 mai 2003.

[79] *Le Procureur c. Ferdinand Nahimana,* affaire n°ICTR-99-52-T, Demande de coopération adressée à la République Rwandaise en application de l'article 28 du Statut, 24 septembre 2002.

[80] The Prosecutor v. Ferdinand Nahimana, Case N°ICTR-99-52-T, Skeleton Argument for Defence Application to Stay Proceedings, 8 mai 2003 et Requête du 13 mai 2003 (voir notamment par. 2.2d)).

[81] *The Prosecutor v. Ferdinand Nahimana et al.,* Case N°ICTR-99-52-T, *Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana*, 5 juin 2003 (« Décision du 5 juin 2003 »), par. 1-12. La Chambre d'appel note que l'Appelant n'a pas interjeté d'appel interlocutoire de la décision du 5 juin 2003 mais a attendu, pour contester cette décision, le dépôt de son Acte d'appel le 4 mai 2004 faisant appel du Jugement au fond (Acte d'appel, p. 5).

transmettre l'intégralité de l'enregistrement en question. Au surplus, la Chambre d'appel relève que la Chambre de première instance était informée du caractère incomplet de l'enregistrement en question et que l'appelant a témoigné à ce sujet[82]. Cette même question est par ailleurs soulevée par l'appelant dans son Mémoire d'appel[83]. L'appelant, à qui il appartient de démontrer, dans le cadre de son appel au fond, que la Chambre de première instance aurait commis une erreur en admettant cette pièce au dossier et/ou en s'y appuyant dans le Jugement, se devait d'évaluer lors de la rédaction de son Acte d'appel et de son Mémoire d'appel l'intérêt de renouveler les démarches entreprises au procès en vue d'obtenir l'enregistrement litigieux. La Chambre d'appel réitère que la présente décision ne préjuge pas de son appréciation ultérieure au fond à ce sujet[84].

26. Par ailleurs, la Chambre d'appel ne voit pas en quoi les enquêtes nécessitent le déplacement au Rwanda du conseil principal, du co-conseil et d'un assistant pour obtenir une copie de l'enregistrement alors que l'Appelant se prévaut d'en connaître la source exacte et qu'il pourrait adresser sa demande aux détenteurs de celui-ci directement par voie écrite.

27. Au vu de ce qui précède, la Chambre d'appel est d'avis que l'appelant n'a pas établi l'existence de circonstances exceptionnelles justifiant l'assistance du Greffe en vue d'entamer, plus de deux ans et demi après le prononcé du Jugement, une enquête complémentaire au stade de l'appel.

IV. Dispositif

28. Par ces motifs, la Chambre d'appel ORDONNE, sous réserve de toute requête aux fins d'expurgation introduite dans les 14 jours par le Procureur, que le Greffe autorise l'appelant à avoir accès à l'accord de plaidoyer conclu dans l'affaire *Serugendo* et pour le reste REJETTE la Requête du 10 juillet 2006 et la Requête du 10 octobre 2006.

29. L'accord de plaidoyer conclu dans l'affaire *Serugendo* reste soumis aux mesures de protection adoptées par la Chambre de première instance[85]. En outre, l'Appelant, son Conseil et toute personne employée par la Défense qui, sur instruction ou sur autorisation dudit Conseil, demandent l'accès à des pièces confidentielles déposées en l'espèce, s'engagent à :

i) ne pas divulguer à un tiers, le nom des témoins, leurs coordonnées, les copies et le contenu de leurs déclarations, les comptes rendus et le contenu de leur témoignage en audience ou toute information qui permettrait de les identifier et violerait la confidentialité visée par les mesures de protection en vigueur, sauf nécessité absolue pour la préparation de la cause de l'Appelant, et avec l'autorisation préalable de la Chambre d'appel,

ii) ne divulguer à un tiers aucun élément de preuve documentaire ou autre, ni le contenu, en tout ou en partie, de tout élément de preuve, déclaration ou témoignage préalables et confidentiels.

30. Si, pour les besoins de la préparation de la cause de l'appelant, une pièce confidentielle est communiquée à des tiers dans le respect des conditions prescrites à l'alinéa (i), toute personne à laquelle est communiquée ladite pièce en l'espèce doit être informée qu'elle a l'interdiction de copier, reproduire ou publier, en tout ou en partie, toute pièce confidentielle, ou de la communiquer à toute autre personne ; en outre, si une personne a reçu ladite pièce, elle devra la restituer à l'appelant ou à son Conseil dès qu'elle n'en aura plus besoin pour la préparation de la cause du l'appelant.

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[82] CRA du 14 octobre 2002, pp. 216-217 et 219-222.
[83] Mémoire d'appel (révisé), par. 116-121, 132-135, 148, 276-279.
[84] Voir aussi Décision du 12 septembre 2006, par. 5.
[85] Incluant sans s'y limiter The Prosecutor v. Joseph Serugendo, Case N°ICTR-2005-84-I, Decision on Motion for Protection of Witnesses, 1 June 2006.

31. Aux fins des alinéas précédents, ne sont pas considérés comme des « tiers » : (i) l'appelant ; (ii) les personnes autorisées par le Greffier à assister le conseil de l'appelant ; (iii) le personnel du Tribunal ; y compris (iv) le personnel du Bureau du Procureur.

Fait en français et en anglais, le texte français faisant foi.

Fait le 8 décembre 2006, à La Haye, Pays-Bas.

[Signé] : Fausto Pocar

The Prosecutor v. Jérôme BICAMUMPAKA, Casimir BIZIMUNGU, Justin MUGENZI and Prosper MUGIRANEZA

Case N° ICTR-99-50

Case History: Jérôme Bicamumpaka

- Name: BICAMUMPAKA
- First Name: Jérôme
- Date of Birth: 1957
- Sex: male
- Nationality: Rwandan
- Former Official Function: Minister of Foreign Affairs
- Date of Indictment's Confirmation: 12 May 1999
- Counts: genocide, complicity in genocide, conspiracy to commit genocide, direct and public incitement to genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date and Place of Arrest: 6 April 1999, in Cameroon
- Date of Transfer: 31 July 1999
- Date of Initial Appearance: 17 August 1999
- Pleading: not guilty
- Date Trial Began: 6 November 2003

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Case History: Casimir Bizimungu

- Name: BIZIMUNGU
- First Name: Casimir

• Date of Birth: unknown

• Sex: male

• Nationality: Rwandan

• Former Official Function: Minister of Health

• Date of Indictment's Confirmation: 12 May 1999

• Counts: genocide, complicity in genocide, conspiracy to commit genocide, direct and public incitement to genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

• Date and Place of Arrest: 11 February 1999, in Kenya

• Date of Transfer: 23 February 1999

• Date of Initial Appearance: 3 September 1999

• Pleading: not guilty

• Date Trial Began: 6 November 2003

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Case History: Justin Mugenzi

• Name: MUGENZI

• First Name: Justin

• Date of Birth: 1949

• Sex: male

• Nationality: Rwandan

• Former Official Function: Minister for Trade

• Date of Indictment's Confirmation: 12 May 1999

• Counts: genocide, complicity in genocide, conspiracy to commit genocide, direct and public incitement to genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

• Date and Place of Arrest: 6 April 1999, in Cameroon

• Date of Transfer: 31 July 1999

• Date of Initial Appearance: 17 August 1999

• Pleading: not guilty

• Date Trial Began: 6 November 2003

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Case History: Prosper Mugiraneza

• Name: MUGIRANEZA

• First Name: Prosper

• Date of Birth: 1957

• Sex: male

• Nationality: Rwandan

• Former Official Function: Minister of Civil Service

• Date of Indictment's Confirmation: 12 May 1999

• Counts: genocide, complicity in genocide, conspiracy to commit genocide, direct and public incitement to genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

• Date and Place of Arrest: 6 April 1999, in Cameroon

• Date of Transfer: 31 July 1999

• Date of Initial Appearance: 17 August 1999

• Pleading: not guilty

• Date Trial Began: 6 November 2003

Reconsideration of Decisions on Protective Measures for Defence Witnesses Pursuant to Appeals Chamber Ruling of 16 November 2005 17 February 2006 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge ; Lee Gacuiga Muthoga ; Emile Francis Short

Jérôme Bicamumpaka, Casimir Bizimungu, Justin Mugenzi and Prosper Mugiraneza – Request for reconsideration, Witness protection measures, Protective measures ordered by the Chamber in respect of all Defence witnesses to be uniformly worded and applied – Modification of the decisions ordered

International Instrument cited :

Rules of Procedure and Evidence, rule 68

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Prosecutor's Motion, Pursuant to Rule 73 (B), for Certification to Appeal the Trial Chamber's Decisions on Motions for Protection of Defence Witnesses Dated 27 June 2005, 4 July 2005 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005 (ICTR-99-50)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of the "Decision on Prosecution Appeal of Witness Protection Measures", as rendered by the Appeals Chamber on 16 November 2005, in which the Appeals Chamber remitted the Impugned Decisions for reconsideration;

RECALLING that on 4 July 2005, the Prosecution filed its motion, pursuant to Rule 73 (B) of the Rules of Procedure and Evidence of the Tribunal ("Rules") for certification to appeal a holding – repeated verbatim in each of the Impugned Decisions – that restricts disclosure of information pertaining to the identity of a protected witness to members of the "immediate Prosecution team" and not to anyone else within the Office of the Prosecutor;[1]

RECALLING that on 28 September 2005, the Chamber rendered its decision on the Prosecution's motion for certification, granting certification of the interlocutory appeal pursuant to Rule 73 (B);[2]

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[1] *Prosecutor v. Bizimungu et al.,* Case N°ICTR-99-50-T, Prosecutor's Motion, Pursuant to Rule 73 (B), for Certification to Appeal the Trial Chamber's Decisions on Motions for Protection of Defence Witnesses Dated 27 June 2005, 4 July 2005.
[2] *Prosecutor v. Bizimungu et al.,* Case N°ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005.

CONSIDERING that the Chamber is directed to reconsider the Impugned Decisions in light of the Appeal Chamber's finding that a protective order restricting access to defence witness identities to a particular "Prosecution team" impermissibly contravenes the Prosecutor's obligation to disclose exculpatory material, pursuant to Rule 68 of the Rules, and that this obligation

> "rest[s] on him or her alone as an individual who is then able to authorize the Office of the Prosecutor as a whole, undivided unit, in fulfilling those obligations;"

RECONSIDERING therefore, the

(i) "Decision on Casimir Bizimungu's Motion for Protection of Defence Witnesses;"
(ii) "Decision on Jerome Bicamumpaka's Motion for Protection of Defence Witnesses;"
(iii) "Decision on Justin Mugenzi's Confidential Motion for Protection of Defence Witnesses,"

as filed on 27 June 2005 (the "Impugned Decisions");

ALSO RECONSIDERING the "Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses" of 2 February 2005, AND the "Decision on Prosecutor's Consolidated Corrigendum to Prosecutor's Response to Defence Motions for Protection of Defence Witnesses and Request for Reconsideration of Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses", filed on 7 July 2005 (collectively, the "Mugiraneza Decision"), in the interest of ensuring that the protective measures ordered by the Chamber in respect of all Defence witnesses are uniformly worded and applied;

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

HEREBY AMENDS the Impugned Decisions as follows:

(i) Paragraph (e) of the Order in each of the Impugned Decisions is replaced with the following paragraph:

> (e) The Prosecution shall not share, discuss, or reveal, directly or indirectly, any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of any Defence witnesses to any person or entity outside the Office of the Prosecutor.

(ii) Paragraph (f) of the Order in each of the Impugned Decisions is deleted.

AND FURTHER ORDERS that the Protective Measures ordered in the Mugiraneza Decision be amended as per the above amendment of the Impugned Decisions.

Arusha, 17 February 2006.

[Signed] : Khalida Rachid Khan ; Lee Gacuiga Muthoga ; Emile Francis Short

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Reconsideration of Oral Ruling of 1 June 2005 on Evidence Relating to the Crash of the Plane Carrying President Habyarimana 23 February 2006 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge ; Lee Gacuiga Muthoga ; Emile Francis Short

Jérôme Bicamumpaka, Casimir Bizimungu, Justin Mugenzi and Prosper Mugiraneza – Théoneste Bagosora et al. Case – André Ntagerura Case – Pauline Nyiramasuhuko et al. Case – Edouard Karemera et al. Case – Issue of responsibility for the shooting down of the President's plane outside of the mandate of the Tribunal, Jurisprudence controversial on the issue of the relevance of the event of the assassination of President Habyarimana, Defence entitled to use any evidence when providing that the evidence is relevant to the charges against the Accused – Motion denied

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba, Décision relative à la requête de Joseph Nzirorera aux fins d'obtenir la coopération du Gouvernement français, 23 February 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba, Decision on Joseph Nzirorera's Application for Certification to Appeal the Decision Denying his Request for Cooperation to Government of France, 31 March 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure, 5 July 2005 (ICTR-98-44)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of a Defence Oral Motion to reconsider the Oral Ruling of 1 June 2005;[1]

RECALLING the oral submissions of the Parties made in court on 31 October 2005, on which the Chamber reserved a ruling;[2]

THE CHAMBER now reconsiders its Decision.

Background

1. The Chamber ruled that the issue as to who was responsible for the shooting down of the plane was not before it. Moreover, Dr. Des Forges had not discussed the matter in her book or in her expert report. Consequently, the Chamber ruled that the question put to Dr. Des Forges was irrelevant.[3]

2. The Defence for Justin Mugenzi, as well as the other Defence teams, requests the Chamber to review this Decision, and indicates that it may call a witness to present evidence regarding responsibility for the shooting down of the plane.[4]

3. Whilst opposing the Motion, the Prosecution accepted that it would be proper for the Chamber to reconsider the Oral Ruling of 1 June 2005, since this issue was likely to recur several times in the presentation of the Defence cases.

Submissions

[1] T. 31 October 2005, pp.33-35; referring to Oral Decision at T. 1 June 2005, p. 21.
[2] T. 31 October 2005, pp. 33-40.
[3] T. 1 June 2005, p. 21.
[4] T. 31 October 2005, p. 33; see also Justin Mugenzi's Notice of Matters to Be Raised at the Pre-Defence Conference to be Held on Thursday 27 October 2005, 25 October 2005.

4. Mr. Mugenzi argues that evidence regarding the matter is relevant. If it is shown that the Accused were not responsible for the downing of the President's plane, this evidence would negate the Prosecution's assertion that the Accused were involved in a plan to commit genocide, formulated prior to 6 April 1994, since the unfolding of the alleged plan would have been triggered by an event outside of their control.

5. The Defence for Mugiraneza adds that such evidence would have a bearing on the credibility of Prosecution witnesses who have testified about the commencement of the massacres.

6. The Defence for Bizimungu raises several points in support of the contention that evidence on the shooting down of the President's plane is relevant: first, the evidence would have a bearing on the state of mind of the Government Ministers at the time; second, the evidence would show whether the government was in control of the situation in Rwanda; third, the evidence would demonstrate whether the Rwandan state had disintegrated and whether the Rwandan government was in control of the military situation; and fourth, the evidence would indicate why roadblocks were established in Rwanda. Finally, it is important to hear this evidence because it shows that the shooting down of the plane is the event most responsible for exacerbating ethnic tension in Rwanda at the time.

7. The Prosecution's main submission is that the responsibility for the shooting down of the plane is irrelevant to the charges against the Accused. Whilst the downing of the plane may have been the "trigger" for the ensuing massacres, the conspiracy was independent of that event. To that extent, the Indictment does not charge the Accused with responsibility for the downing of the plane, and it does not seek to attribute responsibility for this incident to the Accused.

Deliberations

8. The Chamber has reviewed the jurisprudence of the Tribunal on this issue. Several cases have allowed limited questioning on the issue of responsibility for the shooting down of the President's plane. In the case of *Bagosora et al*., Judge Williams presiding, Trial Chamber III ruled that although the responsibility for the shooting down of the plane fell outside of the mandate of the Tribunal, there may be some relevance to a line of questioning based on this event, provided that it does not extend into great detail.[5] Later in the same case, Judge Møse presiding (following a change in the composition of the bench), the Chamber allowed the Defence to question Prosecution Witness General Romeo Dallaire on the shooting down of the plane.[6] In the same case, Defence Witness Dr. Helmut Strizek also testified about this issue.[7] In *Ntagerura et al.,* Trial Chamber III ruled that the report and testimony of a proposed expert witness dealing with the responsibility for the shooting down of the plane would not aid the Chamber in considering any issue clearly relevant to the trial.[8] In the case of *Nyiramasuhuko et al.,* Trial Chamber II ruled, in response to an objection from the Prosecution on the relevance of the line of questioning relating to the shooting down of the plane, that the Defence could, during cross-examination of Prosecution witnesses, "put their case" to the witness "without unnecessary details".[9] In line with that ruling, the same Chamber allowed, without objection, several questions on the assassination of the President to be addressed to Prosecution Expert Witness André Guichaoua.[10] More recently, Trial Chamber III in *Karemera et al*. dealt with the issue by stating that the charges against the Accused are not based on any alleged responsibility of the Accused in the assassination of President Habyarimana. Furthermore, the Chamber stated that it could not relieve any

[5] *Bagosora et al.,* T. 25 September 2002, pp.39-41.
[6] For example *Bagosora et al.,* T. 22 January 2004, pp. 53-55; T. 27 January 2004, pp. 82-83.
[7] For example *Bagosora et al*., T. 12 May 2005, pp. 32-33.
[8] *Ntagerura et al*., T. 4 July 2002, pp. 7-8.
[9] *Nyiramasuhuko et al*., T. 15 June 2004, pp.57-58.
[10] For example *Nyiramasuhuko et al*., T. 5 October 2004, pp.37-40.

of the government Ministers in that case of his alleged individual criminal responsibility for international crimes committed in Rwanda during 1994.[11]

9. In the Chamber's view, the charges in the Indictment are not based upon any alleged responsibility or involvement of the Accused in the shooting down of the President's plane. The Chamber notes the Prosecution's submissions that

> "[…] we can admit as Prosecutors that we are not charging and we are not holding and we are not alleging that the accused persons have anything to do with the shooting down of the plane".

10. The potential involvement or responsibility of the RPF or other forces not associated with the government of Rwanda cannot relieve the Accused of responsibility for the crimes they have been charged with. The Chamber is of the opinion that evidence as to who is responsible for the crash of the President's plane would not assist the Chamber in its decision as to the guilt or innocence of the Accused.

11. Nonetheless, the Chamber reiterates that the Defence is entitled to put its case in whatever way it deems to be most appropriate, providing that the evidence is relevant to the charges against the Accused. The jurisprudence of the Tribunal shows that questions relating to the responsibility for the shooting down of the plane may be put to a witness provided that this line of questioning does not go into great detail.

THEREFORE THE CHAMBER

DENIES the Motion for Reconsideration; and

AFFIRMS its Oral Decision of 1 June 2005.

Arusha, 23 February 2006.

[Signed] : Khalida Rachid Khan ; Lee Gacuiga Muthoga ; Emile Francis Short

[11] *Karemera et al.*, *Décision Relative à la Requête de Joseph Nzirorera aux Fins d'Obtenir la Coopération du Gouvernement Français*, 23 February 2005, para. 11; Decision on Joseph Nzirorera's Application for Certification to Appeal the Decision Denying his Request for Cooperation to Government of France, 31 March 2005, para. 6; Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure, 5 July 2005, para. 12.

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Decision on Justin Mugenzi's Motion to Direct Confirmation in Writing from the WVSS on Witness Availability
23 February 2006 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge ; Lee Gacuiga Muthoga ; Emile Francis Short

Justin Mugenzi – Issues raised in the Motion related problems preceding the previous trial session, Issues resolved without recourse to the Chamber – Motion moot

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of "Justin Mugenzi's Motion for the Trial Chamber to Direct the Support Unit of the WVSS to Confirm in Writing that Arrangements have been made Sufficient to Ensure that Witnesses to be Called in Mugenzi's Defence will be in Arusha at Appropriate Times Following 1 November 2005 to Enable them to Testify", filed on 27 September 2005 (the "Motion");

CONSIDERING that the issues raised in the Motion related to potential witness production problems preceding the previous trial session which began on 1 November 2005 and that these issues have since been resolved without recourse to the Chamber;

THE CHAMBER

DISMISSES the Motion as moot.

Arusha, 23 February 2006.

[Signed] : Khalida Rachid Khan ; Lee Gacuiga Muthoga ; Emile Francis Short

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Decision on Justin Mugenzi's Application for Certification to Appeal the Trial Chamber's Decision on Defence Motions Pursuant to Rule 98 bis Rule 73 (B) of the Rules of Procedure and Evidence
20 March 2006 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge ; Lee Gacuiga Muthoga ; Emile Francis Short

Justin Mugenzi – Certification to appeal, Legal basis for interlocutory appeals from "decisions", According to the Parties a judgement of acquittal pursuant to Rule 98 bis is a "decision" which can be the subject of an interlocutory appeal, Conditions for certification : immediate resolution by the Appeals Chamber may not materially advance the proceedings in this case – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A), 73 (B) and 98 bis

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision On Casimir Bizimungu Motion For Certification To Appeal From The Trial Chamber's Decision Of 3 September 2004 Concerning Rule 73 Bis Of The Rules And For Other Appropriate Relief, 9 March 2005 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005 (ICTR-99-50)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Decision on Request for Certification of Interlocutory Appeal of the Trial Chamber's Judgement on Motions for Acquittal Pursuant to Rule 98 bis, 23 April 2004 (IT-02-60) ; Appeals Chamber, The Prosecutor v. Enver Hadzihasanović and Amir Kubura, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98 bis Motions for Acquittal, 11 March 2005 (IT-01-47)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of "Justin Mugenzi's Application for Certification of Interlocutory Appeal in Accordance with Rule 73 (B)", filed on 9 December 2005 (the "Motion");

CONSIDERING the "Prosecutor's Response to Mr Justin Mugenzi's Motion for Certification of Interlocutory Appeal in Accordance with Rule 73 (B)", filed on 15 December 2005 (the "Response");

RECALLING the "Decision on Defence Motions Pursuant to Rule 98 *bis*", filed on 22 November 2005;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Rules 73 (B) and 98 *bis*;

NOW DECIDES the matter solely on the basis of the briefs of the parties pursuant to Rule 73 (A).

Submissions of the Parties

The Defence Motion

1. The Defence prays for certification to appeal the Trial Chamber's Decision on Defence Motions Pursuant to Rule 98 *bis* ("the Decision"). The Defence's application for certification is limited to the Chamber's findings and decision in respect of Count 9 of the Indictment which charges the Accused with Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II.[1]

[1] Article 4 of the Statute [in relevant part] provides:
"The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:
Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

The Defence had argued that the Prosecution had failed to adduce evidence on a necessary element of the offence alleged in Count 9, namely that the armed conflict must be of a non-international character. According to the Defence, the Chamber accepted both that this was a necessary element to prove, and that the Chamber would not take judicial notice of this fact which must be borne out through evidence.

2. The Defence submits that the Chamber's Decision on Count 9 is flawed. It points to the Chamber's conclusion that:

> The Conflict was between Government forces and the Rwandan Patriotic Front ("the RPF"), which consisted of Rwandan refugees, seeking to exercise their right of return.

The Defence contends that the Chamber failed to properly consider its Rule 98 *bis* submissions in respect of this point. It points to a lack of footnotes referring to the evidence in support of the Chamber's conclusion. Furthermore, the terms "Rwandan refugees", and "right of return" remain undefined by the Chamber. According to the Defence, the Chamber does not demonstrate in the Decision that it dealt with the Defence's submissions on the insufficiency of evidence on the nature of the conflict, nor their contention that the "principal Prosecution expert witness" Dr. Alison Des Forges herself expressed doubt as to whether the war was international or non-international in character. Thus, the Chamber did not take into account all the matters that it should have done when reaching its decision, which is therefore flawed with respect to Count 9.

3. The Defence submits that the Chamber should allow an interlocutory appeal on this issue, since it has demonstrated that all of the criteria under Rule 73 (B) have been met. In particular, the Defence submits that a determination of this issue by the Appeals Chamber:

(i) Would significantly affect the fair and expeditious conduct of the proceedings;
(ii) Would shorten the length and expense of the trial, as the Defence currently intends to call an expert witness to testify on the character of the armed conflict;
(iii) Would significantly affect the outcome of the trial. A successful appeal would see Count 9 resolved in favour of the Defendant and therefore not require him to answer to a charge for which there is insufficient evidence; and
(iv) May materially advance the proceedings given that an appellate determination at this stage would negate the need for any defence evidence or submissions in respect of this count.

The Prosecution Response

4. The Prosecution submits that the Defence has not shown that the Trial Chamber erred in the exercise of its discretion in finding in the Decision that the Prosecution had adduced evidence "to avert an acquittal beyond the balance of probabilities (the appropriate burden of proof for the purposes of Rule 98 *bis*)" against the Accused in respect of Count 9 of the Indictment.[2]

5. The Prosecution further submits that, in deciding whether to grant certification or not, the Trial Chamber exercises a discretionary power. The Defence fails to meet the criteria set down in Rule 73 (B), as the certification sought will not affect the fair and expeditious conduct of the proceedings, and may not affect the outcome of the trial. Therefore the application should fail.

Deliberations

6. The Chamber has reservations as to whether a Rule 98 *bis* "Judgement of Acquittal" is the proper subject of an interlocutory appeal under Rule 73 (B), which deals with interlocutory appeals

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[…]
[2] Response, para. 8.

from "decisions". Although the Appeals Chamber has in the past entertained an interlocutory appeal under Rule 73 (B) from a Rule 98 *bis* decision without comment,[3] in that case the correct Rule under which to appeal was not in issue. There is precedent at Trial Chamber level for denying such requests made under Rule 73 (B).[4] Nonetheless, the Parties in this case implicitly agree that a "Judgement of Acquittal" pursuant to Rule 98 *bis* is a "decision" which can be the subject of an interlocutory appeal.[5] Given that there is little authority on the matter, and that it was not specifically argued in this case, the Trial Chamber is prepared to consider the merits of the application.

7. Rule 73 (B) reads as follows:

> Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

8. The Chamber will consider the submissions relating to the first condition for certification and decide if the "decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" (the "first limb"). If the first limb is met, the Chamber will then consider whether "an immediate resolution by the Appeals Chamber may materially advance the proceedings" (the "second limb"). This is the procedure that the Trial Chamber has followed in previous decisions in this case.[6]

9. The issue the Defence wishes to appeal is the part of the Decision denying the Defence Motion for Acquittal under Rule 98 *bis* on Count 9 of the Indictment. Conceivably, a successful appeal on this issue may significantly affect the *fair and expeditious conduct of the proceedings*, since it could result in the acquittal of the Accused on Count 9 of the Indictment, which in turn would obviate the need for the Accused to present evidence on this charge. Thus, the application meets the requirements of the first limb.

10. Having regard to the stage the trial has reached and the uncertainty as to when the Appeals Chamber would determine the interlocutory appeal, the Trial Chamber is not convinced that an immediate resolution by the Appeals Chamber may materially advance the proceedings. The second limb is therefore not met.

11. While the language used in the Rule 98 *bis* Decision suggests that the Chamber has made a final determination about the non-international nature of the conflict, this is not what was intended. It would be recalled that the Chamber, throughout its Rule 98 *bis* Decision, referred to the test under Rule 98 *bis*, which involves a determination, by the Trial Chamber, that there is sufficient evidence upon the basis of which a reasonable trier of fact could find that the Prosecution has met its evidentiary threshold with respect to the particular element of the offence in question. The Chamber observes that the issue is still open and the Defence is at liberty to present evidence on the matter. The parties may then address the issue in their final submissions and the Chamber will make a final determination of the issue when it delivers its final Judgment.

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[3] *Prosecutor v. Enver Hadzihasanović and Amir Kubura,* Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98 *bis* Motions for Acquittal (AC), 11 March 2005.
[4] *Prosecutor v. Vidoje Blagojević and Dragan Jokić,* Decision on Request for Certification of Interlocutory Appeal of the Trial Chamber's Judgement on Motions for Acquittal Pursuant to Rule 98 *bis*, (TC), 23 April 2004.
[5] Motion, para.13; Response, para. 2.
[6] *Bizimungu et al.,* Decision on Casimir Bizimungu's Motion for Certification to Appeal from the Trial Chamber's Decision of 3 September 2004 Concerning Rule 73 *bis* of the Rules and for Other Appropriate Relief, 9 March 2005; Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005.

FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Defence Motion for certification to appeal.

Arusha, 20 March 2006.

[Signed] : Khalida Rachid Khan ; Lee Gacuiga Muthoga ; Emile Francis Short

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Decision on Jérôme Bicamumpaka's Request for a Declaration that the Indictment does not Allege that he is liable for any form of Joint Criminal Enterprise Rules 72 (A) (ii), 72 (G), and 73 (A) of the Rules of Procedure and Evidence 23 March 2006 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge ; Lee Gacuiga Muthoga ; Emile Francis Short

Jérôme Bicamumpaka – Joint Criminal Enterprise, Scope of article 73 of the Rules, Failure to comply with the time limits constitutes a waiver of the right to lodge a motion, Trial Chamber may allow a late submission in case of demonstration of good cause, No demonstration of good cause – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 54, 72, 72 (A) (ii), 72 (G), 73, 73 (A) and 98 bis

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora, Decision on the Defence Motion for Pre-Determination of Rules of Evidence, 8 July 1998 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Bernard Ntuyahaga, Declaration on a point of law by Judge Laity Kama, President of the Tribunal, Judge Lennart Aspegren and Judge Navanethem Pillay, 22 April 1999 (ICTR-98-40) ; Trial Chamber, The Prosecutor v. Jérôme Bicamumpaka, Decision on the Defence Motion on a Point of Law (Rule 73), 8 April 2003 (ICTR-99-50)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Tihomir Blaškić, Decision on the Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof, 4 April 1997 (IT-95-14) ; Trial Chamber, The Prosecutor v. Mirsolav Kvocka et al., Decision on the Defence Motion regarding Concurrent Procedures before International Criminal Tribunal for the former Yugoslavia and International Court of Justice on the same Questions, 5 December 2000 (IT-98-30/1)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of both "Bicamumpaka's Request for a Declaration that the Indictment does not Allege that he is Liable for any Form of Joint Criminal Enterprise", filed on 19 September 2005 (the "Request") and the "*Appuie de Casimir Bizimungu à la Requête de Jérôme Bicamumpaka Intitulée*

Bicamumpaka's Request for a Declaration that the Indictment does not Allege that he is Liable for any Form of Joint Criminal Enterprise", filed on 22 September 2005 (the "Support");

CONSIDERING the "Prosecutor's Consolidated Response to Mr Jérôme Bicamumpaka's and Dr. Casmir Bizimungu's Request for a Declaratory Order in Respect of Non Pleading of Joint Criminal Enterprise (JCE) in the Indictment", filed on 26 September 2005 (the "Consolidated Response");

CONSIDERING the "Réplique de Casimir Bizimungu à la Réponse Consolidée du Procureur aux Requêtes de Jérôme Bicamumpaka et de Casimir Bizimungu Concernant la Théorie de L'Entreprise Criminelle Commune", filed on 3 October 2005 (the "Reply");

CONSIDERING the Rules of Procedure and Evidence (the "Rules"), particularly Rules 72, 73, and 98 *bis*;

NOW DECIDES the matter solely on the basis of the briefs of the parties pursuant to Rules 72 (A) (ii), 72 (G), and 73 (A).

Submissions of the Parties

The Defence Request

1. The Defence asks the Chamber to declare that joint and criminal liability is not a form of liability in the charges against Mr. Bicamumpaka pursuant to rule 73.[1] The Defence notes that Chambers have previously relied on this rule to make declarations clarifying ambiguities, and asks the Chamber to resolve the ambiguity in the case at hand over whether Joint and Criminal Enterprise (JCE) was pleaded.[2]

2. The Defence submits that JCE must be explicitly pleaded in the Indictment, including the specific type of JCE alleged. The Defence cites a decision from the case of *Čermak and Markač*, which held that the Indictment must specify the following four categories of material facts related to JCE: (a) the nature and purpose of the JCE; (b) the time at which or the period over which the JCE is said to have existed; (c) the identity of those engaged in the JCE; and (d) the nature of the participation by the Accused in the JCE.[3] The Defence submits that the Prosecution has provided none of the above, which, if JCE were allowed to be pleaded, would violate the Accused right to a fair trial.

3. The Defence also submits that references made to JCE in the Pre-trial Brief do not cure the lack of pleading in the Indictment, as the only proper charging document is the Indictment.[4] In support, the Defence cites *Krnojelać*, in which the Appeals Chamber considered JCE as it was pled in the Indictment, but refused to consider Type III JCE as it was only included in the Pre-trial Brief.[5] Lastly, the Defence states the prejudice to the Accused is compounded by references in the Pre-trial Brief to the previously rejected Proposed Amended Indictment.

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[1] Rule 73 (A) of the Rules of Procedure and Evidence provides: "Subject to Rule 72, either party may move before a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused. The Trial Chamber, or a Judge designated by the Chamber from among its members, may rule on such motions based solely on the briefs of the parties, unless it is decided to hear the Motion in open Court."

[2] See the five decisions listed in the Defence Request, footnotes 2, 3, and 4. These decisions are discussed in the Deliberations of this Decision.

[3] *Prosecutor v. Čermak and Markač*, Case N°IT-03-73, "Decision on the Defence Motion on the Form of the Indictment", 8 March 2005, para. 9, citing *Krnojelać*, "Decision on Preliminary Motion on Form of Amended Indictment", 11 February 2000, para. 16.

[4] For this, the Defence cites Prosecutor v. *Krnojelać*, Case N°IT-97-25-A, "Appeals Chamber Judgement", 17 September 2003, para. 138, and the plain meaning of Rule 98 *bis*. Rule 98 *bis* allows the Trial Chamber to find that the evidence is insufficient to sustain a conviction on one or more of the counts charged in the indictment (emphasis added).

[5] *Krnojelać*, 17 September 2003, paras. 142-144.

The Defence Support

4. In the Support, Defence Counsel for Mr. Bizimungu reiterates many of the arguments made in Mr. Bicamumpaka's Request, submitting that the Indictment lacks the precision to support a charge of JCE; that, according to *Kupreskić*, the Accused must be clearly informed of the charges against him.[6] The Defence argues that the absence of reference to JCE in the Indictment in the case at hand does not constitute a mere imprecision, a minor defect or a technical imperfection, but amounts to the Accused being insufficiently informed of the case he must meet. The Defence notes further that the specific type of JCE was not specified, and argues that the Pre-trial Brief cannot be used to correct deficiencies in the Indictment. The Defence therefore asks the Chamber, in the interests of efficiency, for a declaratory ruling on this issue.

The Prosecution's Consolidated Response

5. In response, the Prosecution submits that the Chamber lacks jurisdiction to rely on Rule 73 in this context, as Rule 73 offers an administrative remedy, inappropriate for a substantive criminal issue. Although Rule 72 (A) is the appropriate rule for such an application, the Defence is estopped from relying on this rule, as pursuant to Rule 72 (G), the Defence has failed to raise any objections to the Indictment in the given time. The Prosecution submits further that the earlier Rule 98 *bis* application was the correct rule on which to decide this issue, and therefore, that the Defence is attempting to circumvent the legal process as defined under the Rules.

6. In the alternative, and without prejudice to the foregoing, the Prosecution submits that JCE *was* alleged in the Indictment through the charges and underlying facts;[7] and in fact, that JCE is an implicit mode of responsibility in the charges of Conspiracy and Complicity to Commit Genocide.[8] Further, the Prosecution argues that it has satisfied the four necessary criteria of material facts related to JCE to be specified in the Indictment,[9] namely the nature and purpose of the JCE, the period over which the JCE existed, the identity of those engaged, and Accused participation in the JCE.[10]

7. Further, the Prosecution notes that in *Simić*, a failure to plead the four material criteria results in "no injustice to the accused if he is given an adequate opportunity to prepare an effective defence."[11] The Prosecution submits that the Accused was given notice of a pleading of JCE: in the Pre-trial Brief; in the explicit reference in the Prosecution's opening address; in the evidence presented at trial; and in the arguments put forward in the Prosecutor's Rule 98 *bis* response. The Accused, therefore, had adequate opportunity to prepare an effective defence.

8. The Prosecution challenges the Defence's contention that JCE must be expressly pled in the Indictment, including that the type of JCE be specified, citing various ICTY jurisprudence which support a lesser burden of specificity.[12] The Prosecution also challenges the Defence's submission that

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[6] *Prosecutor v. Kupreskić*, IT-95-16-A, Appeals Judgement, 23 October 2001, para. 88.
[7] The Prosecution lists paragraphs in the Indictment which make reference to JCE in both footnote 10 and paragraph 18.
[8] Namely that implicit in the charge of Conspiracy to Commit Genocide is the notion of concerted action, or joint criminal enterprise, meaning at least two persons sharing a common plan or purpose, and that implicit in the charge of Complicity to Commit Genocide is the participation of at least two persons acting in concert. For more detail, see the arguments made in the Consolidated Response, paras. 20-22.
[9] For this test, the Defence cited *Čermak and Markač,* 8 March 2005; the Prosecution cited *Prosecutor v. Simić*, Case N°IT-95-9-T, (TC), 17 October 2003, para. 145.
[10] For details on each of these arguments, see Consolidated Response, paras. 23-26.
[11] *Simić*, para. 146.
[12] See *Krnojelać*, paras. 138, 140, 141, 144, and 145; *Mejakić et al.* (TC), Decision on Mejakić's Preliminary Motion on the Form of the Indictment, 14 November 2003, p. 3; *Stanisić,* (TC), Decision on Defence Preliminary Motions, 14 November 2003; *Simić* (TC), paras. 23, 30-36.

the Pre-trial Brief cannot be used to put the Accused on notice, citing two ICTY judgements which have held that it can.[13]

9. For the reasons above, the Prosecution asks that JCE be admissible as a mode of a liability, and that the applications be dismissed in their entirety.

The Defence Reply

10. In reply, the Defence for Mr. Bizimungu insists that the Request is based on Rule 73 (A) and Rule 54, not Rule 72 as the Prosecution suggests, and that the Chamber is competent to rule on such matters. The Defence is asking for a declaration in the interests of judicial efficiency.

11. On the merits of the request, the Defence reiterates their arguments that the Indictment must be precise, and that the type of JCE must be pled. The Defence further submits that the Prosecution has:

i. given an erroneous interpretation of the *Kupreskić* precedent;
ii. confused Conspiracy and Complicity to Commit Genocide with JCE;
iii. focussed on ICTY case law, when ICTR case law is more on point; and has
iv. exaggerated the ease with which Pre-trial Briefs can be considered to correct flaws in Indictments.

Deliberations

12. The Chamber has strong reservations on whether an alleged ambiguity or defect in the Indictment is the proper subject for an application pursuant to Rules 54 and 73. The Defence's intention to rely on Rule 54 is only briefly mentioned in the final Reply, and the Chamber finds that this Rule is in a "Pre-Trial Proceedings" section of the Rules, and is intended for less legally substantive matters, such as summonses, *subpoenas*, and transfer orders.[14]

13. Regarding the Chambers' competence to rule on such a matter under Rule 73, the Defence cited a number of decisions in support of this proposition in its initial Request. The Chamber notes, however, that Rule 73 operates in these decisions in two contexts, either to determine the relationship between the Statute and the Regulations,[15] or to determine the scope of authority exercised by various organs or functionaries.[16] Although one of the five decisions cited by the Defence, *Blaškić*, dealt with an alleged defect in the Indictment, the reliance on Rule 73 was dismissed as the matter had already been decided in its "Decision on the Defence Motion to dismiss the Indictment based upon Defects in the Form Thereof", which appears to have been brought on the basis of Rule 72.[17]

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[13] *Prosecutor v. Krstić*, Case N°IT-98-33-T, (TC) 2 August 2001, paras. 602, 602; *Prosecutor v. Kvocka et. al.*, Case N°IT-98-30/1-T, (TC), 2 November 2001, paras. 246-247.

[14] Rule 54 of the Rules of Procedure and Evidence provides: "At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."

[15] *Prosecutor v. Bagosora*, Case N°ICTR-98-41-T, "Decision on the Defence Motion for Pre-Determination of Rules of Evidence", 7 July 1998; *Prosecutor v. Bicamumpaka*, Case N°99-50-I, "Decision on the Defence Motion on a Point of Law (Rule 73)", 8 April 2003; *Prosecutor v. Blaskić*, Case N°IT-95-14, "Decision rejecting the Defence Motion *in limine* alleging Command Responsibility and for a Bill of Particulars Re Command Responsibility Portions of the Indictment", 4 April 1997.

[16] *Prosecutor v. Ntuyahaga*, "Declaration on a point of law by Judge Laity Kama, President of the Tribunal, Judge Lennart Aspergren and Judge Navanethem Pillay", 22 April 1999; *Prosecutor v. Bicamumpaka*, Case N°99-50-I, "Decision on the Defence Motion on a Point of Law (Rule 73)", 8 April 2003, *Prosecutor v. Kvocka et. al.*, Case N°IT-98-30/1, "Decision on the Defence Motion regarding Concurrent Procedures before International Criminal Tribunal for the former Yugoslavia and International Court of Justice on the same Questions", 5 December 2000.

[17] *Prosecutor v. Blaskić*, Case N°IT-95-14, "Decision rejecting the Defence Motion *in limine* alleging Command Responsibility and for a Bill of Particulars Re Command Responsibility Portions of the Indictment", 4 April 1997, which references *Prosecutor v. Blaskić*, Case N°IT-95-14, "Decision on the Defence Motion to dismiss the Indictment based upon Defects in the Form Thereof", 4 April 1997.

14. This Chamber finds, therefore, that the legal mechanism for raising the issue at bar is not Rule 73. Alleged defects in the Indictment can be raised either as preliminary motions under Rule 72 (A) (ii), or as part of a Motion for Judgement of Acquittal under Rule 98 *bis*.

15. Rule 72 (A) (ii) provides:

> Preliminary motions, being motions which:
>
> (…)
>
> (ii) allege defects in the form of the Indictment;
>
> (...)
>
> shall be in writing and be brought not later than thirty days after disclosure to the Defence of all material and statements referred to in Rule 66 (A) (i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84.

16. Pursuant to Rule 72 (G), a failure to comply with the time limits prescribed in the rule constitutes a waiver of the right to lodge a motion; however, a Trial Chamber may allow a late submission should good cause be shown. The Chamber notes that the Defence Request was submitted almost a year and a half after the commencement of opening statements on 29 March 2004, and that there have been no submissions on the issue of good cause for delay.

17. Regarding the other method for raising alleged defects in the Indictment, Rule 98 *bis*, the Chamber notes that such a Motion has already been brought and decided in this case. The Chamber refers the Defence to the earlier 22 November 2005 "Decision on Defence Motions pursuant to Rule 98 *bis*".

18. Therefore, the Chamber is of the view that Rule 73 is an inappropriate mechanism for such a Request, Rule 72 is time barred, and that a Rule 98 *bis* application has already been adjudicated. The parties may raise this issue during their final submissions at the end of the case.

FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Defence Request for a declaration that the Indictment does not allege liability for joint criminal enterprise (JCE).

Arusha, 23 March 2006.

[Signed] : Khalida Rachid Khan ; Lee Gacuiga Muthoga ; Emile Francis Short

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Decision on Prosper Mugiraneza's Emergency Motion to Vary Conditions on Interview of Jean Kambanda
Rule 73 (B) of the Rules of Procedure and Evidence
5 April 2006 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge ; Lee Gacuiga Muthoga ; Emile Francis Short

Prosper Mugiraneza – Jean Kambanda – Requirement of a representative of the Registry to be present during the interview of the witness, Interview by the Defence under conditions agreed by the Witness, – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 73 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Prosper Mugiraneza's Motion to Vary the Restrictions in the Trial Chamber's Decision of 2 October 2003 Related to Access to Jean Kambanda, 24 August 2004 (ICTR-99-50)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of "Prosper Mugiraneza's Emergency Motion to Vary Conditions on Interview of Jean Kambanda", filed on 20 March 2006 (the "Motion");

CONSIDERING the "Prosecutor's Response to Prosper Mugiraneza's Motion to Vary Conditions on Interview of Jean Kambanda", filed on 24 March 2006 (the "Response");

RECALLING the "Decision on Prosper Mugiraneza's Motion to Vary the Restrictions in the Trial Chamber's Decision of 2 October 2003 related to Jean Kambanda", dated 24 August 2004 (the "Order of 24 August 2004"), and the "Decision on Prosper Mugiraneza's Extremely Urgent Motion to Vary Conditions of Interview with Jean Kambanda", dated 19 January 2005;

NOW DECIDES the matter solely on the basis of the briefs of the parties pursuant to Rule 73 (A).

Submissions

1. The Defence requests the Chamber to vary its Order of 24 August 2004 which allowed Mugiraneza's Counsel to interview Jean Kambanda in the presence of a Registry representative. It submits the requirement that a representative of the Registry be present at such interview is no longer needed, as the Prosecution has concluded its case without calling Kambanda as a witness. Furthermore, the Defence states that Kambanda is unwilling to be interviewed in the presence of a representative of the Registry. According to the Defence, Kambanda is presently residing in the United Nations Detention Facility in Arusha awaiting to testify in another case presently being heard by the Tribunal. The Defence claims that other Defence Counsel may freely interview Jean Kambanda, but Mugiraneza's Counsel may not, due to the restrictions imposed by the Order of 24 August 2004.

2. The Prosecution submits that the Defence Motion "lacks a legal basis" to request the Chamber to vary its previous order. The Prosecution argues that the restriction was based upon a suggestion of the Defence and the conditions for that restriction were intended to be fair to both parties.

Deliberations

3. In its Order of 24 August 2004, the Chamber stated that

> "as suggested by the Defence and in order to avoid any possible allegation of improper conduct against any party involved in this process, the Trial Chamber is of the view that this interview

shall take place in the presence of a neutral and third party, namely a representative of the Registrar."[1]

Save for these restrictions, the Defence would be free to interview Jean Kambanda on terms acceptable to him.

4. The concern facing the Chamber before it handed down its Order was that had the Defence been allowed unrestricted access to Kambanda, and had he then refused to testify for the Prosecution, the Defence may have exposed itself to allegations of improper conduct. The Decision of the Chamber was intended to prevent such allegations. The Prosecution case has closed and Jean Kambanda did not testify as a Prosecution Witness. Thus, the aforementioned considerations informing the Chamber's Order of 24 August 2004 are no longer relevant.

5. Accordingly, the Chamber finds the requirement that a representative of the Registry be present at the interview is no longer necessary.

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the Defence Motion in the following terms only:

REMOVES the requirement that a representative of the Registry be present at the interview of Jean Kambanda by Counsel for Mugiraneza;

REQUESTS the Registrar to make arrangements as soon as is practicable to facilitate the interview of Jean Kambanda by Counsel for Mugiraneza, if Jean Kambanda is so disposed.

Arusha, 5 April 2006.

[Signed] : Khalida Rachid Khan ; Lee Gacuiga Muthoga ; Emile Francis Short

[1] "Decision on Prosper Mugiraneza's Motion to Vary the Restrictions" in the Trial Chamber's Decision of 2 October 2003 related to Jean Kambanda, 24 August 2004.

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Decision on Prosper Mugiraneza's Emergency Ex Parte Motion to Seal Registry Decision as a Violation of a Defence Team Member's Right to Privacy 22 May 2006 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge ; Lee Gacuiga Muthoga ; Emile Francis Short

Prosper Mugiraneza – Legal assistant's health and finances, Information published in a Deputy Registrar's Decision filed as a public document, Decision already withdrawn from the public domain and reclassified as confidential, Right to privacy of the legal assistant not affected by the publication of the medical information because of the absence of details, Right to privacy of the legal assistant not affected by the publication of financial information because of the public nature of the information – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A) and 73 (E)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Bicamumpaka and Mugenzi's Motion for Specificity in the Pre-Trial Brief, 24 November 2004 (ICTR-99-50)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of "Prosper Mugiraneza's Emergency *Ex Parte* Motion to Seal Registry Decision as a Violation of a Defence Team Member's Right to Privacy", filed on 19 April 2006 (the "Motion");

CONSIDERING "The Registrar's Submissions in Respect of Prosper Mugiraneza's Emergency *Ex Parte* Motion to Seal Registry Decision as a Violation of a Defence Team Member's Right to Privacy", filed on 27 April 2006 (the "Registrar's Response");

HAVING EXAMINED the Deputy Registrar's Decision entitled "In The Matter Of The Application Of Review By Thomas D. Moran Defence Counsel For Prosper Mugiraneza, Regaridng Non-Reimbursement Of Flight Ticket Charges And Non-Payment Of Dsa For 2 Days In Amsterdam And Other Issues By The Defence Counsel And Detention Management Section", dated 13 April 2006 (the "Deputy Registrar's Decision");

NOW DECIDES the matter solely on the basis of the briefs of the Defence and the Registrar pursuant to Rule 73 (A).

Submissions of the Parties

The Motion

1. On 19 April 2006, Counsel for Mugiraneza filed a Strictly Confidential *Ex Parte* Emergency Motion to seal a Decision issued by the Deputy Registrar following an appeal by Defence Counsel to

have an administrative decision pertaining to his legal assistant, Ms Cline, revisited. The Deputy Registrar's Decision on the said appeal was filed as a public document, and it is that classification of the filing that is the subject of the instant application.

2. The Motion is premised on grounds that matters relating to a person's health and finances are protected and therefore should not have been publicly disseminated.

3. In his submissions relating to Ms Cline's financial affairs, Counsel states that the Registrar

> "…has seen fit to put Mugiraneza's legal assistant's financial matters literally on the street. Anyone with a computer and a modem will be able to access personal financial information. One hopes that this was a mistake rather than a deliberate attempt to embarrass a member of a defence team."

4. As a footnote on the same point, Counsel goes on to say that

> "[s]tated differently, undersigned counsel hopes that the Deputy Registrar acted without thinking rather than filing the decision as a public document with malice aforethought. It is unthinkable that the Deputy Registrar acted deliberately to embarrass Ms. Cline. If he in fact acted deliberately, it should be considered outrageous conduct."

5. With regard to the publication of Ms Cline's "medical status", Counsel states that

> "[t]he Deputy Registrar's decision also contains information about Ms. Cline's health and an illness she suffered. Information about a person's medical status should be kept confidential by the Tribunal."

6. In addition to the sealing of the Deputy Registrar's Decision, Counsel seeks eight different Orders from the Chamber. Each of those Orders seeks to ensure that any and all matters pertaining to the Deputy Registrar's Decision and the instant Motion be treated as confidential.

The Registrar's Response

7. The Registrar invites the Chamber to examine the Decision of the Deputy Registrar and submits that in respect of the "legal assistant's financial matters", there is almost no information coming within such a description. The Registrar adds that while there is a reference to the DSA rate common to all such assistants, this is information that applies to all staff and contractors and is therefore publicly available. The only other financial information in the impugned Decision is that of two different quotations for an airline ticket, which the Registrar contends do not come within the description of the "legal assistant's financial matters". It is submitted that *if* any information had been given that related to the legal assistant's personal income or expenditure, these might have been considered to be protected.

8. With regard to the purported publication of "…information about Ms. Cline's health and an illness", the Registrar submits that this must be judged by what is actually in the public Decision. The Decision refers to a two day illness of an unspecified character at an unspecified date. It is submitted that this does not come within the description offered by Counsel.

9. The Registrar further notes that Counsel for Mugiraneza should have sought to discuss the matter with the Deputy Registrar before filing the instant Motion. The Registrar states that had that been done, the Deputy Registrar would have been glad to oblige him with a changed and re-classified filing. Indeed, the re-classification of the public document was requested by the Deputy Registrar immediately the Motion was brought to his attention. The Deputy Registrar emphasises that this would have been done had Counsel simply discussed this matter with him.

10. The Registrar's Response also records the latter's dismay at the language and tenor employed by Counsel in the instant Motion. With regard to the allegation of the Defence that the Deputy Registrar might have acted "without thinking", "with malice aforethought" or "deliberately to

embarrass" the legal assistant in his team, the Deputy Registrar assures the Chamber that he remains motivated by the highest regard for all counsel who appear before the Tribunal.

11. Finally, the Registrar submits that the Motion filed by Counsel for Mugiraneza seeks to encourage the Trial Chamber to intervene in respect of an administrative matter and to issue orders to the Registry. The Rules of the Tribunal make provision for review by the Chambers of certain decisions of the Registry if the issues impact on the right of the accused to a fair trial and the duty of the Trial Chamber to do justice in a case. In the jurisprudence of the *ad hoc* tribunals, if there is a substantive right of an accused implicated in a Registry decision, then the Chamber can intervene. The Registrar contends that it is not immediately apparent what fair trial issue or what right of an accused is at issue here.

Deliberations

12. As a preliminary point, the Chamber notes that the Decision which is the subject of the present Motion has been withdrawn from the public domain and reclassified as confidential. In effect, this means that the principal relief being sought in the present application has been granted so that it is moot for the purposes of this decision.

13. Be that as it may, the Chamber has examined the Deputy Registrar's Decision so as to determine whether or not matters which should have been treated as confidential were published, thereby violating Ms Cline's right to privacy.

14. On the issue of the publication of medical information, the Deputy Registrar's Decision says nothing more than that Ms Cline was ill for two days and as consultants are paid only for the days they actually work, Ms Cline will not be paid Daily Subsistence Allowance (DSA) for that period. The Chamber does not consider this statement to be a breach of Ms Cline's right to privacy.

15. On the issue of "financial information", the Deputy Registrar's Decision refers to a number of points relating to payments of DSA and reimbursement for airline tickets. The Chamber notes that the Daily Subsistence Allowance for any duty station/location is determined and periodically reviewed by the International Civil Service Commission, and is publicly available in much the same way as salary scales of United Nations staff members are easily available and accessible to anyone. The other "financial" matter that is referred to is the cost of Ms Cline's airline ticket from Amsterdam to Houston. The Chamber notes that like DSA, the cost of an airline ticket is not protected, confidential information. The Chamber finds that the Deputy Registrar's Decision makes no mention of Ms. Cline's personal income or expenditure so as to violate her right to privacy.

16. Having carefully examined the Deputy Registrar's Decision in light of the allegations made by the Defence, and having found no violation of Ms Cline's right to privacy nor impropriety in the conduct of Deputy Registrar, and having regard to the fact that the latter's decision has in fact been reclassified, the Chamber finds it unnecessary to discuss or comment on the other reliefs sought and considers them to be superfluous to the present application.

17. Finally, the Chamber also notes with concern the harsh and inappropriate language that Defence Counsel used in his Motion. The Chamber recalls that in respect of a different issue, this Chamber had issued a Decision in which Parties were reminded of the obligation to "conduct themselves in a manner befitting their respective roles."[1] The Chamber finds it necessary to remind Counsel of that advice. Counsel are exhorted to exercise restraint and caution in their choice of language when filing applications before this Chamber.

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[1] *Prosecutor v. Bizimungu et al,* ICTR-99-50-T, "Decision on Bicamumpaka and Mugenzi's Motion for Specificity in the Pre-Trial Brief", 24 November 2004.

FOR THE ABOVE REASONS, THE CHAMBER

DISMISSES the Motion in its entirety;

DIRECTS the Registry, pursuant to Rule 73 (E), not to pay fees and costs associated with the filing of this Motion.

Arusha, 22 May 2006.

[Signed] : Khalida Rachid Khan ; Lee Gacuiga Muthoga ; Emile Francis Short

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Decision on Casimir Bizimungu's Motion for Cancellation of Witness Protection Orders for Witnesses WDA, WAG and WDP
Rules 69 and 75 of the Rules of Procedure and Evidence
17 August 2006 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge ; Lee Gacuiga Muthoga ; Emile Francis Short

Casimir Bizimungu – Measures of protection for Defence witnesses, Consultation of the Victims and Witnesses Support Unit by the Chamber – Witness Protection Orders for Witnesses cancelled

International Instrument cited :

Rules of Procedure and Evidence, rules 69, 73 (A) and 75

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, designated by the Chamber to decide this Motion pursuant to Rule 73 (A) of the Rules (the "Chamber");

BEING SEIZED of the "Requête de la Défense du Dr Casimir Bizimungu en Annulation des Mesures de Protection des Témoins à Décharge WDA, WAG et WDP", filed on 31 July 2006 (the "Motion");

CONSIDERING "The Registrar's Submissions Regarding Casimir Bizimungu's Requests for Either the Cancellation or Amendment of Protective Measures for Defence Witnesses", filed on 11 August 2006 (the "Registrar's Submissions");

RECALLING the "Decision on Casimir Bizimungu's Motion for Protection of Defence Witnesses", dated 27 June 2005, and the "Reconsideration of Decisions on Protective Measures for Defence Witnesses Pursuant to Appeals Chamber Ruling of 16 November 2005", dated 17 February 2005 (together, the "Witness Protection Orders");

NOW DECIDES the matter solely on the basis of the briefs of the parties pursuant to Rule 73 (A).

Preliminary matters

1. Judge Khalida Rachid Khan, sitting as a Judge of the Chamber, decides this Motion pursuant to the following Rules.

> Rule 69: Protection of Victims and Witnesses
>
> (A) In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.
>
> (B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witness Support Unit.
>
> [...]
>
> Rule 75: Measures for the Protection of Victims and Witnesses
>
> (A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Support Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused.
>
> [...]
>
> (I) An application to a Chamber to rescind, vary or augment protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber, and any reference in this Rule to "a Chamber" shall include a reference to "a Judge of that Chamber".

Submissions

2. The Defence requests, pursuant to Rules 69 and 75, that the Chamber cancels the Witness Protection Orders for Witnesses WDA, WAG, and WDP. It informs the Chamber that these witnesses wish to testify under their own names, and have no fear of reprisals.[1]

3. The Registrar has no objection to the request. The Registrar asks the Chamber to note the administrative and security consequences of lifting protective measures for witness.[2]

Deliberations

4. The Witness Protection Orders, which presently remain in force, granted Protected Witness status to all potential Defence Witnesses for Casimir Bizimungu nominated to the Victims and Witnesses Support Unit in the proper format. The Defence is aware that cancellation of the Witness Protection Orders for these three witnesses means that the Tribunal will not be responsible for their safety.

5. In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Support Unit. The Victims and Witnesses Support Unit is a unit of the Registry, under the overall authority of the Registrar. The Chamber invited the Registrar to make submissions on the matter. The Registrar in his Response has expressed no objection to the request.

6. Based upon the clear indication from Counsel that these witnesses do not require the Tribunal's protection, and the absence of objection from the Registrar to the Motion, the Chamber is prepared to

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[1] The Motion, paragraphs 5, 6, and 13.
[2] The Registrar's Submissions, paragraph 25

grant the request for cancellation of the Witness Protection orders in respect of the above named witnesses.

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the Defence Motion in the following terms only:

CANCELS the Witness Protection Orders for Witnesses WDA, WAG, and WDP.

Arusha, 17 August 2006.

[Signed] : Khalida Rachid Khan

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Decision on Casimir Bizimungu's Motion for Permission to Convey Protected Information to Defence Experts
Rule 54 of the Rules of Procedure and Evidence
11 September 2006 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge ; Lee Gacuiga Muthoga ; Emile Francis Short

Casimir Bizimungu – Filing of Prosecution Response Out of Time, Inherent jurisdiction of the Chamber to consider submissions filed outside the time limit – Permission to Convey Protected Information to Defence Experts, Restricted information concerning the protected witness to be communicated to the Defence team, Expert witness are not part of the Defence team – Possibility to vary the protective measures orders, Need of the Defence to communicate protected information to its experts does not warrant a variation – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rules 54, 66, 69, 73, 73 (A), 75 and 75 (I) ; Statute, art. 20 and 21

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of the "Requête de Casimir Bizimungu Aux Fins d'Obtenir la Permission de Communiquer des Informations Aux Experts de la Défense", filed on 5 May 2006 (the "Motion");

CONSIDERING the Prosecutor's "Request for Leave to Respond Out of Time to Dr. Casimir Bizimungu's Motion to Convey Protected Information to Defence Experts," filed on 22 August 2006 (the "Response");

NOTING Casimir Bizimungu's "Réponse à la Requête du Procureur qui Demande d'Être Relevé d'un Défaut de Trois Mois et Demi et qui Conteste la Requête de Casimir Bizimungu aux Fins d'Obtenir la Permission de Divulguer des Informations à ses Experts," filed on 24 August 2006 (the "Reply");

NOW DECIDES the matter solely on the basis of the briefs of the parties, pursuant to Rule 73 (A).

Introduction

1. The Defence Motion concerns the ambit of protective measures ordered with respect to Prosecution witnesses in the Decision of this Chamber of 22 September 2000.[1] Firstly, the Defence seeks to clarify whether or not it is permitted to communicate certain information[2] falling within the scope of those protective measures orders to expert witnesses it proposes to call. Secondly, and relying upon Rule 54 of the Rules, if the Chamber is of the view that the communication of information falling within the scope of those orders, to proposed Defence experts, is prohibited by its Decision of 22 September 2000, the Defence seeks an order permitting it to communicate the said information to proposed expert witnesses. In support of its Motion, the Defence proposes to have each prospective expert witness swear an affidavit containing a confidentiality clause, which it would file with the Registry, prior to disclosing any protected information to him or her. Annexed to the Motion is a sample of that affidavit.

2. On 22 August 2006 – some three months out of time – the Prosecution filed a Response, seeking the Chamber's leave for its submissions to be considered out of time, and opposing the Defence Motion. The Defence replied to the Prosecution Response, submitting that the Prosecution should not be granted leave to respond out of time, and rebutting the substance of the Prosecution's arguments.

3. As a preliminary matter, therefore, the Chamber must determine whether or not to grant the Prosecution leave to respond out of time. The Chamber will then go on to consider the merits of the Defence Motion.

Deliberations

Preliminary Issue – Filing of Prosecution Response Out of Time

4. The Prosecution submits that its omission to respond within the time frame stipulated by the Rules (5 days) was due to inadvertence. It submits that the Chamber has inherent jurisdiction to consider a response filed out of time and, furthermore, that in light of the issue under consideration in this case, it is in the interests of justice for it to do so.

5. The Defence submits that the Prosecution has not advanced sufficient grounds for its failure to respond to the Defence Motion for a period in excess of three months. In the Defence's view, simple oversight is insufficient to justify such a long delay. The Defence notes that the Motion was sent, by email, to eight members of the Prosecution's team, and submits that any grant, by this Chamber, of an extension of time, in circumstances where there has been such a long delay, is an undesirable precedent to set.

6. Rule 73 of the Rules requires a responding party to file a response within five days of receipt of the Motion. The Chamber does, however, have an inherent jurisdiction to consider submissions filed outside that time limit. Whilst the length of the delay and the reasons advanced for that delay are relevant considerations to an exercise of its inherent jurisdiction, the Chamber considers that these factors are not uniquely determinative of the case at hand. This Tribunal is vested with unique powers

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[1] *Prosecutor v. Casimir Bizimungu*. Case N°ICTR-99-50-T, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (TC), 22 September 2000.

[2] The information forming the subject matter of the Defence application includes extracts of testimony taken in closed session and evidence and testimony filed under seal. See Defence Motion, paras. 5 and 7.

and responsibilities with regard to the protection of victims and witnesses – notably, by Article 21 of the Statute, and by Rules 69 and 75 of the Rules, which provisions must be read in the context of fundamental guarantees to the Accused. Although the Chamber is concerned at the length of the Prosecution's delay in responding to the Defence Motion, and its oversight with respect to a Motion seeking to clarify or vary the protective measures in place for its witnesses, the Chamber considers it to be in the interests of justice to consider the Prosecution's submissions on such an important issue. The Chamber therefore grants the Prosecution leave to respond out of time, and accordingly considers all of the submissions before it with respect to this issue.

Merits of Defence Motion

7. The relevant protective measures in place for Prosecution witnesses, as ordered by this Chamber in its Decision of 22 September 2000, are as follows:

- The Defence and the Accused are prohibited from sharing, revealing or discussing, directly or indirectly, any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of any individuals so designated to any person or entity other than the Accused, assigned Counsel or other persons working on the immediate Defence team;
- The Defence is required to designate to the Chamber and the Prosecutor all persons working on the immediate Defence team who would have access to any names, addresses, whereabouts and/or other identifying information of persons falling within the ambit of the orders; and
- Defence Counsel is required to advise the Chamber in writing of any changes in the composition of its team, and to ensure that any member leaving the Defence team remit all materials that could lead to the identification of persons falling within the ambit of its protective measures orders.

8. Firstly, the Chamber must determine whether or not a Defence expert witness falls within the scope of the term "other persons working on the immediate Defence team," thereby being permitted to have access to information classified as protected within the ambit of its Decision of 22 September 2000. The Defence submits that this is not clear. The Prosecution submits that an expert witness is clearly not a person working on the Defence team, but rather a mere witness providing expert opinion.

9. The Chamber considers that the term "other persons working on the immediate Defence team" is in fact clear and should be strictly construed so as to permit disclosure of protected information to the Accused, his Counsel and those working in the preparation of the Defence case. Furthermore, the Chamber notes that the persons falling within the scope of this term are recorded with the Chamber in writing, and updated as required, in compliance with this Chamber's Orders of 22 September 2000. The Chamber shares the Prosecution's view that Defence expert witnesses are witnesses and not "other persons working on the immediate Defence team". As such, no protected information can be communicated to them without variation of this Chamber's orders of 22 September 2000. Therefore, the Chamber will now consider whether a variation of its protective measures orders, as provided for under Rule 75 (I) of the Rules, is in the interests of justice.

10. The Defence submits that, in order to prepare its experts, it needs to discuss confidential and protected information with them, including evidence filed under seal and closed-session testimony of witnesses. No details have been provided concerning which protected information is sought to be conveyed to the Defence experts in question. The Prosecution strongly opposes the Defence Motion, submitting that the Defence has advanced insufficient grounds for a variation of the protective measures currently in place for its witnesses.

11. When making its original protective measures orders for Prosecution witnesses, the Chamber took a number of relevant matters into consideration, including its powers and responsibilities under the Statute and the Rules (notably Articles 20 and 21 of the Statute, and Rules 66, 69 and 75 of the

Rules), the materials submitted by the Prosecution as a basis for the protective measures sought, and the salient jurisprudence of this Tribunal. In the Chamber's view, the Defence's need to communicate protected information to its experts does not warrant a variation of the protective measures currently in place for the concerned witnesses. Similarly, the fact that Prosecution experts – such as Dr. Alison Des Forges, and Dr. Binaifer Nowrojee – had access to prosecutorial materials in the preparation of their Reports does not assist the Defence in showing why its prospective experts should be afforded unfettered access to protected materials.

12. Finally, the Defence's offer to have each of its experts swear an affidavit containing a confidentiality clause, a sample of which is annexed to its Motion, prior to disclosing confidential information to him or her, does not strengthen its case for the variation of the orders currently in place. The Chamber notes, however, that it is open to entertaining requests for disclosure of protected information on a case-by-case basis, for example, upon the provision of details concerning the information sought to be disclosed, the protected witness concerned, to whom the information is to be provided, and why it is necessary to provide such information to that individual.

FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 11 September 2006.

[Signed] : Khalida Rachid Khan ; Lee Gacuiga Muthoga ; Emile Francis Short

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Decision on Casimir Bizimungu's Confidential Motion Requesting the Chamber to Hear Expert Witness Helmut Strizek in The Hague or Alternatively to Authorise Testimony by Video-Link
Rules 54 and 90 (A) of the Rules of Procedure and Evidence
11 September 2006 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge ; Lee Gacuiga Muthoga ; Emile Francis Short

Casimir Bizimungu – In principle the witnesses are heard directly by the Chambers, Doctor's certificate attesting the witness inability to travel, Temporarily relocation of the Chamber from Arusha impossible considering the resources of the Tribunal, Testimony by means of video-link – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 4, 54, 73 (A) and 90 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 October 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Testimony by Video-Conference, 20 December 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Aloys Simba, Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link, 4 February

2005 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on the Prosecutor's Motion for Special Protective Measures for Witnesses G and T, 14 September 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Protais Zigiranyirazo, Decision on Request for Authorisation to Hold Trial Session Away from the Seat of the Tribunal, Office of the President, 12 May 2006 (ICTR-2001-73)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of "Requête Confidentielle de Casimir Bizimungu Visant Demander à la Chambre de se Déplacer à la Haye pour Entendre le Témoin Expert Helmut Strizek ou Subsidiairement d'Entendre ce Témoin Expert par Voie de Vidéoconférence", filed on 1 June 2006 (the "Motion");

NOTING that the Prosecution did not file a Response;

NOW DECIDES the Motion solely on the basis of the briefs of the Parties, pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules").

Introduction

1. The Defence wishes to call Dr. Helmut Strizek as an expert witness in its case. It submits that Dr. Strizek has health issues that now prevent him from flying in aeroplanes. Thus, it is, at the present time, impossible for him to travel to Arusha. The Defence requests that either the Chamber travels to The Hague in order to hear the witness directly, or, alternatively, that the Chamber authorise the taking of Dr. Strizek's testimony by video-link.

Discussion

2. Rule 90 (A) of the Rules state that witnesses shall, in principle, be heard directly by the Chambers. The seat of the Tribunal is in Arusha, and, under normal circumstances, witnesses travel to Arusha to give testimony.

3. From the confidential submissions filed by the Defence, which include a doctor's certificate attesting to Dr. Strizek's condition and advising against air travel, the Chamber accepts that it would be unwise to require him to fly to Arusha in order to testify.

4. The Chamber finds that health issues which prevent a witness from flying to Arusha are valid grounds for considering alternative methods for receiving testimony.

5. The Defence's preferred option is that the Chamber temporarily relocates from Arusha to The Hague in order to receive the testimony of Dr. Strizek directly. It submits that Rule 4 of the Rules permits a Chamber or Judge to exercise their functions away from the Tribunal if so authorized by the President in the interests of justice. Whilst the Chamber accepts that it is possible for such a measure to be granted under very exceptional circumstances, the Chamber understands that logistical and budgetary considerations seriously restrict this possibility as a viable option.[1]

[1] *Prosecutor v. Protais Zigiranyirazo,* Case N°ICTR-01-73-T, Decision on Request for Authorisation to Hold Trial Session Away from the Seat of the Tribunal, Office of the President, 12 May 2006.

6. The Defence's alternative request is that the Chamber authorise the taking of his testimony by means of video-link. Although the Rules do not expressly provide for taking testimony by video-link, this option is well developed in the jurisprudence of the Tribunal as a means for receiving the testimony of witnesses who are unable to travel to Arusha.[2] Indeed, the Chamber has already received witness testimony by means of video-link during the Prosecution phase of this trial.[3] A Chamber may order that testimony be taken by means of video-link under Rule 54 of the Rules provided that it is in the interests of justice to do so. In making such an evaluation, the Chamber must weigh the importance of the testimony, the witness's inability or unwillingness to attend, and whether a good reason has been adduced for that inability or unwillingness.[4]

7. The Defence submits that Dr. Strizek is an important witness in its case, and summarises the witness' anticipated testimony. The Chamber is unaware of the position of the Prosecution, as it has not filed a Response. Whilst the Chamber reserves its ruling on the expertise of this witness and also the relevance of his proposed testimony, based upon the submissions of the Defence, and the fact that Dr. Strizek has twice before testified before the Tribunal as an expert witness, the Chamber is prepared to accept that Dr. Strizek may have important testimony to give before the Chamber in this case.

8. The Chamber, being satisfied that Dr. Strizek is unable to travel to Arusha to give testimony directly before the Chamber and that a good reason has been advanced by the Defence, is prepared as an exceptional measure to authorise the taking of his testimony by video-link.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion in the following terms only:

AUTHORISES the taking of Dr. Helmut Strizek's testimony by video-link;

REQUESTS the Registry to make arrangements for the testimony of proposed Expert Witness Dr. Helmut Strizek via video-link.

Arusha, 11 September 2006.

[Signed] : Khalida Rachid Khan ; Lee Gacuiga Muthoga ; Emile Francis Short

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[2] See, *inter alia, Prosecutor v. Simba,* Decision Authorising the Taking of Evidence of Witnesses IMG, ISG and BJKl by Video-Link (TC), 4 February 2005; *Prosecutor v Bagosora et al.,* Decision on Prosecution Request for Testimony of Witness BT via Video-Link (TC), 8 October 2004; *Prosecutor v. Karemera et al.,* Decision on the Prosecutor's Motion for Special Protective Measures for Witnesses G and T (TC), 14 September 2005.

[3] For example Witness D, a protected witness for the Prosecution, testified by way of videoconference due to his extraordinary vulnerability.

[4] *Bagosora et al.,* Decision on Prosecution Request for Testimony of Witness BT via Video-Link (TC), 8 October 2004, para. 6; *The Prosecutor v. Aloys Simba,* Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJKl by Video-Link (TC), 4 February 2005, para. 4; *Bagosora et al.,* Decision on Testimony by Video-Conference (TC), 20 December 2004, para. 4.

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Decision on Prosecutor's Motion for Judicial Notice Rule 94 (A) of the Rules 22 September 2006 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge ; Lee Gacuiga Muthoga ; Emile Francis Short

Jérôme Bicamumpaka, Casimir Bizimungu, Justin Mugenzi and Prosper Mugiraneza – Edouard Karemera et al. Case – Judicial Notice, Facts of common knowledge : legal question, Conclusion on facts of the Appeals Chamber in another case, Mandatory nature of the judicial notice under Rule 94 (A), Binding nature of the Appeals Chamber finding relating to facts, Judicial economy – Motion granted for 6 of the 7 facts

International Instrument cited :

Rules of Procedure and Evidence, rules 94 (A), 94 (B) and 98 bis

International Cases cited :

I.C.T.R. Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on the Prosecutor's Motion and Notice of Adjudicated Facts, 10 December 2004 (ICTR-99-50) ; Appeals Chamber, The Prosecutor v. Laurent Semanza, Judgement, 20 May 2005 (ICTR-97-20) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Defence Motions Pursuant to Rule 98 bis, 22 November 2005 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Justin Mugenzi's Application for Certification to Appeal the Trial Chamber's Decision on Defence Motions Pursuant to Rule 98 bis, 20 March 2006 (ICTR-99-50) ; Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 (ICTR-98-44)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of the "Prosecutor's Motion for the Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94 (A)", filed on 19 July 2006 (the "Motion").

CONSIDERING the

(i) "*Réponse de Casimir Bizimungu à la Troisième Requête du Procureur en Constat Judicaire, Intitulée* Prosecutor's Motion for the Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94 (A)", dated 23 July 2006 and filed on 24 July 2006 (the "Response of Casimir Bizimungu")[1];

(ii) "Response to the Prosecutor's Motion for the Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94 (A)", dated 3 August 2006 and filed on 7 August 2006 (the "Response of Jérôme Bicamumpaka");

[1] LCSS translation available in draft at time of filing: "Casimir Bizimungu's Response to Prosecutor's Third Motion for Judicial Notice entitled Prosecutor's Motion for the Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94 (A)", DII06-0171 (E).

(iii) "Prosper Mugiraneza's Reply to the Prosecutor's Motion for the Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94 (A)", dated 3 August 2006 and filed on 7 August 2006 (the "Response of Prosper Mugiraneza");
(iv) "Justin Mugenzi's Response to the Prosecutor's Motion for the Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94 (A)", filed on 14 August 2006 (the "Response of Justin Mugenzi");

NOTING that the Prosecution did not file a Reply to the Defence Responses;

NOW DECIDES the Motion solely on the basis of the briefs of the Parties, pursuant to Rule 73 (A) of the Rules.

Introduction

1. The Prosecution moves the Trial Chamber, pursuant to Rule 94 (A), to take judicial notice of the following seven facts, which it submits are "facts of common knowledge"[2]:

Fact One:

Between 6 April 1994 and 17 July 1994, genocide against the Tutsi ethnic group occurred in Rwanda.

Fact Two:

Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified, according to the following ethnic classifications: Hutu, Tutsi, and Twa.

OR

Between 6 April 1994 and 17 July 1994, in Rwanda, Hutu, Tutsi and Twa were protected groups falling within the scope of the Genocide Convention of 1948.

OR

Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified according to the following ethnic classifications: Hutu, Tutsi, and Twa, which were protected groups falling within the scope of the Genocide Convention of 1948.

Fact Three:

The following state of affairs existed in Rwanda between 6 April 1994 and 17 July 1994: There were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed and or caused serious bodily or mental harm to persons perceived to be Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity.

Fact Four:

Between 6 April 1994 and 17 July 1994, there was an armed conflict in Rwanda that was NOT of an international character.

Fact Five:

Between 1 January 1994 and 17 July 1994, Rwanda was a State Party to the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948), having acceded to it on 16 April 1975.

Fact Six:

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[2] Motion, paragraph 1.

Between 1 January 1994 and 17 July 1994, Rwanda was a State Party to the Geneva Conventions of 12 August 1949 and their Additional Protocol II of 8 June 1977, having acceded to the Geneva Conventions of 12 August 1949 on 5 May 1964 and having acceded to Protocols Additional thereto of 1977 on 19 November 1984.

Fact Seven:

Before the introduction of multi-party politics in Rwanda in 1991, the office of the *Bourgmestre* was characterized by the following features:

(a) The *Bourgmestre* represented executive power at the commune level.

(b) The *Bourgmestre* was appointed and removed by the President of the republic on the recommendation of the Minister of interior.

(c) The *Bourgmestre* had authority over the civil servants posted in his commune.

(d) The *Bourgmestre* had policing duties in regard to maintaining law and order.

2. The Prosecution's request stems from a recent Decision of the Appeals Chamber in *Karemera et al*.[3] in which the Appeals Chamber, finding that the Trial Chamber had erred, directed the Trial Chamber to take judicial notice, under Rule 94 (A), of the following facts:

The following state of affairs existed in Rwanda between 6 April 1994 to 17 July 1994: There were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed or caused serious bodily or mental harm to person[s] perceived to be Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity.[4]

Between 1 January 1994 and 17 July 1994 in Rwanda there was an armed conflict not of an international character.[5]

Between 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group.[6]

The *Karemera* Appeals Chamber also held that the *Semanza* Appeals Chamber endorsed the *Semanza* Trial Chamber's decision to take judicial notice of the following facts of common knowledge:

Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified, according to the following ethnic classifications: Hutu, Tutsi, and Twa.

Between 1 January 1994 and 17 July 1994, Rwanda was a State Party to the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948), having acceded to it on 16 April 1975.

Between 1 January 1994 and 17 July 1994, Rwanda was a State Party to the Geneva Conventions of 12 August 1949 and their Additional Protocol II of 8 June 1977, having succeeded to the Geneva Conventions of 12 August 1949 on 5 May 1964 and having acceded to Protocols Additional thereto of 1977 on 19 November 1984.

Before the introduction of multi-party politics in Rwanda in 1991, the office of the *Bourgmestre* was characterized by the following features:

(a) The *Bourgmestre* represented executive power at the *commune* level.

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[3] Prosecutor v. Édouard Karemera et al., Case N°ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC)*, 16 June 2006 (henceforth, the "*Karemera* Decision").
[4] *Karemera* Decision, paragraphs 26-32.
[5] Ibid.
[6] *Karemera* Decision, paragraphs 33-38.

(b) The *Bourgmestre* was appointed and removed by the President of the Republic on the recommendation of the Minister of the Interior.

(c) The *Bourgmestre* had authority over the civil servants posted in his *commune*.

(d) The *Bourgmestre* had policing duties in regard to maintaining law and order.

The *Karemera* Appeals Chamber concluded that these facts are notorious and not reasonably subject to dispute.

3. The Motion is opposed in its entirety by Casimir Bizimungu, Jérôme Bicamumpaka and Justin Mugenzi. Prosper Mugiraneza makes submissions on the characterisation of the conflict within Rwanda during 1994, and urges the Trial Chamber not to take judicial notice of Fact Four above.

4. A prior Prosecution motion for judicial notice of facts of common knowledge under Rule 94 (A) of the Rules was denied by the Trial Chamber on the basis that a Trial Chamber cannot take judicial notice of any document under Rule 94 (A).[7]

Preliminary matters

5. The Defence for Justin Mugenzi filed its Response outside of the time limits given by the Chamber. Counsel for Mugenzi explains that the Mugenzi legal team was busy with other commitments. The Chamber does not find this to be an acceptable reason for the late filing. However, considering the significance of the issues at stake, the Trial Chamber will fully consider the submissions of all the Parties.

DISCUSSION

6. Rule 94 (A) states: "A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof." Judicial notice under Rule 94 (A) is mandatory. If a Trial Chamber determines that a fact is one "of common knowledge", it must take judicial notice of it. As the Appeals Chamber stated in the *Semanza* Appeal Judgement:

> As the ICTY Appeals Chamber explained in *Prosecution v. Milošević*, Rule 94 (A) "commands the taking of judicial notice" of material that is "notorious." The term "common knowledge" encompasses facts that are not reasonably subject to dispute: in other words, commonly accepted or universally known facts, such as general facts of history or geography, or the laws of nature. Such facts are not only widely known but also beyond reasonable dispute.[8]

The Appeals Chamber also considered the nature of a finding of judicial notice under Rule 94(A), and stated that:

> Whether a fact qualifies as a "fact of common knowledge" is a legal question. By definition, it cannot turn on the evidence introduced in a particular case, and so the deferential standard of review ordinarily applied by the Appeals Chamber to the Trial Chamber's assessment of and inferences from such evidence has no application.[9]

7. The Trial Chamber cannot accept the Defence arguments that the Appeals Chamber rulings on Rule 94 (A) judicial notice in the *Karemera* Decision, the *Semanza* Judgement have no applicability in this case. Neither can it accept Justin Mugenzi's argument that the determination that a fact is one of common knowledge is a question of fact, which only the Trial Chamber can make. In essence, the legal effect of the *Karemera* Decision is that a determination by the Appeals Chamber that any given

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[7] Decision on Prosecutor's Motion for Judicial Notice Pursuant to Rules 73, 89 and 94, 2 December 2003, paragraphs 25-26.
[8] *Semanza*, Judgement (AC) (hereinafter, the "*Semanza* Judgement"), paragraph 194.
[9] *Karemera* Decision, paragraph 23.

fact is one of common knowledge and of which judicial notice should be taken under Rule 94 (A) is binding upon all Trial Chambers.

8. Casimir Bizimungu, Jérôme Bicamumpaka and Justin Mugenzi submit that, since the Trial Chamber has already made rulings with respect to most of the facts which form the basis of the present application, these matters are barred from re-litigation by virtue of the doctrine of *res judicata*. A review of the Trial Chamber's prior Decisions concerning Prosecution requests for judicial notice reveals that, except for Fact Four, none of the facts currently before the Chamber in the present Motion have been the subject of an application for judicial notice before the Trial Chamber under Rule 94 (A), which concerns facts of common knowledge. The Chamber's *first* Decision on judicial notice, which was brought under both Rule 94 (A) and Rule 94 (B), did not concern any of the facts currently before the Chamber.[10] That Decision related to certain *documents*, and the Chamber held that it cannot take judicial notice of documents as facts of common knowledge under Rule 94 (A). The Chamber's *second* Decision on judicial notice dealt exclusively with an application brought under Rule 94 (B) of the Rules, which concerns only adjudicated facts or documentary evidence from other proceedings of the Tribunal.[11] Fact Four has, however, been the subject of a previous application before the Trial Chamber pursuant to Rules 94 (A) of the Rules. In its "Decision on Defence Motions Pursuant to Rule 98 *bis*" of 22 November 2005, the Trial Chamber declined to take judicial notice of Fact Four, either as an adjudicated fact, or as a fact of common knowledge.[12] Furthermore, in a subsequent decision relating to certification to appeal the Decision on Defence Motions Pursuant to Rule 98 *bis*, the Trial Chamber stated that the characterization of the conflict in Rwanda as international or non-international in nature was an issue which was still open, and the Defence was at liberty to present evidence on the matter.[13] However, the Trial Chamber considers that the Appeals Chamber's ruling in *Karemera,* which is binding on all Trial Chambers, requires this Trial Chamber to reconsider its earlier Decision on this issue insofar as it is contrary to the Appeal Chambers ruling. For that reason, the argument based on *res judicata* cannot be sustained.

9. Casimir Bizimungu, Jérôme Bicamumpaka and Justin Mugenzi argue that the Motion is belated and that granting it would hinder judicial economy and cause them prejudice, since considerable effort has already gone into the preparation of their defence strategies.[14] Mugenzi's Defence argues that granting the Motion would cause Mugenzi particular prejudice, since he is close to completing the presentation of his evidence and, had he known at an earlier stage that the Prosecution was still seeking judicial notice, additional questions could have been asked of his witnesses.[15]

10. Where the Appeals Chamber has taken judicial notice of certain facts as facts of common knowledge, Trial Chambers are bound to follow such findings. It is proper for the Chamber to take judicial notice of such facts at any stage of the Trial. The Trial Chamber is also of the view that the identification of a fact as one of common knowledge fosters judicial economy by dispensing with the need to consider evidence on matters which do not require proof.

11. The Appeals Chamber ruling in *Karemera*, directing the *Karemera* Trial Chamber to reconsider its ruling on facts of common knowledge under Rule 94 (A), related to the same facts that the Prosecution formulates as Facts One, Three and Four in the present Motion. Due to the binding

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[10] Decision on Prosecutor's Motion for Judicial Notice Pursuant to Rules 73, 89 and 94, 2 December 2003
[11] *Prosecutor v. Casimir Bizimungu et al.,* Case N°ICTR-99-50-T, Decision on the Prosecutor's Motion and Notice of Adjudicated Facts, 10 December 2004.
[12] *Prosecutor v. Casimir Bizimungu et al.,* Case N°ICTR-99-50-T, Decision on Defence Motions Pursuant to Rule 98 *bis*, 22 November 2005, paragraph 100.
[13] *Prosecutor v. Casimir Bizimungu et al.,* Case N°ICTR-99-50-T, Decision on Justin Mugenzi's Application for Certification to Appeal the Trial Chamber's Decision on Defence Motions Pursuant to Rule 98 *bis*, paragraph 11.
[14] Response of Casimir Bizimungu, paragraphs 33-43, 131, 134-149, 150-158; Response of Jérôme Bicamumpaka, paragraphs 17-19, 21-22, 29; Response of Justin Mugenzi, paragraphs 3-5.
[15] Response of Justin Mugenzi, paragraph 4.

nature of the Appeals Chamber finding, the Trial Chamber thus takes judicial notice under Rule 94 (A) of Facts One, Three and Four above.

12. The Trial Chamber recalls that the *Semanza* Trial Chamber took judicial notice, under Rule 94 of the Rules[16] of, among others, Facts Five and Six above, a position which was subsequently upheld on appeal in both the *Semanza* Appeals Chamber Judgement,[17] and endorsed in the *Karemera* Decision.[18] Thus, the Chamber takes judicial notice of these two facts as facts of common knowledge under Rule 94 (A) of the Rules.

13. In relation to Fact Two, the Prosecution proposes three alternatives in relation to which it seeks judicial notice. Judicial notice of the first alternative was taken by the *Semanza* Trial Chamber, and subsequently endorsed by the *Semanza* Appeals Chamber. Judicial notice of the second alternative was taken by the *Karemera et al*. Trial Chamber, and subsequently endorsed by the Appeals Chamber. The third alternative proposed by the Prosecution encompasses the facts embodied in the first two alternatives. As neither of the first two alternatives has been disturbed on appeal, the Chamber takes judicial notice of the third alternative since it comprises all of the facts endorsed by the Appeals Chamber.

14. Casimir Bizimungu and Jérôme Bicamumpaka submit that the Prosecution has not shown how Fact Seven is relevant to the proceedings and therefore it should not be admitted as a fact of common knowledge.[19] The Trial Chamber agrees. The Appeals Chamber noted in the *Semanza* Judgement that:

> The Appeals Chamber affirms that Rule 94 of the Rules is not a mechanism that may be employed to circumvent the ordinary requirement of relevance and thereby clutter the record with matters that would not otherwise be admitted.[20]

Before the Trial Chamber enters into a consideration of whether a fact is one of common knowledge of which judicial notice can be taken under Rule 94 (A) of the Rules, that fact should be relevant to the issues that fall to be decided in the case. The Prosecution has not attempted to demonstrate the relevance of Fact Seven to the case against the Accused, and its relevance is not evident to the Trial Chamber, as is the case with Facts One through Six. Therefore the Trial Chamber does not presently take judicial notice of Fact Seven as a fact of common knowledge under Rule 94 (A) of the Rules.

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the Motion in part, by taking judicial notice under Rule 94 (A) of the following facts of common knowledge:

> (i) Between 6 April 1994 and 17 July 1994, genocide against the Tutsi ethnic group occurred in Rwanda.
>
> (ii) Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified according to the following ethnic classifications: Hutu, Tutsi, and Twa, which were protected groups falling within the scope of the Genocide Convention of 1948.

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[16] Rule 94 of the Rules at that time is the exact equivalent to Rule 94 (A) of our current Rules.
[17] *Semanza* Judgement, paragraphs 191-194.
[18] *Karemera* Decision, paragraphs 28-29.
[19] Response of Casimir Bizimungu, paragraphs 23, 163-164; Response of Jérôme Bicamumpaka, paragraph 28.
[20] *Semanza*, Judgement (AC), paragraph 189.

(iii) The following state of affairs existed in Rwanda between 6 April 1994 and 17 July 1994: There were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed and or caused serious bodily or mental harm to persons perceived to be Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity.

(iv) Between 6 April 1994 and 17 July 1994, there was an armed conflict in Rwanda that was NOT of an international character.

(v) Between 1 January 1994 and 17 July 1994, Rwanda was a State Party to the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948), having acceded to it on 16 April 1975.

(vi) Between 1 January 1994 and 17 July 1994, Rwanda was a State Party to the Geneva Conventions of 12 August 1949 and their Additional Protocol II of 8 June 1977, having acceded to the Geneva Conventions of 12 August 1949 on 5 May 1964 and having acceded to Protocols Additional thereto of 1977 on 19 November 1984.

DENIES the Motion in respect of Fact Seven.

Arusha, 22 September 2006.

[Signed] : Khalida Rachid Khan ; Lee Gacuiga Muthoga ; Emile Francis Short

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Decision on Casimir Bizimungu's Requests for Disclosure of the Bruguière Report and the Cooperation of France
Article 28 of the Statute and Rule 68 of the Rules of Procedure and Evidence
25 September 2006 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge ; Lee Gacuiga Muthoga ; Emile Francis Short

Casimir Bizimungu – Disclosure obligation of the Prosecutor, Prosecution makes the initial determination of whether information and materials are exculpatory, Bruguière Report, Exculpatory character of the Report, Responsibility of the Accused not based upon former President Habyarimana's assassination, Arguments related to the nature of the conflict moot due to a former Tribunal's decision affirming the non-international character of the conflict – Cooperation of the States with the Tribunal, France, Material requested not relevant to the Trial – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 54, 68, 68 (A), 73 (A) and 94 (A) ; Statute, 28

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Georges Rutaganda, Decision on the Urgent Defence Motion for Disclosure and Admisssion of Additionnal Evidence and Scheduling Order, 12 December 2002 (ICTR-96-3) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Accused Nzirorera's Motion for Inspection of Materials, 5 February 2004 (ICTR-98-44) ; ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, 10 March 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Bicumumpaka's Motion for Disclosure of Exculpatory Evidence (MDR Files), 17 November 2004 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba, Décision relative à la requête de Joseph Nzirorera aux fins d'obtenir la coopération du Gouvernement français, 23 February 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba, Decision on Joseph Nzirorera's Application for Certification to Appeal the Decision Denying his Request for Cooperation to Government of France, 31 March 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure, 5 July 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute, 31 October 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana, Decision on Nzuwonomeye's Motion Requesting Cooperation From the Government of Ghana Pursuant to Article 28 of the Statute, 13 February 2006 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. François-Xavier Nzuwonemeye, Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of Togo Pursuant to Article 28 of the Statute, 13 February 2006 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. François-Xavier Nzuwonemeye, Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of the Netherlands Pursuant to Article 28 of the Statute, 13 February 2006 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Reconsideration of Oral Ruling of 1 June 2005 on Evidence Relating to the Crash of the Plane Carrying President Habyarimana, 23 February 2006 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Prosecutor's Motion for Judicial Notice, 22 September 2006 (ICTR-99-50)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Decision on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000 (IT-95-14)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEISED of the "Requête de Casimir Bizimungu aux fins de Communication par le Procureur du Rapport Bruguière (Confidentielle)", filed on 24 February 2006 (the "Rule 68 Motion"),[1] and the "Requête de Casimir Bizimungu aux Fins de Coopération de la France, filed on 4 May 2006 (the "Article 28 Motion");

CONSIDERING the "Prosecutor's Response to Casimir Bizimungu's Motion for Disclosure of the Bruguière Report", filed 2 March 2006 (the "Rule 68 Response");

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[1]LCSS translation available in draft at time of filing: "Casimir Bizimungu's Motion for the Prosecutor to Disclose the Bruguière Report", DII06-0059 (E).

CONSIDERING the "Réplique à la Réponse du Procureur à la Requête de Casimir Bizimungu en Communication du Rapport Bruguière", filed 20 March 2006 (the "Rule 68 Reply");[2]

NOTING that the Prosecution did not file a response to the Article 28 Motion;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Article 28 of the Statute and Rules 54, and 68 of the Rules;

NOW DECIDES the Motion solely on the basis of the briefs of the Parties, pursuant to Rule 73 (A) of the Rules.

Introduction

1. On 24 February 2006, the Defence for Casimir Bizimungu filed a Confidential Motion, relying on Rule 68 of the Rules, for disclosure of the Report of French Judge Jean-Louis Bruguière ("Bruguière Report", or "Report"), which concerns the 6 April 1994 fatal attack on then Rwandan President Habyarimana's plane. On 11 May 2006, the Defence filed a related Motion, relying on Article 28 of the Statute and Rule 54 of the Rules, requesting the Chamber to order the cooperation of France in procuring the Bruguière Report. Because of the related nature of the requests, the Chamber will now rule upon them together.

Submissions

THE RULE 68 MOTION

The Defence Request

2. The Defence for Casimir Bizimungu moves the Trial Chamber to issue an order, pursuant to Rule 68 (A) of the Rules, directing the Prosecution to disclose the Bruguière Report. If the Prosecution is not in possession of the Report, the Defence requests the Chamber to order the Prosecution to obtain a copy of it and to disclose it to the Defence.

3. The Defence notes that the Prosecution failed to respond to Casimir Bizimungu's previous requests for the Report in compliance with Rule 68,[3] and annexes its correspondence with the Prosecution requesting the document.[4] It further submits that the Bruguière Report is a well identified document known to the Prosecution.[5]

4. The Defence asserts that the Bruguière Report will provide evidence relevant to several of the Indictment's counts. In general, these arguments can be summarised as follows: (i) the Report shows

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[2] LCSS translation available in draft at time of filing: "Reply to the Prosecutor's Response to the '*Requête de Casimir Bizimungu Aux Fins de Communication par le Procureur du Rapport Bruguière*'", DII06-0060 (E).

[3] *Prosecutor v. Blaskić*, Decision on the Production of Discovery Materials, 27 January 1997, ruled that in response to a request for disclosure, the Prosecution must: State whether the material is in its possession; and state whether in its opinion the material is likely to be exculpatory. Or it may state that although the material may be exculpatory, it should not be disclosed for some reasons.

[4] This correspondence comprises the following annexes: Annex C, Divulgation à la défense de Casimir Bizimungu du Mémorandum Hourigan et du Rapport Bruguière en Vertu de l'article 68 du Règlement de procédure et de preuve, dated 10 June 2004; Annex D, Prosecutor's Response to the "Request for Disclosure of Documents Pursuant to Rule 68, dated 14 June 2004; Annex E, Deuxième demande de divulgation du Rapport Bruguière en vertu de l'article 68 du Règlement de procédure et de preuve, dated 22 June 2004; and Annex F, Reply to the Defence's "Second Request for Disclosure of the Bruguière Report Pursuant to Rule 68, dated 1 July 2004.

[5] In support of this assertion, the Defence relies upon a *dossier de presse* (Annex A), which includes press coverage of: the Commission Rogatory convened by Judge Bruguière with the Prosecution's consent, and former Prosecutor Carla Del Ponte's statements that her office was working closely with Bruguière intending to use his findings to determine whether to open an investigation of its own.

that the shooting down of the plane by the Rwandan Patriotic Front ("RPF") was the main cause of the massacres, thereby diverting or at least mitigating responsibility for them;[6] (ii) the Report calls into question the Prosecution's theory of a conspiracy by negating responsibility for the alleged triggering event; (iii) the Report has a bearing on the state of mind of government ministers at the time; (iv) the Report is relevant to the level of government control over the situation in Rwanda at the time; (v) the Report explains events in the context of resumed hostilities between the RPF and the Rwandan government, thereby showing the necessity of civil defence measures, including the establishment of roadblocks; and (vi) the Report is relevant to the classification of the conflict as international or non-international, and therefore alleged violations of the Geneva Conventions, because it may contain information regarding Ugandan assistance to the RPF.

5. In addition to its relevance to allegations in the Indictment, the Defence also asserts that the Report's information implicating the RPF in Habyarimana's death will impeach numerous Prosecution witnesses, especially those over whom the RPF exerts considerable control. Many witnesses in this case either live or are detained within Rwanda's borders; and thus, the Defence asserts that their testimony is subject to the RPF's approval.

The Prosecution's Response

6. In response, the Prosecution submits that it is not better situated to obtain the document than the Defence. Judge Bruguière denied each of the Defence's three requests for the document on the grounds that it is sealed pursuant to Article 11 of the French Code on criminal proceedings.

7. The Prosecution also maintains that the Bruguière Report's investigation into the attack upon President Habyarimana's plane is irrelevant to the Accused's case. According to the Prosecution, the Trial Chamber's oral decision of 1 June 2005 (reaffirmed on 23 February 2006) ruled that the Indictment is not based upon any alleged involvement by the Accused in the downing of the President's plane. Although this ruling reiterated the Defence's right to present its case in the manner it deems most appropriate, it also directed the Defence not to delve into Habyarimana's assassination in great detail.

The Defence Reply

8. The Defence submits that the Prosecution's failure to deny knowledge of the Bruguière Report is a tacit admission that it is in its possession.

9. Bizimungu argues that it is his right to tell his side of the story and, therefore, exculpatory evidence under Rule 68 should not be strictly limited to "the formulation of the indictment".

THE ARTICLE 28 MOTION

10. In the Article 28 Motion, the Defence seeks the same material via another means, requesting that the Chamber order the French government to cooperate by disclosing the Bruguière Report to Casimir Bizimungu. For the purposes of the Article 28 Motion, the Defence relies upon many of the factual allegations in its Rule 68 Motion.

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[6] The Defence relies on numerous sources in support of this contention, including: Annex B, Report of the Special Rapporteur of the Human Rights pursuant to Resolution S-31 of the Commission and the Decision 1994/223 of the Economic and Social Council, Witness QU's statement that the person who shot him/her said they did so in retaliation because the Head of State had been killed, T. 17 March 2004, p. 15, Witness D's testimony that the massacres perpetrated after 6 April 1994 were mainly caused by the crash of the President's plane, T. 15 June 2004, p. 58, line 4., and Witness Nkuliyingoma's report that ethnic hostilities resumed following Habyarimana's plane crash, T. 8 July 2004, p. 17.

11. The Defence submits that it is seeking disclosure of a well-known document that it has specifically identified. Although not in the public domain, this report attracted a lot of media attention and publicity. Furthermore, in his communications with the Defence, Judge Bruguière acknowledged the existence of the document by refusing to disclose it.

12. The Defence argues that the relevance of the Report to the criminal responsibility of the Accused is a question of fact which varies from case to case, depending on the positions occupied by the Accused and the circumstances under which they found themselves at the moment those events took place.

13. The Defence notes that Judge Bruguière refused to disclose the report, and includes an annexure to the Motion consisting of email communications between Defence Counsel and Judge Bruguière in the course of which the Judge states: (i) under French law the report is not to be disclosed to third persons;[7] and (ii) there is no domestic avenue for judicial review of his inability to disclose the report to third persons.

14. The Prosecution did not file a response to the Article 28 Motion.

Deliberations

The Rule 68 Motion

15. Rule 68 (A) obliges the Prosecution to disclose material

> "which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence."[8]

These obligations are of a continuous nature.[9]

16. The Prosecution makes the initial determination of whether information and materials are exculpatory.[10] Where the Defence believes that exculpatory evidence or materials in the Prosecution's custody or control have not been disclosed, it may request that the Trial Chamber order disclosure pursuant to Rule 68. For this request to succeed the Defence must sufficiently identify the material sought and make a sufficient showing that it is exculpatory.[11]

17. The Chamber finds that the materials provided by the Defence have sufficiently identified the material sought, the Bruguière Report, for the purposes of Rule 68.

18. Moving to the exculpatory character of the Bruguière Report, the Chamber notes that several of Bizimungu's arguments on this point were advanced jointly by the Defence — albeit in less detail — in their request for reconsideration of the Chamber's Oral Ruling of 1 June 2005, where the issue of

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[7] Despite Judge Bruguière's claim, the Defence recalls that *dossiers d'instruction* have been the subject of orders made by other Trial Chambers of the ICTR, and in this respect it cites the Trial Chamber's decision in *Karemera et al.,* in which that Chamber ordered a State to disclose documents contained within a *dossier d'instruction*. *Prosecutor v. Karemera et al.,* Case N°ICTR-98-44-PT, *Décision Relative à la Requête de Joseph Nzirorera aux Fins d'Obtenir la Coopération du Gouvernement d'un Certain État* (TC), 23 février 2005.

[8] Rule 68 (A) of the Rules of Procedure and Evidence.

[9] Rule 68 (E) of the Rules of Procedure and Evidence; *Prosecutor v. Blaskić*, Case N°IT-95-14-A, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings (AC), 26 September 2000, para. 32.

[10] *Prosecutor v. Rutaganda*, Case N°ICTR-96-3-A, Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order (AC), 12 December 2002, para. 18.

[11] *Prosecutor v. Bizimungu et al.*, Case N°ICTR-99-50-T, Decision on Bicamumpaka's Motion for Disclosure of Exculpatory Evidence (MDR Files), 17 November 2004, para. 14.

who shot down the plane was ruled improper for the cross-examination of Prosecution Expert Witness Dr. Alison Des Forges.

19. As noted in its Reconsideration of Oral Ruling of 1 June 2005 on Evidence Relating to the Crash of the Plane Carrying President Habyarimana, the Chamber has reviewed the jurisprudence of the Tribunal on this issue.[12] The trend has been to allow limited questioning of witnesses regarding the responsibility for the shooting down of the President's plane,[13] but Trial Chambers have generally been more reluctant to deal at length with this issue because they have found that its resolution will not assist them in addressing the criminal responsibility of the accused in their respective trials.[14]

20. The Chamber reiterates that the answer to the question, "Who shot down President Habyarimana's plane?" has no bearing on the responsibility of the Accused in this trial. The charges against Casimir Bizimungu and his co-Accused are not based upon their alleged responsibility or involvement in former President Habyarimana's assassination. Thus, evidence as to who is responsible for the crash of the President's plane would not assist the Chamber in determining the guilt or innocence of the Accused.

21. The Chamber understands that the Defence strategy with regard to the Bruguière Report does not rest on denying the responsibility of the Accused for bringing down Habyarimana's plane. The Defence seeks to show that the RPF shot down former President Habyarimana's plane, and that this action destabilised Rwanda and aroused the Rwandan people to such a degree that the country moved beyond the control of the government, and thus of the Accused. Without addressing this argument in detail, the Chamber notes that its essence – as it relates to the charges against the Accused – is not the identity of President Habyarimana's assassins, but rather the circumstances faced by the Rwandan government after his death. The Defence can make this argument just as effectively without the Bruguière Report. Arguments related solely to the historical record, as opposed to the specific charges against the Accused, are beyond the scope of this trial.

22. The Chamber notes that arguments related to the nature of the conflict – whether it is a non-international or international armed conflict under the Geneva Conventions – are moot as a result of its Decision on the Prosecution's Motion for Judicial Notice, which took judicial notice, as a fact of

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[12] *Bizimungu et al*., Case N°ICTR-99-50-T, Reconsideration of Oral Ruling of 1 June 2005 on Evidence Relating to the Crash of the Plane Carrying President Habyarimana, 23 February 2006, para. 8.

[13] For example, *Prosecutor v. Bagosora et al.,* T. 25 September 2002, pp.39-41; T. 22 January 2004, pp. 53-55 (cross-examination of prosecution witness Romeo Dallaire); T. 27 January 2004, pp. 82-83 (cross-examination of prosecution witness Romeo Dallaire); T. 12 May 2005, pp. 32-33 (testimony of defence witness Dr. Helmut Strizek); *Prosecutor v. Nyiramasuhuko et al*., T. 15 June 2004, pp.57-58 (allowing the defence to "put their case" regarding responsibility for shooting down the plane to prosecution witnesses on cross-examination as long as they did not go into unnecessary detail); T. 5 October 2004, pp.37-40 (cross-examination of prosecution witness André Guichaoua).

[14] For example, in *Ntagerura et al*., the Chamber ruled that the report and testimony of a proposed expert witness dealing with this issue would not aid the Chamber in considering issues relevant to the trial. *Ntagerura et al*., T. 4 July 2002, pp. 7-8. In *Karemera et al*., the Chamber denied a similar request under Rule 68, finding that Accused Nzirorera had failed to show how materials relating to the assassination of President Habyarimana could suggest the innocence or mitigate the guilt of the accused, or affect the credibility of the prosecution evidence. *Karemera et al*., Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, para. 15. In a series of later decisions in the same case the *Karemera et al*. Chamber denied specific requests for the Bruguière Report, reiterating that the charges in that case are not based on any alleged responsibility of the Accused in the assassination of President Habyarimana, and that evidence regarding the shooting down of the plane could not relieve the government Ministers of their alleged individual criminal responsibility for international crimes committed in Rwanda during 1994. *Karemera et al*., Decision on Accused Nzirorera's Motion for Inspection of Materials, 5 February 2004, para. 11; Décision *Relative à la Requête de Joseph Nzirorera aux Fins d'Obtenir la Coopération du Gouvernement Français*, 23 February 2005, para. 11; Decision on Joseph Nzirorera's Application for Certification to Appeal the Decision Denying his Request for Cooperation to Government of France, 31 March 2005, para. 6; Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure, 5 July 2005, para. 12.

common knowledge under Rule 94 (A), that the armed conflict in Rwanda in 1994 was non-international.[15]

23. Regarding the credibility of Prosecution witnesses, the Chamber rejects the Defence argument that the Report, which the Defence submits will contradict statements made by RPF officials to the international community, can be used to impeach the credibility of Prosecution witnesses living in Rwanda on the basis that their testimony is controlled by the current RPF government. If anything, the Bruguière Report may be relevant to the RPF's credibility, which is not at issue before this Tribunal and does not fall within the scope of the term "Prosecution evidence" under Rule 68 (A). While evidence of RPF control over Prosecution witnesses might affect such witnesses' credibility, the Defence has not demonstrated that the Bruguière Report would enlighten the Chamber on such matters. Thus, the Chamber finds that the Defence has failed to make a sufficient showing that the Bruguière Report may affect the credibility of Prosecution witnesses.

24. The Chamber therefore rules that the Defence for Casimir Bizimungu has failed to show the exculpatory character of the Bruguière Report for the purposes of Rule 68.

The Article 28 Motion

25. Article 28 of the Statute mandates State cooperation with the Tribunal in the "investigation and prosecution of persons accused of committing serious violations of international humanitarian law".[16] Pursuant to this Article, States are required to comply with requests or orders issued by Trial Chambers regarding, among other things, the "production of evidence" and "the service of documents".[17] The criteria to be satisfied by the party seeking an order for State cooperation with the production of evidence or service of documents under Article 28 of the Statute are: (i) the party seeking the material must specifically identify, to the extent possible, the documents sought; (ii) the party must articulate the document's relevance to the trial; and (iii) the party must show that its efforts to obtain the documents have been unsuccessful.[18]

26. The Chamber finds that the Defence has identified the material sought, the Bruguière Report, with sufficient specificity for the purposes of Article 28 of the Statute.

27. Nonetheless, with respect to the relevance of the Bruguière Report to this trial, the Chamber notes its ruling that the Defence failed to show the exculpatory character of the Report for the purposes of its request under Rule 68. For the same reasons – notably, (i) that the Indictment charges none of the Accused with shooting down President Habyarimana's plane; (ii) that the identity of Habyarimana's assassins are not relevant to any Defence based on the inability to control the country after his killing; and (iii) that the Defence has not shown that the Report would be helpful in assessing the credibility of witnesses – the Chamber finds that the Defence has failed to show the relevance of the Bruguière Report to this trial for the purposes of Article 28.

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[15] *Bizimungu et al*., Case N°ICTR-99-50-T, Decision on Prosecutor's Motion for Judicial Notice, 22 September 2006, para. 11.
[16] Article 28 (1), Statute of the International Tribunal for Rwanda.
[17] Article 28 (2), Statute of the International Tribunal for Rwanda.
[18] *Bagosora et al*., Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, 10 March 2004, para. 4; see also *Bagosora et al*., Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute, 31 October 2005, para. 2. *Prosecutor v. Blaskic,* Judgement on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997 (AC), 29 October 1997; *Prosecutor v. Ndindiliyimana et al*.,, Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of Ghana Pursuant to Article 28 of the Statute, 13 February 2006, para. 6; Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of Togo Pursuant to Article 28 of the Statute, 13 February 2006, para. 6; Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of the Netherlands Pursuant to Article 28 of the Statute, 13 February 2006, para. 6.

FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Rule 68 Motion in its entirety.

DENIES the Article 28 Motion in its entirety.

Arusha, 25 September 2006.

[Signed] : Khalida Rachid Khan ; Lee Gacuiga Muthoga ; Emile Francis Short

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Decision on Prosper Mugiraneza's Motion for Records of All Payments Made Directly or Indirectly to Witness D Rule 68 of the Rules of Procedure and Evidence 28 September 2006 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge ; Lee Gacuiga Muthoga ; Emile Francis Short

Prosper Mugiraneza – Records of All Payments Made Directly or Indirectly to Witness, Risks that future informants might use information of payments made to a witness as a bargaining tool, Use of the details of payment to appreciate the credibility of the witness – Motion upon analysis of a detailed statement of expenses to be filed confidentially by the Prosecutor

International Instrument cited :

Rules of Procedure and Evidence, rules 66, 68, 68 (A), 73 and 73 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI, 14 September 2004 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Bicumumpaka's Motion for Disclosure of Exculpatory Evidence (MDR Files), 17 November 2004 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation, 19 April 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Protais Zigiranyirazo, Decision on Defence and Prosecution Motions Related to Witness ADE, 31 January 2006 (ICTR-2001-73) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Prosecution's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and His Family, 21 June 2006 (ICTR-98-44)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000 (IT-95-14)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of "Prosper Mugiraneza's Motion Pursuant to Rule 66 for Records of All Payments Made Directly or Indirectly to Witness D", filed on 23 June 2006 (the "Motion");

CONSIDERING the "Prosecutor's Request for Leave to Respond Out of Time to Mr. Prosper Mugiraneza's Motion Pursuant to Rule 66 for Records of All Payments Made Directly or Indirectly to Witness D", filed on 22 August 2006 (the "Response");

RECALLING the Chamber's Oral Ruling of 16 June 2004 ordering Defence Counsel to avoid questions relating to the nature of Witness D's witness protection programme;

NOW DECIDES the matter solely on the basis of the briefs of the parties pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules").

Introduction

1. On 16 June 2004, this Chamber ordered the Defence for Casimir Bizimungu to refrain from cross-examining Prosecution Witness D regarding the specifics of the witness protection programme he is in. The Defence for Prosper Mugarineza (the "Defence") now requests that the Chamber order disclosure of the financial details of that programme, as well as any other payments made directly or indirectly to Witness D by the Tribunal and "other entities", arguing that this information is exculpatory under Rule 68.

Preliminary matters

2. The Prosecution states that its failure to respond to the Motion within five days of receiving it, as required under Rule 73 of the Rules, was inadvertent.[1] It invokes the Chamber's inherent power to admit the response in the interests of justice.

3. The Chamber notes the importance of the issue raised by the Defence motion, specifically the Chamber's duty to strike an appropriate balance between its responsibility to protect witnesses and its obligation to guarantee the rights of the Accused. Despite the Chamber's concern regarding the length of the Prosecution's delay, the Chamber recalls that Witness D has already testified and finds that the delay did not impact the proceedings. Thus, given the importance of the issues before it, the Chamber will consider all submissions before it in the interests of justice.

Discussion

4. The Chamber notes that Prosper Mugiraneza refers to Rule 66 of the Rules in the title of his Motion but exclusively to Rule 68 of the Rules in the body of the Motion. The Chamber assumes that the reference to Rule 66 in the title is in error and rules on the request pursuant to Rule 68.

5. The Defence avers that the extent of the financial benefit received by Witness D is relevant to the Witness's motivation for providing testimony favourable to the Prosecution and therefore relevant to the Witness's credibility. The Defence suggests that the statement of payments submitted by the Prosecution on 15 June 2004 (Prosecution Exhibit 56) is incomplete.

6. Despite the Chamber's Oral Ruling preventing cross-examination regarding the specifics of the witness protection programme, the Defence submits—on the basis of a recent decision in *Karemera et*

[1] The Prosecution filed its response some two months after the filing of the Motion.

al.[2] – that the Prosecution should be forced to disclose not only direct payments made by the Prosecution to Witness D, but also all other "funds expended on Witness D's behalf by the Tribunal and other entities", including funds expended in connection with Witness D's witness protection programme. It submits that disclosure of these funds and explanations for their expenditure on the Witness's behalf will not reveal Witness D's identity or location or otherwise threaten the Witness's security.

7. The Defence acknowledges the Trial Chamber's concerns expressed in the Karemera et al. Decision regarding the possibility that future informants might use information of payments made to a witness as a bargaining tool. Therefore, the Defence does not request that the disclosure be made public.

8. According to the Prosecution, the Defence admits: (i) that the Prosecution has already made sufficient disclosures regarding payments to Witness D; and (ii) that the Trial Chamber forbade cross-examination regarding the specific benefits of Witness D's witness protection programme. Therefore, the Prosecution avers that Prosper Mugiraneza's Motion is a "disguised appeal" of the Chamber's prior Oral Ruling.

9. The Prosecution submits that, under the Statute and the Rules, the Chamber is independent, competent to make its own rulings, and has equal authority to all other Trial Chambers. While a Defence application for reconsideration on the basis of an Appeal Chamber decision may be appropriate, the present Defence application on the basis of another Trial Chamber's ruling is not. If the Defence motion is granted as a result of another Trial Chamber's decision, there will be no finality to this Chamber's decisions.

10. Under Rule 68 (A), the Prosecution is obliged to disclose material

> "which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence."[3]

The Prosecution's obligations are ongoing.[4] Where the Defence believes that exculpatory material in the Prosecution's custody or control has not been disclosed, it may request that the Trial Chamber order disclosure. Before the Chamber will grant a request under Rule 68, the Defence must sufficiently identify the material sought and make a *prima facie* showing that it is exculpatory.[5] Where the Defence specifically requests information or material covered by Rule 68 (A) that is not within the possession or control of the Prosecution and that the Defence has been unable to procure through its own efforts, the Prosecution should attempt to obtain and disclose the relevant information or material if it is in a better position than the Defence to do so.[6]

11. The Chamber recalls that its Oral Ruling of 16 June 2004 restricting questioning on the specifics of Witness D's witness protection programme reflected the Chamber's concern that the identity of the witness might be revealed. The specific question which led to the ruling concerned whether the witness had been given a new identity as part of that programme. The Prosecution represented that the Witness had specifically been instructed by the administrators of the witness

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[2] *Prosecutor v. Karemera, et al.*, Case N°ICTR-98-44-T, Decision on Prosecution's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and His Family, 21 June 2006.
[3] Rule 68 (A) of the Rules of Procedure and Evidence.
[4] Rule 68 (E) of the Rules of Procedure and Evidence; *Prosecutor v. Blaskic*, Case N°IT-95-14-A, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings (AC), 26 September 2000, para. 32.
[5] *Prosecutor v. Bizimungu et al.*, Case N°ICTR-99-50-T, Decision on Bicamumpaka's Motion for Disclosure of Exculpatory Evidence (MDR Files), 17 November 2004, para. 14.
[6] *Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI, 14 September 2004, para. 10.

protection programme not to answer that question or any other question which might make it easier to determine the Witness's location or identity.[7]

12. Despite the Prosecution's claim that the issue raised has already been decided by the Chamber, the Chamber finds that its Oral Ruling of 16 June 2004 did not determine whether information regarding the financial benefits received by Witness D is exculpatory for the purposes of disclosure under Rule 68. Moreover, the Chamber notes that the Prosecution does not argue that the information is not exculpatory for the purposes of Rule 68. Nor has the Prosecution requested relief from disclosure under Rule 68 (D), or Rule 66 (C), provisions which allow such relief where disclosure

> "may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State."

The Prosecution has not revealed a detailed statement of monies expended on behalf of Witness D to the Chamber.

13. The Chamber notes that not all payments made on behalf of witnesses are exculpatory for the purposes of Rule 68. Some expenses, such as transportation and accommodation costs connected with investigations and hearings, are reasonable and necessary and do not tend to undermine their credibility.[8] The Chamber is of the view that some expenses associated with a witness protection programme are also likely to be reasonable and necessary and therefore not exculpatory under Rule 68.[9] The Chamber is also mindful that the sum total of monies distributed under a witness protection programme would be deceptive without knowing the cost of living in the country administering the program, exchange rates, as well as other economic factors.[10] Such details might be difficult to disclose without compromising the safety of the Witness by potentially revealing his whereabouts. Nonetheless, the Chamber cannot determine the question before it, specifically, whether indirect and direct payments made to Witness D are exculpatory for the purposes of Rule 68, without seeing a detailed statement of payments, including details of all expenses connected with the witness protection programme. Therefore, the Chamber, pursuant to its authority to issue orders necessary for the conduct of trial under Rule 54, orders the Prosecution to provide such a detailed statement of expenses, which should be filed with the Chamber *ex parte* and strictly confidential. The Chamber reserves its decision on the central issue of whether these payments are exculpatory for the purposes of Rule 68 until it has had time to review the Prosecution's disclosure made pursuant to this order.

FOR THE FOREGOING REASONS, THE CHAMBER

ORDERS the Prosecution to provide the Chamber with a detailed statement of all expenses incurred on Witness D's behalf and on behalf of members of his family, including the details of all expenses connected with the witness protection programme he is enrolled in, to be filed with the Chamber ex parte and strictly confidential;

RESERVES its final decision on the Defence motion until the Chamber has had a chance to review the Prosecution materials submitted pursuant to the above Order.

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[7] *Bizimungu, et al*., T. 16 June 2004, pages 13-15.
[8] Compare *Prosecutor v. Karemera et al*., Case N°ICTR-98-44-PT, Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005, para. 7.
[9] In *Karemera et al*., Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation, 19 April 2005, para. 9, the Chamber refused to order a State, pursuant to a Defence request under Article 28 of the Statute, to disclose the monetary value of the benefits received by a witness under a witness protection program, noting that such disclosure was not necessary to determine the credibility of the witness. In *Prosecutor v. Zigiranyirazo et al*., Case N°ICTR-2001-73-T, Decision on Defence and Prosecution Motions Related to Witness ADE, 31 January 2006, para. 22, the Chamber, in ordering disclosure of the sum total of payments made directly by the Tribunal to the witness, specifically distinguished the *Karemera et al*. Decision cited directly above because it involved payments made through a witness protection programme.
[10] *Karemera et al*., Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation, 19 April 2005, para. 9.

Arusha, 28 September 2006.

[Signed] : Khalida Rachid Khan ; Lee Gacuiga Muthoga ; Emile Francis Short

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Decision on Casimir Bizimungu, Justin Mugenzi and Jérôme Bicamumpaka's Written Submissions Concerning the Issues Raised at the Hearing of 31 March 2006 in Relation to the Cross Examination of Witness Augustin Kayinamura (Formerly INGA)
1 November 2006 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge ; Lee Gacuiga Muthoga ; Emile Francis Short

Jérôme Bicamumpaka, Casimir Bizimungu and Justin Mugenzi – Sylvestre Gacumbitsi Case – Party seeking to use a document in cross-examination must priory inform the other side and provide a copy – Interpretation of the effect of witness protection measures granted for Defence witnesses on the Prosecution, Continuing jurisdiction of the Chamber which ordered the protection measures over material and evidence sealed including in other case, Disclosure obligation of the prosecutor : prosecution obliged to seek the permission of the original Trial Chamber if it wishes to use closed session testimony from other proceedings for reason other than to fulfil its disclosure obligations under the Rules – Methods to obtain the evidence, Evidence obtained in violation of a prior ruling of the Chamber, No automatic exclusion of all unlawfully obtained evidence, Appreciation of the prejudice to the Defence – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rules 68, 75 (F) and 95

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Elizaphan and Gérard Ntakirutimana, Decision on the Motion of the Defence to Strike the Testimony of Witness YY, 5 November 2001 (ICTR-96-10 and ICTR-96-17) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Prosper Mugirnaeza's Renewed Motion to Exclude His Custodial Statements from Evidence, 4 December 2003 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on Disclosure of Transcripts and exhibits of Witness X, 3 June 2004 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. Elie Ndayambaje, Decision on Ndayambaje's Confidential Motion to Have Detainee Testimony Declared Inadmissible, 25 October 2004 (ICTR-96-8) ; Appeals Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Prosecution Appeal of Witness Protection Measures, 16 November 2005 (ICTR-99-50)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Radoslav Brđanin, Decision on the Defence "Objection to Intercept Evidence", 3 October 2003 (IT-99-36)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of "Casimir Bizimungu, Justin Mugenzi and Jérôme Bicamumpaka's Written Submissions Concerning the Issues Raised at the Hearing of 31 March 2006 in Relation to the Cross-Examination of Witness Augustin Kayinamura (Formerly Inga)", filed on 2 April 2006 (the "Motion");

CONSIDERING the "Prosecutor's Response to Mugenzi Bizimungu and Bicamumpaka's Written Submissions Concerning the Issues Raised at the Hearing of 31 March 2006 in Relation to the Cross-Examination of Witness Augustin Kayinamura (Formerly INGA)", filed on 10 April 2006 (the "Response");

RECALLING the Chamber's Oral Ruling of 20 February 2004 regarding access to and use of closed-session testimony from other proceedings before the Tribunal;

HEREBY DECIDES the matter solely on the basis of the briefs of the parties pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules").

Introduction

1. At the hearing of 31 March 2006, during its cross-examination of Defence Witness Augustin Kayinamura (formerly INGA), the Prosecution sought to use the transcript of prior testimony given by the witness in closed session in the matter of the *Prosecutor v. Gacumbitsi*. The Defence objected to the Prosecution's use of the transcript on the grounds that (i) the transcript had not been communicated to the Defence in advance, which was a violation of the established practice of this Chamber; and (ii) the use of closed session testimony from another trial before the Tribunal during open session and without the permission of the Chamber that ordered the closed session is a violation of that Chamber's order as well as prior orders of this Chamber. Alternatively, the Defence argued that if the Prosecution is allowed unfettered access to all closed session transcripts from all proceedings before the Tribunal, then the principle of equality of arms requires that the Defence must also have such access.

2. The Prosecution acknowledged that its use of the transcript in open session was improper, but that the remedy was simply to move to closed session. Nonetheless, the Prosecution argued that its use of the closed session testimony was proper as the Prosecution is a single entity that is party to all proceedings before the Tribunal.

3. The Chamber requested written submissions on the issues raised; the Defence filed its joint Motion on 3 April 2006, and the Prosecution filed its response on 10 April 2006.

Deliberations

Advance Communication of Documents to be Used in Cross-Examination

4. The Chamber reaffirms its Oral Rulings of 26 October 2004[1] and of 5 October 2006,[2] where it directed that a party seeking to use a document in cross-examination must, prior to the commencement of its cross-examination, inform the other side and provide a copy of the document to opposing counsel.

[1] T. 26 October 2004, pp. 26-27.
[2] T. 5 October 2006, pp. 2-8.

Access to, and Use of, Closed Session Transcripts from Other Proceedings

5. The Parties disagree over the interpretation of Rule 75 (F) and the Appeals Chamber's Decision of 16 November 2005 regarding the effect of witness protection measures granted for Defence witnesses on the Prosecution.[3] The Prosecution implies that the addition of subsection (F) to Rule 75 and the subsequent Appeals Chamber decision effectively overruled this Chamber's Oral Ruling of 20 February 2004, which required any party who seeks access to closed session transcripts from another proceeding to make an application to the original Chamber which ordered the closed session for permission to access the transcript. The Prosecution argues that the effect of the Appeals Chamber's ruling that the Prosecution is party to all proceedings suggests, by inference, that the Prosecution is not required to seek permission to access and use protected materials in cross-examination. The Defence argues that Rule 75 (F) is limited to the context of the Prosecution's disclosure obligations under the Rules, and that the Appeals Chamber's decisions affirmed this.

6. Rule 75 (F) states, "Once protective measures have been ordered in respect of a … witness" in one case, such protective measures "shall continue to have effect *mutatis mutandis*" in any other case, but "shall not prevent the Prosecutor from discharging any disclosure obligation" in another case. The original Chamber retains continuing jurisdiction over material and evidence sealed pursuant to a protective order. A protected witness' subsequent actions, including giving unprotected testimony in another trial, are irrelevant to the continuing applicability of the original protective order.

7. In the *Bizimungu* Appeals Chamber Decision, the Appeals Chamber relied on its 6 October 2005 decision on a similar matter in the *Prosecutor v. Bagosora*, where it found that underlying Rule 75 (F)

> "is the proposition that evidence gained by one Prosecution team without the knowledge of others 'may suggest the innocence or mitigate the guilt of an accused in another case, or affect the credibility of Prosecution evidence in that other case'".[4]

The *Bagosora* Appeals Chamber Decision held that witness protection orders should not be construed as restricting the Prosecution's disclosure obligations under Rule 68 of the Rules. Members of the Prosecution working on any proceedings before the Tribunal should be able to access any exculpatory material for purposes of disclosure, even if that material is protected by order of another Trial Chamber.[5] The *Bizimungu* Appeals Chamber Decision confirmed this ruling.[6] In the Chamber's view, the Appeals Chamber's rulings are limited to circumstances involving the Prosecution's disclosure obligations under Rule 68.[7] The Appeals Chamber did not state that the Prosecution shall have access to all closed session transcripts in all cases for all purposes.

8. Based upon the above-referenced decisions of the Appeals Chamber, Rule 75 (F), and this Chamber's Oral Ruling of 20 February 2004, the Chamber finds that the Prosecution is obliged to seek the permission of the original Trial Chamber if it wishes to use closed session testimony from other proceedings for any reason other than to fulfil its disclosure obligations under the Rules. Here, the

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[3] *Prosecutor v. Bizimungu*, Decision on the Prosecution Appeal of Witness Protection Measures (AC), 16 November 2005 ("*Bizimungu* Appeals Chamber Decision").
[4] *Prosecutor v. Bagasora et al.*, Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005, para. 45 ("*Bagosora* Appeals Chamber Decision").
[5] *Bagosora* Appeals Chamber Decision, para. 44.
[6] *Bizimungu* Appeals Chamber Decision, para. 4.
[7] While the *Bagosora* and *Bizimungu* Appeals Chamber Decisions involved disclosure under Rule 68, the plain language of Rule 75 (F), which refers explicitly to "any disclosure obligations under the Rules", and the jurisprudence of other Trial Chambers suggests that Rule 75 (F) authorizes the Prosecution to disclose otherwise protected materials in fulfilment of any disclosure obligation under the Rules. For example, *Prosecutor v. Nahimana et al.*, Case N°ICTR-99-52-T, Decision on Disclosure of Transcripts and Exhibits of Witness X, 3 June 2004, paras. 4, 6 (disclosure of closed session testimony pursuant to Rules 66 (A) (ii) authorized without prior permission of original Trial Chamber pursuant to Rule 75 (F)).

Prosecution should have sought the permission of the *Gacumbitsi* Chamber before using the closed session testimony for the purpose of cross-examination.

Exclusion of the Testimony Elicited Using the Closed-Session Transcripts

9. The Parties also disagree as to the appropriate remedy, if any. The Defence requests that the portions of the cross-examination arising from the closed session transcript be stricken from the record pursuant to Rule 95 of the Rules. The Prosecution argues that it obtained the evidence by proper means, and that Rule 95 was therefore inapplicable in this instance. In addition, the Prosecution argues that although it has not complied with the Chamber's practice direction regarding the provision of materials to the opposing party before their use during cross-examination, any potential resulting prejudice was avoided. Moreover, any violation of the *Gacumbitsi* Chamber's closed session order was cured when the Chamber ordered that the cross-examination proceed in closed session.

10. Rule 95 of the Rules provides that

> "no evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings".

11. The Chamber is of the view that the methods used by the Prosecution to obtain the closed session transcripts did nothing to cast any doubt on their reliability, or the reliability of the cross-examination testimony arising from these transcripts during the 31 March 2006 hearing.[8]

12. The remaining question is whether admission of testimony elicited using the closed session transcripts obtained in violation of a prior ruling of this Chamber as well as the protective orders of the *Gacumbitsi* Chamber is "antithetical to, and would seriously damage, the integrity of the proceedings". The Chamber notes that Rule 95 does not require automatic exclusion of all unlawfully obtained evidence.[9] Rather,

> "in applying the provisions of Rule 95, this Tribunal considers all the relevant circumstances and will only exclude evidence if the integrity of the proceedings would indeed otherwise be seriously damaged".[10]

13. The closed session transcripts from *Gacumbitsi* were used to ask the Witness questions regarding his ethnicity, his knowledge of an alleged warrant for his arrest for genocide in Rwanda, and whether he was involved in killing a household servant named Bimenyimana. The Prosecution argues that the Defence needed no prior preparation for these three simple questions and thus was not prejudiced. The Accused do not claim they were prejudiced or otherwise explain why exclusion of the relevant testimony is necessary in order to avoid serious damage to the integrity of the proceedings. Indeed, during the hearing of 31 March 2006, Defence Counsel for Accused Mugenzi, stated

> "in this particular case, the mischief, if any, may be small. And we're not talking about, if I can use the crude expression, putting the toothpaste back in the tube."[11]

14. The Chamber considers the following circumstances relevant to the issue raised regarding the integrity of the proceedings under Rule 95:

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[8] Compare, *Prosecutor v. Ndayambaje*, Case N°ICTR-96-8-T, Decision on Ndayambaje's Confidential Motion to Have Detainee Testimony Declared Inadmissible (TC), 25 October 2004, para. 18 ("Given that the concerned evidence were testimonies given under oath or affirmation before the Chamber, the Chamber finds that, the Defence fails to show that the evidence these detained witnesses has given was obtained by methods which cast substantial doubt on its reliability …").
[9] *Prosecutor v. Brdanin*, Case N°IT-99-36-T, Decision on the Defence "Objection to Intercept Evidence" (TC), 3 October 2003, para. 54.
[10] *Prosecutor v. Bizimungu et al.*, Case N°ICTR-99-50-T, Decision on Prosper Mugirnaeza's Renewed Motion to Exclude His Custodial Statements from Evidence, 4 December 2003, para. 29; *Brdanin*, Decision on the Defence "Objection to Intercept Evidence", para. 61.
[11] T. 31 March 2006, p. 35.

- The prejudice to the Accused, if any, caused by the Prosecution's violation of the *Gacumbitsi* Chamber's protective order was small;
- It is in the interest of justice that the parties place all available evidence before the Trial Chamber and that the Chamber hears and evaluates such evidence;[12]
- The Prosecution's use of the closed-session transcript was based on a colourable, if mistaken, interpretation of Appeals Chamber jurisprudence that it mistakenly believed had changed the prior procedure regarding use of closed-session testimony from other proceedings, as opposed to a blatant disregard of that procedure;
- The evidence sought to be excluded is not the wrongfully obtained closed-session transcripts themselves, but rather testimony given under oath in answer to questions arising from these transcripts, and subject to re-examination by the Defence for Mugenzi.

In the Chamber's view these circumstances do not require exclusion in order to prevent serious damage to the integrity of the proceedings.

15. The Chamber stresses that the admission into evidence of the testimony arising from the wrongfully obtained closed-session transcripts does not imply approval by the Chamber of the means by which the transcripts were obtained.

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the Motion in part;

DECLARES that it is the general practice established by this Chamber that a party seeking to use a document in cross-examination must, prior to the commencement of its cross-examination, inform the other side and provide a copy of the document to opposing counsel;

ORDERS that the Prosecutor shall not, without leave of the original Trial Chamber, use material sealed by that Chamber for any purpose other than in fulfilment of its disclosure obligations under the Rules;

DENIES the Defence Motion in all other respects.

Arusha, 1 November 2006.

[Signed] : Khalida Rachid Khan ; Lee Gacuiga Muthoga ; Emile Francis Short

[12] *Prosecutor v. Ntakirutimana*, Case N°ICTR-96-10-T and ICTR-96-17-T, Decision on the Motion of the Defence to Strike the Testimony of Witness YY, 5 November 2001 para. 13.

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Decision on Prosecution Motion for Full Compliance with Rule 73 ter and Variation of Chamber's Decision of 27 June 2005 Rules 69, 73 (A), 73 ter (B), and 75 (I) of the Rules of Procedure and Evidence 20 November 2006 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge ; Lee Gacuiga Muthoga ; Emile Francis Short

Jérôme Bicamumpaka, Casimir Bizimungu, Justin Mugenzi and Prosper Mugiraneza – Request for assignment of confidential status to samples of witness testimony summaries – Obligation of the Defence to provide copies of the written statements of each witness it intends to call – Variation of the Defence witness protection measures, Risk potential to compromise the witnesses' privacy, safety and security, due to the potential for intimidation and coercion – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 69, 73 (A), 73 ter (B) and 75 (I)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Defence Motion for Reconsideration of Special Protective Measures for Witness 'T'", 6 March 2006 (ICTR-98-44)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of the "Prosecutor's Motion for Full Compliance with Rule 73 *ter* and Variation of Order (h) in the Decision on Dr. Casimir Bizimungu's Motion for the Protection of Defence Witnesses Dated 27 June 2005, Pursuant to Rules 69, 73 (A), 73 *ter* (B), and 75 (I)", filed on 25 May 2006 (the "Motion");

CONSIDERING the "*Réponse Confidentielle de Casimir Bizimungu à la Requête du Procureur Intitulée*: Prosecutor's Motion for Full Compliance with Rule 73 *ter* and Variation of Order (h) in the Decision on Dr. Casimir Bizimungu's Motion for the Protection of Defence Witnesses Dated 27 June 2005 Pursuant to Rules 69, 73 (A), 73 *ter* (B), and 75 (I)", filed on 30 May 2005 (the "Response");

NOTING Prosper Mugiraneza's Memorandum on Prosecutor's Motion for Full Compliance with Rule 73 *ter* and Variation of Order (h) in the Decision on Dr. Casimir Bizimungu's Motion for the Protection of Defence Witnesses Dated 27 June 2005 Pursuant to Rules 69, 73 *ter* (B), and 75 (I)", filed on 13 June 2006 (the "Memorandum"), and the *Corrigendum* thereto, filed on 1 September 2006 (the "*Corrigendum*");

NOTING ALSO the oral submissions made by the Parties, concerning the Motion, during the proceedings in this case of 21 August 2006;

NOW DECIDES the matter solely on the basis of the briefs of the parties, pursuant to Rule 73 (A).

Introduction

1. In its Motion, the Prosecution seeks two types of relief relating to the witnesses to be called to testify in Casimir Bizimungu's defence. Firstly, the Prosecution seeks an order which will compel the Bizimungu Defence to furnish the Prosecution with full witness statements for its witnesses. Secondly, the Prosecution seeks an order varying Order (h)[1] of the Trial Chamber's Decision on Casimir Bizimungu's Motion for Protection of Defence Witnesses, of 27 June 2005, so as to require Casimir Bizimungu to provide the Prosecution with the personal particulars of his witnesses.[2]

2. Although the Bizimungu Defence filed a Response on 30 May 2005 which opposed the Motion in principle, it subsequently disclosed to the Prosecution, and filed with the Chamber, the following materials:[3]

> (i) Witness statements and will say statements for alibi witnesses (seven witnesses in total), including the witnesses' full names, addresses and telephone numbers; and
>
> (ii) Witness statements and will say statements for the witnesses it intended to call to testify during the trial session which took place between August and October 2006, including:
>
> - each witness' full name,
> - the name of his or her father and mother,
> - the witness' date and place of birth,
> - the witness' religion,
> - the witness' address in 1994,
> - the witness' occupation in 1994, and,
> - in relation to Rwandan witnesses, the witness' ethnicity.

3. On 13 June 2006, the Defence for Prosper Mugiraneza filed a Memorandum in relation to the Motion, submitting that the Motion was without merit and should be denied.

4. During the proceedings in this case of 21 August 2006, the Defence for Casimir Bizimungu requested that the Prosecution withdraw its Motion in light of the disclosure of the materials outlined in paragraph two, above. The Prosecution declined to withdraw the Motion.[4]

5. The Chamber notes that the relief sought by the Prosecution specifically relates to the Accused Casimir Bizimungu. This is made clear by the fact that the Prosecution specifically seeks to vary Order (h) of this Chamber's Decision on protective measures for Casimir Bizimungu's witnesses. The Motion does not seek any general relief. Accordingly, the Chamber considers the merits of the Motion

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[1] Order (h) states: "The disclosure to the Prosecution of the names, addresses, whereabouts of, and other identifying data which reveal or may identify Defence witnesses, and any other information in the supporting material on the file with the Registry is prohibited until such time as the Chamber is assured that the witnesses have been afforded an adequate mechanism for protection. The Defence is authorised to disclose any material to the Prosecution in a redacted form until such a mechanism is in place, and in any event, the Defence is under no obligation to reveal the identifying data to the Prosecutor sooner than twenty-one (21) days before the witness is due to testify at trial, unless the Chamber decides otherwise pursuant to Rule 69 (A) of the Rules."

[2] The Prosecution seeks the Order to be varied so as to require the provision of the following details with respect to Casimir Bizimungu's witnesses: (1) date and place of birth; (2) name of parents; (3) religion; (4) ethnicity; (5) occupation in 1994; (6) address in 1994; (7) current address.

[3] Refer to filings of 9 June 2006.

[4] T., 21 August 2006, pp. 4-5.

solely on the basis of the Prosecution's brief, as required by Rule 73 (A) of the Rules – that is, specifically with regard to the Accused Casimir Bizimungu.

Preliminary matter – Request for 'Confidential Status' to be assigned to Annexure

6. In its Response, the Defence seeks an order from the Chamber that the Annexure to the Prosecution Motion, which contains samples of witness testimony summaries previously disclosed to the Prosecution, be assigned confidential status, and removed from the public record. The basis for the Defence request is that the material concerned is extracted from the Defence's Pre-trial Brief, which was assigned confidential status. The Chamber has reviewed the material in question and notes that it contains brief and general summaries of the witness' testimony, and a reference to the witness' pseudonym. Due to the nature of the material concerned, the Chamber considers that assigning confidential status to this material is not required in order to safeguard the privacy and security of the witnesses concerned. The Chamber notes that there are different considerations in assigning confidential status to an entire Pre-trial Brief, which do not necessarily concern the particular pages which have been extracted from it. The Defence's application therefore falls to be rejected.

Regarding the provision of full witness statements by the Bizimungu Defence

7. The Prosecution Motion firstly seeks an order requiring the Defence to provide full witness statements for its witnesses. The Motion does not specify in respect of which witnesses full statements are sought, therefore the Chamber considers that the Motion is seeking the provision of full witness statements for all witnesses to be called in Casimir Bizimungu's defence. On 9 June 2006, the Bizimungu Defence provided either full witness statements, signed by each witness, or detailed will-say statements in respect of each witness who was to testify during the August to October trial session. The Chamber is therefore of the view that the provision of this material by the Defence has rendered the first part of the Prosecution's Motion moot, as regards the witnesses in relation to whom the 9 June 2006 disclosure was made.

8. In relation to the provision of full witness statements, therefore, the issue which remains to be resolved is whether the Chamber should order the Bizimungu Defence to disclose full witness statements for its remaining witnesses (i.e. in relation to whom disclosure was not made on 9 June 2006).

9. In support of its request for an order requiring the provision of full witness statements, the Prosecution has relied upon Rule 73 *ter* of the Rules, seeking that the Defence be ordered to "comply strictly with the provisions of Rule 73 *ter* (B)".[5] Rule 73 *ter*, entitled "Pre-Defence Conference", empowers the Chamber to hold a conference prior to the commencement, by the Defence, of its case.[6] Rule 73 *ter* (B) bestows a discretionary power upon the Chamber to make certain orders with respect to the management of the Defence case during such a conference and before the commencement of the Defence case (emphasis added). Rule 73 *ter* (B) also empowers the Chamber to order the Defence to provide copies of the written statements of each witness whom the Defence intends to call. Again, pursuant to the Rule, the Chamber is empowered to exercise that discretion during the Pre-Defence Conference.

10. On 31 October 2005, this Chamber in fact held a Pre-Defence Conference in accordance with the provisions of Rule 73 *ter*.[7] During that conference, the Chamber specifically considered whether or not it should grant the Prosecution's request to order the Defence (of each of the Accused) to provide full witness statements of the witnesses whom it intended to call, as provided for by Rule 73 *ter* (B) of

[5] See Prosecution Motion, p. 9.
[6] See Rule 73 *ter* (A).
[7] T., 31 October 2005 (closed session).

the Rules. After considering the submissions of both the Prosecution and Defence on this point, the Chamber declined to exercise its discretion in favour of the Prosecution's request.

11. The Chamber considers that the Prosecution's Motion amounts to an attempt to seek reconsideration of this Chamber's Rule 73 *ter* rulings of 31 October 2005. The grounds advanced for the relief sought – that since the Defence for Justin Mugenzi provided full witness statements to the Prosecution, the Bizimungu Defence should also be required to do so; and that the provision of full witness statements by the Bizimungu Defence will assist the Prosecution in preparing its case – were known to the Chamber on 31 October 2005. Furthermore, in deciding whether or not to exercise its discretion in favour of ordering the Defence to provide full witness statements to the Prosecution, the Chamber considered whether it was in the interests of justice to do so. The Chamber therefore does not consider that a new fact has been discovered that was not known to the Chamber on 31 October 2005, or that there has been a material change in circumstances since that date, or that there is reason to believe that its original Decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in injustice thereby warranting the exceptional remedy of reconsideration.[8] Accordingly, the Chamber declines to order that the Bizimungu Defence provide full witness statements of its remaining witnesses.

Regarding the request for variation of Order (h) of Chamber's Decision of 27 June 2005

12. Two matters remain to be considered regarding the Prosecution's request for a variation of Order (h) of 27 June 2005. The first matter is whether, with regard to Rule 75(I) of the Rules, the Prosecution has provided sufficient grounds for any change being made to the 21 day time stipulation in Order (h), such that a variation reducing, or disposing with, this time limit is warranted. The second matter is whether Order (h) should be varied so as to require the Defence to provide personal particulars of each of its witnesses, either forthwith, or on a date to be specified.

13. As regards the first matter – whether there are grounds for interfering with the 21 day time stipulation for the provision of personal information, in Order (h) – presently, the Defence is under no obligation to disclose identifying data to the Prosecutor sooner than 21 days before the witness is due to testify at trial. The Prosecution submits that this Order should be varied

> "in the interests of justice, judicial economy, fairness… and to enable the Prosecutor to have adequate information and time to conduct background investigation on the witnesses".[9]

14. The Chamber finds that the Prosecution has failed to adduce sufficient grounds to warrant an interference with the 21 day time stipulation in Order (h). In deciding whether or not to grant protective measures in respect of Casimir Bizimungu's witnesses, and in deciding the exact form such measures should take, the Chamber took into account a number of relevant matters, including its various powers and duties under the Statute and the Rules, as well as the material advanced in support of the application. The time stipulation in Order (h) was fixed after careful consideration of what was required to safeguard the privacy and security of the witnesses. Insufficient reasons have been advanced to merit an interference with this time stipulation.

15. As regards the second matter – whether Order (h) should be varied so as to require the Defence to provide full personal particulars of each of its witnesses – the Chamber considers that this part of the Prosecution Motion has been rendered moot, except in relation to that part of the Prosecution's request which seeks the disclosure of the current residential address for each of Casimir Bizimungu's witnesses. The Prosecution has advanced no reason as a basis for its request for the provision of Bizimungu witnesses' current residential address. The Chamber is of the view that revealing the

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[8] *Karemera et al.*, Case N°ICTR-98-44-T, Decision on Defence Motion for Reconsideration of Special Protective Measures for Witness 'T'", 6 March 2006, para. 3.
[9] Motion, para. 14.

current address of Defence witnesses has the potential to compromise the witnesses' privacy, safety and security, due to the potential for intimidation and coercion. It therefore declines to order the provision of Casimir Bizimungu's witnesses' current residential addresses to the Prosecution. Finally the Chamber notes that, having regard to its disinclination to interfere with the 21 day time stipulation in Order (h), the Defence will continue to be required to provide identifying information of its witnesses – other than the witness' current residential address – no sooner than 21 days before the witness is scheduled to testify at trial.

FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Prosecution Motion in its entirety; and

DENIES the Defence request for an order that the Annexure to the Prosecution Motion be filed confidentially.

Arusha, 20 November 2006.

[Signed] : Khalida Rachid Khan ; Lee Gacuiga Muthoga ; Emile Francis Short

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Decision on Casimir Bizimungu's Motion to Cancel Protective Measures for Defence Witness WFQ4
Rules 69 and 75 of the Rules of Procedure and Evidence
7 December 2006 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge ; Lee Gacuiga Muthoga ; Emile Francis Short

Casimir Bizimungu – Measures of protection for Defence witnesses, Will of the witness to testify, Consultation of the Victims and Witnesses Support Unit by the Chamber – Witness Protection Orders for Witnesses cancelled

International Instrument cited :

Rules of Procedure and Evidence, rules 69, 73 (A) and 75

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Chamber");

BEING SEIZED of the "Casimir Bizimungu's Motion to Cancel Protective Measures for Defence Witness WFQ4", dated on 17 October 2006, (the "Motion");

RECALLING the "Decision on Casimir Bizimungu's Motion for Protection of Defence Witnesses", dated 27 June 2005, and the "Reconsideration of Decisions on Protective Measures for Defence Witnesses Pursuant to Appeals Chamber Ruling of 16 November 2005", dated 17 February 2005 (together, the "Witness Protection Orders");

NOW DECIDES the matter solely on the basis of the briefs of the parties pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules");

Introduction

1. The Defence requests, pursuant to Rules 69 and 75 of the Rules, that the Chamber sets aside the protective measures for Witness WFQ4. It informs the Chamber that this witness wishes to testify unprotected under his true identity, and has no fear of reprisals.

Preliminary matter

2. The Chamber requested confidential submissions from the Witness and Victim Support Section of the Registry (the "WVSS") on the complete withdrawal of protective measures for Witness WFQ4, pursuant to Rule 69 (B) of the Rules. The WVSS expressed no objection to the complete withdrawal of protective measures.[1]

Discussion

3. The Witness Protection Orders, which presently remain in force, granted Protected Witness status to all potential Defence Witnesses for Casimir Bizimungu nominated to the Victims and Witnesses Support Unit in the proper format. The Defence is aware that cancellation of the Witness Protection Orders for Witness WFQ4 means that the Tribunal will not be responsible for his safety.

4. Based upon the clear indication from Counsel that Witness WFQ4 does not require the Tribunal's protection, and the expression of no objection from the WVSS, the Chamber is prepared to grant the request for cancellation of the Witness Protection Orders in respect of Witness WFQ4.

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the Defence Motion, and

CANCELS the Witness Protection Orders for Witness WFQ4

Arusha, 7 December 2006.

[Signed] : Khalida Rachid Khan ; Lee Gacuiga Muthoga ; Emile Francis Short

[1] Confidential communication from WVSS to Chambers dated 28 November 2006.

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Decision on Justin Mugenzi's Application for Certification for Interlocutory Appeal of the Decision on the Prosecution's Motion for Judicial Notice Rule 73 (B) of the Rules of Procedure and Evidence 11 December 2006 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge ; Lee Gacuiga Muthoga ; Emile Francis Short

Casimir Bizimungu and Justin Mugenzi – Edouard Karemera et al. Case – Certification for Interlocutory Appeal, Judicial Notice : alternative means for the Prosecution to meet its burden of proof on issues of fact, Issue of a possible interlocutory appeal of a judicial notice decision already discussed by the Appeals Chamber, Principle of inter partes proceedings,

International Instrument cited :

Rules of Procedure and Evidence, rule 73 (B)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Laurent Semanza, Judgement, 20 May 2005 (ICTR-97-20) ; Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora, Decision on Nsengiyumva Request for Certification to Appeal Decision on Exclusion of Evidence, 6 November 2006 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Motions for Reconsideration, 1 December 2006 (ICTR-98-44)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of "Justin Mugenzi's Application for Certification for Interlocutory Appeal (In Accordance with Rule 73 (B) of the Decision on Prosecutor's Motion for Judicial Notice", filed on 10 October 2006;

CONSIDERING the

(i) "Prosecutor's Response to Justin Mugenzi's Application for Certification for Interlocutory Appeal (In Accordance with Rule 73 (B)) of the Decision on Prosecutor's Motion for Judicial Notice", filed on 17 October 2006;

(ii) "Prosper Mugiraneza's Memorandum Related to Justin Mugenzi's Motion for Certification to Appeal", filed on 30 October 2006;

(iii) "Prosecutor's Response to Prosper Mugiraneza's *Memorandum* Related to Justin Mugenzi's Motion for Certification to Appeal", filed on 3 November 2006;

(iv) "Requête de Casimir Bizimungu en Certification et en Appui à La Requête en Certification de Justin Mugenzi Contre la Décision Intitulée : Decision on Prosecutor's Motion for Judicial Notice", filed on 5 November 2006;

(v) "Prosecutor's Response to Requête de Casimir Bizimungu en Certification et en Appui à La Requête en Certification de Justin Mugenzi Contre la Décision Intitulée : Decision on Prosecutor's Motion for Judicial Notice", filed on 9 November 2006;

(vi) "Casimir Bizimungu's Reply to the Prosecutor's Response to Requête de Casimir Bizimungu en Certification et en Appui à La Requête en Certification de Justin Mugenzi Contre la Décision Intitulée : Decision on Prosecutor's Motion for Judicial Notice", filed on 11 November 2006;

NOTING the

(i) *Prosecutor v. Karemera et al.*, Case N°ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2006;

(ii) *Prosecutor v. Kaeremera et al.*, Case N°ICTR-98-44-AR73(C), Decision on Motion for Reconsideration (AC), 1 December 2006;

HEREBY DECIDES the motion.

Introduction

1. On 22 September 2006 the Trial Chamber granted in part the Prosecution's Motion for Judicial Notice.[1] In so doing, it relied on the Appeals Chamber's Decision in *Karemera*, which clarified the nature of judicial notice under Rule 94 (A) of the Rules of Procedure and Evidence (the "Rules"), and directed that certain facts be recognized by the Trial Chamber as facts of common knowledge pursuant to that rule.[2]

2. The Defence for Mugenzi now seeks certification, under Rule 73 (B) of the Rules, to appeal the Trial Chamber's Decision on the Prosecutor's Motion for Judicial Notice. Mugiraneza supports Mugenzi's application, but suggests that he might not join Mugenzi in appealing if certification is granted. The Bizimungu Defence joins Mugenzi's application, and expresses its intention to file submissions with the Appeals Chamber if certification is granted. The Prosecution opposes Mugenzi's application and argues that Mugiraneza's and Bizimungu's submissions are improper.

3. On 1 December 2006, the Appeals Chamber dismissed three motions for reconsideration of the *Karemera* Appeals Chamber Decision.[3]

Preliminary issue

4. The Prosecution suggests that Mugiraneza's and Bizimungu's submissions are procedurally improper and frivolous, and prays that the Chamber dismiss them and sanction their respective Counsel. The Chamber disagrees with the Prosecution's characterization of Bizimungu's submissions, which clearly state his intention to join Mugenzi in seeking certification to appeal the Trial Chamber Decision.[4]

5. Mugiraneza's Memorandum is procedurally improper. Mugiraneza states that he does not seek certification to appeal, but offers arguments in support of Mugenzi's application and challenges the

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[1] *Prosecutor v. Bizimungu et al.*, Case N°ICTR-99-50-T, Decision on Prosecutor's Motion for Judicial Notice (TC), 22 September 2006 ("Trial Chamber Decision").

[2] *Prosecutor v. Karemera et al.*, Case N°ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2006 ("*Karemera* Appeals Chamber Decision).

[3] *Prosecutor v. Karemera et al.*, Case N°ICTR-98-44-AR73(C), Decision on Motions for Reconsideration (AC), 1 December 2006 ("*Karemera* Appeals Chamber Reconsideration Decision" or "Reconsideration Decision"). Each of the Accused in *Karemera et al* filed a separate motion for reconsideration.

[4] "Requête de Casimir Bizimungu en Certification et en Appui à La Requête en Certification de Justin Mugenzi Contre la Décision Intitulée : Decision on Prosecutor's Motion for Judicial Notice", para. 9. Even the title of the Motion makes Bizimungu's position clear.

Chamber's judicial notice of the existence of a non-international armed conflict. Nonetheless, the Chamber will consider Mugiraneza's arguments, as he was also affected by the Chamber's Decision.

6. The Chamber declines the Prosecution's invitation to dismiss the submissions and sanction the Counsel for Bizimungu or Mugiraneza.

Discussion

7. Rule 73 (B) states that leave to file an interlocutory appeal of a decision may be granted if the issue involved "would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" and where "immediate resolution may materially advance the proceedings".[5]

8. Judicial notice of a fact of common knowledge provides an alternative means for the Prosecution to meet its burden of proof on issues of fact, such as the existence of a non-international conflict. As such, the Chamber finds that the decision to take judicial notice is one that could significantly affect the outcome of the trial.[6] Therefore the Chamber will consider whether immediate resolution of the issues by the Appeals Chamber would materially advance the proceedings.

9. Mugenzi submits that immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings because there is serious doubt as to the correctness of the legal principles applied in the Trial Chamber Decision. According to Mugenzi and Bizimungu, the Trial Chamber is not bound to take judicial notice of the "facts of common knowledge" from the *Karemera* Appeals Chamber Decision. Mugenzi argues that the Trial Chamber misunderstood a question of fact for a question of law when it determined that it was bound to take judicial notice of certain specified facts.

10. Mugenzi adds that the Trial Chamber should grant certification so the Appeals Chamber can clarify the nature of the judicial notice taken. Mugiraneza argues that the *Karemera* Appeals Chamber Decision was based on the Appeals Chamber's misinterpretation of its judgement in *Semanza*, and that judicial notice should not be taken of "relevant facts", because this deprives the accused of the "right" to contest them.[7] Bizimungu argues that, because he did not have the opportunity to argue the issues before the Appeals Chamber, the Trial Chamber's application of the *Karemera* Appeals Chamber Decision to this case contravenes his right to be heard.

11. Mugenzi also argues that the Trial Chamber Decision was particularly unfair to him given that he had finished presenting his Defence before the Decision was rendered. Specifically, Mugenzi suggests that the consequence of the Trial Chamber Decision is that the Prosecution has been allowed to re-open its case and introduce factual evidence without allowing Mugenzi to respond. Mugenzi also argues that it is unfair for the Trial Chamber to take judicial notice of a fact after hearing contrary evidence. Bizimungu argues that fairness requires the Chamber to consider the stage of the proceedings and its own prior decisions before taking judicial notice of any fact.

12. The Appeals Chamber recently reaffirmed the principles of the *Karemera* Appeals Chamber Decision, stressing "whether a fact qualifies as 'a fact of common knowledge' under Rule 94 (A) is a

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[5] Rule 73 (B) of the Rules of Procedure and Evidence.

[6] "[A]llowing judicial notice of a fact of common knowledge – even one that is an element of an offence, such as the existence of a 'widespread or systematic' attack – does not lessen the Prosecution's burden of proof or violate the procedural rights of the Accused. Rather, it provides an alternative way that the burden can be satisfied, obviating the necessity to introduce evidence documenting what is already common knowledge". *Karemera* Appeals Chamber Decision, para. 37 (citing *Prosecutor v. Semanza*, Case N°ICTR-97-20-A, Judgement (AC), 20 May 2005, para. 192.

[7] The Chamber notes that, pursuant to Rule 94 (A) and the relevant jurisprudence, judicial notice may *only* be taken of relevant facts, and cannot be taken of irrelevant facts.

legal question" that "does not turn on evidence introduced in a particular case".[8] In dismissing the request for reconsideration, the Appeals Chamber addressed many of the arguments that Mugenzi and Bizimungu seek to raise on appeal if this Chamber were to grant certification.

13. Regarding the binding nature of the *Karemera* Appeals Chamber Decision on Trial Chambers, the Appeals Chamber stated:

> The Appeals Chamber recalls that in the Decision on Judicial Notice it determined that the Trial Chamber has no discretion to rule that a fact of common knowledge must be proved through evidence at trial. This determination was based on an interpretation of Rule 94 (A) of the Rules. The express language of this Rule does not allow the Trial Chamber the discretion to require proof of facts of common knowledge. Such discretion only exists for matters of judicial notice which fall within the ambit of Rule 94 (B) of the Rules, that is, adjudicated facts or documentary evidence from other proceedings of the Tribunal.[9]

In reaching this conclusion the Appeals Chamber considered and rejected submissions to the effect that (i) "failing to allow the Trial Chamber the discretion not to take judicial notice of a fact of common knowledge given the late stage of the trial proceedings, ... would be unfair to [Karemera] and the other Applicants", and (ii) "that even if the Appeals Chamber found a certain fact to be a fact of common knowledge, it does not necessarily follow that judicial notice of that fact must be taken in a particular case".[10] The Appeals Chamber rejected the request

> "to leave discretion to the Trial Chamber to decline to take judicial notice of facts of common knowledge, if, considering the stage of the proceedings or other facts, it believes that it is unfair to do so".[11]

14. In the Reconsideration Decision, the Appeals Chamber also addressed the argument that, because it purported to bind all trial chambers, the *Karemera* Appeals Chamber Decision violated "the principle of *inter partes* proceedings and was inconsistent with the *audi alteram partem* doctrine". Similar arguments were raised by Bizimungu in his submissions. The Appeals Chamber rejected this argument, noting that

> "[p]arties in other cases are not prevented from challenging the implication of the Decision on Judicial Notice in their respective cases in proceedings before their respective Trial Chambers".[12]

The parties have been afforded this opportunity in the case at hand.

15. The arguments raised by the Defence have already been considered and rejected by the *Karemera* Appeals Chamber Reconsideration Decision. Requesting the Appeals Chamber to revisit these legal principles would not materially advance the proceedings.[13]

FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Defence Application.

Arusha, 11 December 2006.

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[8] *Karemera* Appeals Chamber Reconsideration Decision, paras. 8, 11.
[9] *Karemera* Appeals Chamber Reconsideration Decision, para. 24.
[10] *Karemera* Appeals Chamber Reconsideration Decision, para. 22.
[11] *Karemera* Appeals Chamber Reconsideration Decision, para. 22.
[12] *Karemera* Appeals Chamber Reconsideration Decision, para. 27.
[13] See *Prosecutor v. Bagosora*, Case N°ICTR-98-41-T, Decision on Nsengiyumva Request for Certification to Appeal Decision on Exclusion of Evidence (TC), 6 November 2006, para. 4.

[Signed] : Khalida Rachid Khan ; Lee Gacuiga Muthoga ; Emile Francis Short

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Decision on Casimir Bizimungu's Extremely Urgent and Confidential Motion to Have Witness WDK Testify via Video link
Rules 54 and 90 (A) of the Rules of Procedure and Evidence
7 December 2006 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge ; Lee Gacuiga Muthoga ; Emile Francis Short

Casimir Bizimungu – Video link testimony, Unwillingness of the witness living an European country to come testify in Arusha, Genuine and well-founded good reason inability to come testify : demonstration of particular family obligations, Appreciation of the importance of the testimony, Video-link testimony does not affect the right to cross-examination – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 54 and 71

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 October 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Ntabakuze Motion to Allow Witness DK 52 to Give Testimony by Video-conference, 22 February 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. François Karera, Decision on Testimony by Video-link, 29 June 2006 (ICTR-01-74)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Duško Tadić, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, 25 June 1996 (IT-94-1)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding Judge, Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial chamber");.

BEING SEIZED of the "Requête confidentielle en extrême urgence du Dr Casimir Bizimungu en vue d'entendre le témoin WDK par voie de vidéoconférence", filed on 3 November 2006 (the "Motion");

CONSIDERING the "Prosecution response to Requête confidentielle en extrême urgence du Dr. Casimir Bizimungu en vue d'entendre le témoin WDK par voie de vidéoconférence", dated 8 November 2006 and filed on 9 November 2006;

Introduction

1. Defence Witness WDK resides in a European country and refuses to travel to Arusha to testify. The Defence asks that she be allowed to testify via video-link from The Hague or another suitable destination. It bases its request on Rules 54 and 71 of the Rules of Procedure and Evidence ("the

Rules"), arguing that the interests of justice and the rights of the Accused justify hearing her testimony in this manner.

2. The Prosecution asserts that he would not oppose the request provided that the Prosecution's right to cross-examination is guaranteed.

Discussion

3. Rule 90 (A) of the Rules states that witnesses shall, in principle, be heard directly by the Chambers. The seat of the Tribunal is in Arusha, and, under normal circumstances, witnesses travel to Arusha to give testimony. Although the Rules do not expressly provide for taking testimony by video-link, this option is well developed in the jurisprudence of the Tribunal as a means for receiving the testimony of witnesses who are unable or unwilling to travel to Arusha. A Chamber may authorize testimonies by video-link under Rule 54 of the Rules where it is in the interests of justice, based on a consideration of the importance of the testimony, the inability or unwillingness of the witness to attend and, whether a good reason has been adduced for that inability or unwillingness.[1] Where the witness is unwilling to attend, his refusal must be genuine and well-founded, giving the Chamber reason to believe that the testimony would not be heard unless the video-link is authorized.[2]

Importance of the testimony

4. The Defence intends to call Witness WDK as an alibi witness for the Accused. It submits that she is an important witness who is expected to testify that she saw the Accused in Kinshasa, D.R.C., several times between April and July 1994. The Chamber accepts that Witness WDK may have important testimony to give in this case.

Inability or Unwillingness to Attend

5. The Defence asserts that Witness WDK is a single-parent who is responsible for taking care of her five-year old son. The only other person who can care for the child is the witness' own mother, who normally lives with the witness. However, the witness' mother has been hospitalized for several months and is currently unable to perform this role. The witness is the only support available to her young son and her sick mother.

6. The Chamber notes the jurisprudence cited by the Defence in support of its application. These decisions allowed witnesses to testify via video-link due to their particular family obligations – they were nursing mothers with young children – which prevented them from travelling to The Hague to give testimony before the ICTY.

7. The Defence further submits that an additional reason for allowing testimony via video-link in this case is that the Witness is her family's only source of income, and her employment status does not allow her to leave work for more than a day. To support its argument, the Defence cites a decision from the *Karera* case in which the Chamber considered that:

> practical inconveniences related to family or work, do not in themselves justify testimonies through video-link. However a 10 % of the source of income of a refugee who supports a family

[1] *The Prosecutor* v. *Bagosora et al*., Case N°ICTR-98-41-T, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 October 2004 ; *Tadić*, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link (TC), 25 June 1996.
[2] *The Prosecutor v*. *Bagosora et al*., Case N°ICTR-98-41-T, Decision on Ntabakuze Motion to Allow Witness DK 52 to Give Testimony by Video-conference, 22 February 2005, para. 4.

is more than a "practical inconvenience". Furthermore, the concerns of the witness are based on his own past experience. The Chamber accepts his reason for refusing to travel to Arusha.[3]

8. The Defence has established that the particular family obligations of Witness WDK prevent her from travelling to Arusha. Thus, a good reason has been adduced for the inability of Witness WDK to attend.

9. The Prosecution's right to cross-examine the witness is guaranteed, and the Chamber finds that receiving Witness WDK's testimony via video-link will not prevent effective cross-examination by the Prosecution.

10. Accordingly, the Chamber, in the interests of justice, is prepared to authorize the taking of her testimony by video-link from The Hague or other such suitable venue that the Tribunal is able to arrange.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion in the following terms only:

AUTHORIZES the taking of Witness WDK's testimony by video-link from The Hague or other such suitable venue that the Tribunal is able to arrange;

REQUESTS the Registry, in consultation with the parties, to make arrangements for the testimony of proposed Witness WDK via video-link.

Arusha, 7 December 2006.

[Signed] : Khalida Rachid Khan ; Lee Gacuiga Muthoga ; Emile Francis Short

[3] *The Prosecutor v. Karera,* Case N°ICTR-01-74-T, Decision on Testimony by Video-link, 29 June 2006, para. 6.

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Decision on Casimir Bizimungu's Very Urgent Motion for an Order Applying Rule 70 to Specific Information to be Provided to the Defense by the United States Government
11 December 2006 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge ; Lee Gacuiga Muthoga ; Emile Francis Short

Jérôme Bicamumpaka, Casimir Bizimungu, Justin Mugenzi and Prosper Mugiraneza – Defence in the process of seeking information in the possession of the United States, Power of the Chamber to exclude evidence being considered irrelevant or lacking in probative value – Motion granted

International Instruments cited :

Rules of Procedure and Evidence, rules 70, 73, 89 (B) and 89 (C); Rules of Procedure and Evidence of the ICTY, Rule 70 ; Statute, art. 20

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

SITTING as Trial Chamber II: composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial Chamber"):

BEING SEIZED of "Casimir Bizimungu's View Urgent Motion for an Order Applying Rule 70 to Specific Information to be Provided to the Defense by the United States Government", filed on 2 November 2006 (the "Motion");

CONSIDERING the "Prosecutor's Response to Dr. Casimir Bizimungu's Very Urgent Motion for an Order Applying Rule 70 to Specific Information to be Provided to the Defence by the United States Government", filed on 9 November 2006 (the "Response").

CONSIDERING the Statue of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Article 20 of the Statute and Rule 70 of the Rules;

HEREBY DECIDES the matter solely on the basis of the briefs of the parties pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules").

Submissions

1. The Defence requests the Trial Chamber to issue an order for the provisions of Rule 70 to apply *mutantis mutandis* to any information to be provided to the Defence by the United States Government (the "U.S.") in response to the request by the Defence.

2. The Defence submits that the U.S. is prepared to provide information in response to the request upon the condition of confidentiality and only if the Trial Chamber issues an order expressly providing that the provisions of Rule 70 would apply to any information so provided. The U.S. further requires that the Defence sign an agreement equivalent to that which applies when information is provided by the U.S. to the Office of the Prosecutor.

3. The Defence quotes the Appeals Chamber in submitting that the purpose of Rule 70

"is to encourage States, organisations, and individuals to share sensitive information with the Tribunal. The Rule creates an incentive for such cooperation by permitting the sharing of information on a confidential basis and by guaranteeing information providers that the confidentiality of the information they offer and of the information's sources will be protected."[1]

While the protection of Rule 70 applies to information provided in confidence to the Prosecutor, the Defence submits that, in the Interests of justice, the same rule should apply to the Defence.

4. The Prosecutor submits that since the provisions of Rule 70 relate only to the Prosecutor and not the Defence, it is not open to the Defence to bring an application under that Rule. In response, the Defence argues that if the Prosecutor's assertion is true. It restricts the right of the Accused to adequate facilities to prepare his defence and the principle of equality of arms between the parties. The Defence believes that the information being sought from the U.S. contains material relevant to the preparation and presentation of the defence of the Accused.

5. The Prosecutor argues that the Defence application must fail because the Chamber has not been apprised as to the relevance and probative value of the information being sought, as required by Rule 89. The Prosecutor submits that the Chamber is being asked to consider the Motion based only upon the Defence's assessment of the nature and essence of the proposed evidence.

6. In response, the Defence argues that Rule 89 relates to the admissibility of evidence at trial, and not to the current situation. The Defence contends that it is not, at this stage, required to disclose the nature and character of the information being sought from the U.S. Government which information the latter seems willing to share with Casimir Bizimungu. The U.S. position is that information shared with either party before international tribunals should be subject to the same protection of confidentiality.

Deliberations

7. Rule 70 of the Rules of Procedure and Evidence reads as follows:

(A) Notwithstanding the provisions of Rules 66 and 67, reports, *memoranda*, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.

(B) If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence. that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

(C) If. after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance.

(D) If the Prosecutor calls as a witness the person providing or a representative of the entity providing information under this Rule, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on grounds of confidentiality.

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[1] *Prosecutor v. Milosevic,* Case N°IT-02-54-AR108bis and AR73.3. Public Version of the Confidential Decision on the interpretation and Application of Rule 70, 23 October 2002, at par. 19.

(E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to limitations contained in Sub-Rules (C) and (D).

(F) Nothing in Sub-Rule (C) or (D) above shall affect a Trial Chamber's power under Rule 89 (C) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

8. The language of Rule 70, as it stands within the ICTR Rules of Procedure and Evidence, does not envisage a Defence request for similar protection. The Rules of Procedure and Evidence of the International Criminal Tribunal for Yugoslavia, however, expressly provides that the provisions of Rule 70 "shall apply *mutatis mutandis* to specific information in the possession of the accused" so that a Trial Chamber may, upon an application by the Defence, afford it with the type of protection provided for by Rule 70.

9. The Chamber notes the Prosecutor's objections to the present application, which are based on the provisions of Rule 89 (B) and (C). Rule 89 (B) stipulates that

> In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

10. The Chamber takes the view that although the language of although the ICTR Rule 70 is limited to applications by the Prosecutor, broadening the ambit of that Rule to include applications by the Defence would serve to foster equality of arms between the Parties, is consistent with the Rule's rationale, and is, therefore "consonant with the spirit of the Statue".

11. At this stage of the proceedings, the Chamber is not required to make an assessment as to relevance and probative value of the information being sought. The Defence is in the process of seeking information in the possession of the U.S., which it believes is material to the presentation of its case. The U.S. is prepared to provide the requested information, but only on condition that it is afforded the protection of confidentiality guaranteed by Rule 70. Once the information has been obtained, it is still open to the Defence to decide on whether or not it wishes to present as evidence any testimony document or other material so provided to it. Should the Defence elect to present such evidence, it would be open to the Prosecutor to challenge it. Although any challenge by the Prosecutor would be subject to the limitations stipulated paragraphs (C) and (D) of Rule 70, sub-rule (F) clearly preserves the Chamber's power to apply the terms of Rule 89 (C) and exclude any evidence which it finds to be irrelevant or lacking in probative value

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the Motion; and

ORDERS that the provisions of Rule 70 shall apply *mutatis mutandis* to the specific information obtained by the Defence for Casimir Bizimungu from the Government of the United States in response to the Defence request of 16 August 2006.

Arusha, 11 December 2006

[Signed] : Khalida Rachid Khan ; Lee Gacuiga Muthoga ; Emile Francis Short

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Decision on Casimir Bizimungu's Motion in Respect of a Condition in the Special Services Agreement for Expert Witnesses 12 December 2006 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge ; Lee Gacuiga Muthoga ; Emile Francis Short

Casimir Bizimungu – Offer of payment of the Registrar to its potential expert witnesses conditional upon their being eventually qualified as expert witnesses by the Chamber, Purpose of the conditional payment term, Witness heard but not as an expert witness, Not acceptable as a general policy to request potential expert witnesses to gamble on whether or not the Tribunal will pay them for their work, Duty of fairness to the witness, Clause permissible in exceptional cases where the Registrar is of the opinion that there is no likelihood that the potential expert witness will be qualified as an expert by the Chamber – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 19, 33 (A) and 94 bis

International Cases cited :

I.C.T.R. : President of the Tribunal, The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali, Decision on the Appeal of the Registrar's Decision of 13 April 2005 with regard to Mr Edmond Babin, 18 April 2005 (ICTR-97-21)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Judgement, 17 December 2004 (IT-95-14/2)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of "Casimir Bizimungu's Motion in Support of Justin Mugenzi's Motion for a Review of the Registry's Decision to Include a Condition in Respect of Payment Within the Proposed Special Services Agreement to be Offered to Mr. Herman Cohen", filed on 8 July 2006 (the "Motion");

CONSIDERING

(i) Justin Mugenzi's Motion for a Review of the Registry's Decision to Include a Condition in Respect of Payment Within the Proposed Special Services Agreement to be Offered to Mr. Herman Cohen, filed on 6 July 2006 (the "Mugenzi Motion");

(ii) Justin Mugenzi's Notice of Withdrawal of Motions Dated 29 March and 4 July 2006 Concerning Witness Herman Cohen, filed 17 August 2006;

(iii) The Registrar's Submission in Respect of Casimir Bizimungu's Motion in Relation to the Remuneration of Proposed Expert Witnesses, filed 23 August 2006 (the "Registrar's Submissions");

NOTING that the Prosecution filed no Response;

NOW DECIDES the Motion:

Introduction

1. The Defence for Casimir Bizimungu moves the Chamber to order the Registrar to reconsider his decision to make offer of payment to its potential expert witnesses conditional upon their being eventually qualified as expert witnesses by the Chamber.

2. The same request was originally made by the Defence for Justin Mugenzi. The Defence for Casimir Bizimungu then joined with the Defence for Justin Mugenzi, adopting its submissions in their entirety, and requesting the same relief. The Defence for Justin Mugenzi subsequently withdrew its Motion; however the Defence for Casimir Bizimungu did not. The Registrar then filed submissions under Rule 33 (B) of the Rules.

Discussion

3. In his submissions, the Registrar clarifies that

> "[it] is standard procedure for the Registrar to attach a condition to the effect that remuneration will be based on the determination by the Chamber of the expertise of the proposed expert witness. This was based on a policy decision adopted in April 2005 following a Decision by the President dated 18 April 2005"[4487],

4. In that case, and following *a voir dire* hearing, the Trial Chamber in the case of *The Prosecutor v. Pauline Nyiramasuhuko et al.* ruled that a proposed expert brought by the Defence, Mr. Edmond Babin, did not in fact qualify as an expert witness. Nonetheless, the Trial Chamber allowed him to testify before the Tribunal as a factual witness. Following his testimony, a disagreement ensued between the Defence and the Registry over payment, with the Registry claiming that he should not be paid for his services as an expert witness, since he had not testified as such. The Defence claimed that there was nothing in the contract that made payment conditional upon the Chamber's qualification of the witness as an expert. The matter was raised before the President of the Tribunal, who, acting in exercise of his authority to review decisions of the Registrar under Rules 19 and 33 (A) of the Rules, ruled that the Accused did not have a "protective right or interest in the case that warrant[ed] a review of the Registrar's decision", and that the issues raised in the Motion did not threaten the interests of justice.[4488] Despite this jurisdictional ruling, the President recommended that the Registrar reconsider his decision in this particular case "in fairness to [Mr. Babin]", since the contract has not stated that his payment was conditional upon his qualification as an expert by the Tribunal, however recommended that in future "there is need for the Registry to clarify its position with regard to proposed expert witnesses who are not accepted as such by the Trial Chamber". The President further suggested that the Registrar's position could be conveyed in future contracts with proposed expert witnesses.[4489] Having reviewed the Decision of the President, this Chamber finds that the Decision does not amount to a policy ruling regarding the correctness of conditional payment clauses in all contracts for potential expert witnesses.

5. The Defence submits that the conditional payment offered by the Registrar for its expert witnesses violates its rights under Article 20 (4) (e) of the Statute, which provides the Accused with the right "[to] examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her." The Defence further submits that conditional payment violates the principle of equality of arms. The Chamber recalls that the Appeals Chamber has held that the principle of equality of arms is an aspect of the right to a fair trial. At a minimum, a fair trial must entitle the accused to adequate time and facilities for his or her defence, under conditions that do not place him or her at a

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[4487] The Registrar's Submissions, paragraph 6.
[4488] The Decision of the President, paragraph 11.
[4489] *Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case N°ICTR-97-21-T, Decision on the Appeal of the Registrar's Decision of 13 April 2005 with regard to Mr Edmond Babin, Decision of the President, 18 April 2005 (the "Decision of the President"), paragraph 12.

substantive disadvantage as regards his or her opponent.[4490] This right does not imply that the Chambers are charged to ensure parity of resources between the Prosecutor and the Defence, such as the material equality of financial or personal resource.[4491]

6. According to Rule 94 *bis*, the Party calling the expert witness must file the expert's statement with the opposing party as soon as possible and with the Chamber not later than twenty-one days before the expert is expected to testify.[4492] Within fourteen days, the opposing party is expected to notify the Chamber whether or not it accepts the witness' qualification as an expert, whether it accepts the expert witness statement, and whether it wishes to cross-examine the expert.[4493] Thus, inherent in the procedure laid down in the Rules is the risk that commissioned work by a potential expert will be challenged by the opposing party, and ultimately rejected by the Chamber.

7. Where an Accused is found to be indigent, the expenses of the Defence are borne by the Tribunal, including payment for the services of an expert witness. The Chamber understands that the purpose of the conditional payment term in the contract for services offered to the expert witness is aimed at managing the Tribunal's budgetary limitations and accounting obligations.[4494] The Defence submits that such a condition may discourage potential expert witnesses from agreeing to prepare a report or to testify for the Defence.

8. In the Chamber's opinion, it is not acceptable as a general policy to request potential expert witnesses to gamble on whether or not the Tribunal will pay them for their work. The Chamber finds that imposing such a risk on the witnesses themselves may lead to indigent Accused persons failing to secure the services of well-qualified experts, and ultimately depriving the Chamber of useful expert testimony relevant to the case. Such a situation may lead to a violation of the Accused's right to a fair trial by denying the Accused adequate facilities to prepare his or her defence. Thus, in order to protect the rights of the Accused, the Chamber directs the Registrar to reconsider his general policy regarding the terms the Registry offers to potential Defence expert witnesses in this case.

9. Nonetheless, the Chamber recognises that the Tribunal's resources are finite, and the Registrar must ensure that they are used fairly and efficiently. Whilst the Chamber does not find acceptable as a general policy the imposition of conditional payment clauses for potential expert witnesses, the Chamber considers that such a clause may be permissible in exceptional cases where the Registrar is of the opinion that there is no likelihood that the potential expert witness will be qualified as an expert by the Chamber. In such an exceptional case, a contractual provision stating that payment in full or in part for the services of the proposed expert witness will be conditional upon eventual qualification by the Chamber, would not compromise the Accused's rights, as provided for under the Statute.

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the Motion, in the following terms only:

DIRECTS the Registrar to reconsider his general policy regarding the terms the Registry offers to potential Defence expert witnesses in this case, in light of the Chamber's findings above.

Arusha, 12 December 2006.

[Signed] : Khalida Rachid Khan ; Lee Gacuiga Muthoga ; Emile Francis Short

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[4490] *Prosecutor v. Kordić et al.*, Case N°IT-95-1412-A, *Judgement* (AC), 17 December 2004, paragraph 175.
[4491] *Ibid*, paragraph 176.
[4492] Rule 94 *bis* (A) of the Rules of Procedure and Evidence.
[4493] Rule 94 *bis* (B) of the Rules of Procedure and Evidence.
[4494] The Registrar's Submissions, paragraph 10.

Le Procureur c. Jérôme BICAMUMPAKA, Casimir BIZIMUNGU, Justin MUGENZI et Prosper MUGIRANEZA

Affaire N° ICTR-99-50

Fiche technique: Jérôme Bicamumpaka

• Nom: BICAMUMPAKA

• Prénom: Jérôme

• Date de naissance: 1957

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: Ministre des affaires étrangères

• Date de confirmation de l'acte d'accusation: 12 mai 1999

• Chefs d'accusation: génocide, complicité dans le génocide, entente en vue de commettre le génocide, incitation directe et publique à commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date et lieu de l'arrestation: 6 avril 1999, au Cameroun

• Date du transfert: 31 juillet 1999

• Date de la comparution initiale: 17 août 1999

• Précision sur le plaidoyer: non coupable

• Date du début du procès : 6 novembre 2003

***

Fiche technique: Casimir Bizimungu

• Nom: BIZIMUNGU

• Prénom: Casimir

• Date de naissance: inconnue

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: Ministre de la santé

• Date de confirmation de l'acte d'accusation: 12 mai 1999

• Chefs d'accusation: génocide, complicité dans le génocide, entente en vue de commettre le génocide, incitation directe et publique à commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date et lieu de l'arrestation: 11 février 1999, au Kenya

• Date du transfert: 23 février 1999

• Date de la comparution initiale: 3 septembre 1999

• Précision sur le plaidoyer: non coupable

• Date du début du procès : 6 novembre 2003

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Fiche technique: Justin Mugenzi

• Nom: MUGENZI

• Prénom: Justin

• Date de naissance: 1949

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: Ministre du commerce

• Date de confirmation de l'acte d'accusation: 12 mai 1999

• Chefs d'accusation: génocide, complicité dans le génocide, entente en vue de commettre le génocide, incitation directe et publique à commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date et lieu de l'arrestation: 6 avril 1999, au Cameroun

• Date du transfert: 31 juillet 1999

• Date de la comparution initiale: 17 août 1999

• Précision sur le plaidoyer: non coupable

• Date du début du procès : 6 novembre 2003

***

Fiche technique: Prosper Mugiraneza

• Nom: MUGIRANEZA

• Prénom: Prosper

• Date de naissance: 1957

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: Ministre de la fonction publique et du travail

• Date de confirmation de l'acte d'accusation: 12 mai 1999

• Chefs d'accusation: génocide, complicité dans le génocide, entente en vue de commettre le génocide, incitation directe et publique à commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date et lieu de l'arrestation: 6 avril 1999, au Cameroun

• Date du transfert: 31 juillet 1999

• Date de la comparution initiale: 17 août 1999

• Précision sur le plaidoyer: non coupable

• Date du début du procès : 6 novembre 2003

Décision relative à la requête du Procureur en constat judiciaire Art. 94 (A) du Règlement 22 septembre 2006 (ICTR-99-50-T)

(Original : Français)

Chambre de première instance II

Juges : Khalida Rachid Khan, Présidente de Chambre ; Lee Gacuiga Muthoga ; Emile Francis Short

Jérôme Bicamumpaka, Casimir Bizimungu, Justin Mugenzi et Prosper Mugiraneza – Affaire Edouard Karemera et consorts – Constat judiciaire, Faits de notoriété publique : question de droit, Conclusion quant à des faits de la Chambre d'appel dans une autre affaire, Le constat judiciaire établi en vertu de l'article 94 (A) du Règlement est obligatoire, Décision de la Chambre d'appel de considérer qu'un fait est de notoriété publique s'impose à toutes les Chambres de première instance, Economie judiciaire – Requête acceptée pour les faits 6 et 7

Instrument international cité :

Règlement de Procédure et de preuve, art. 94 (A), 94 (B) et 98 bis

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Casimir Bizimungu et consorts, Décision relative a la Requête du Procureur en constat judiciaire de faits admis – Article 94 (B) du Règlement de procédure et de preuve, 10 décembre 2004 (ICTR-99-50) ; Chambre d'appel, Le Procureur c. Laurent Semanza, Arrêt, 20 mai 2005 (ICTR-97-20) ; Chambre de première instance, Le Procureur c. Casimir Bizimungu et consorts, Decision on Defence Motions Pursuant to Rule 98 bis, 22 novembre 2005 (ICTR-99-50) ; Chambre de première instance, Le Procureur c. Casimir Bizimungu et consorts, Decision on Justin Mugenzi's Application for Certification to Appeal the Trial Chamber's Decision on Defence Motions Pursuant to Rule 98 bis, 20 mars 2006 (ICTR-99-50) ; Chambre d'appel, Le Procureur c. Edouard Karemera et consorts, Décision faisant suite a l'appel interlocutoire interjeté par le Procureur de la décision relative au constat judiciaire, 16 juin 2006 (ICTR-98-44)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal ») ;

SIÉGEANT en la Chambre de première instance II, composée des juges Khalida Rachid Khan, Président, Lee Gacuiga Muthoga et Emile Francis Short (la « Chambre ») ;

SAISI de la requête du Procureur en constat judiciaire intitulée Prosecutor's Motion for the Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94 (A), déposée le 19 juillet 2006 (la « requête ») ;

CONSIDÉRANT les réponses ci-après :

i) Réponse de Casimir Bizimungu à la troisième requête du Procureur en constat judicaire intitulée *Prosecutor's Motion for the Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94*

(A), datée du 23 juillet 2006 et déposée le 24 juillet 2006 (la « Réponse de Casimir Bizimungu »)[4495] ;

ii) Response to the Prosecutor's Motion for the Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94 (A), datée du 3 août 2006 et déposée le 7 août 2006 (la « Réponse de Jérôme Bicamumpaka ») ;

iii) Prosper Mugiraneza's Reply to the Prosecutor's Motion for the Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94 (A), datée du 3 août 2006 et déposée le 7 août 2006 (la « Réponse de Prosper Mugiraneza ») ;

iv) Justin Mugenzi's Response to the Prosecutor's Motion for the Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94 (A), déposée le 14 août 2006 (la « Réponse de Justin Mugenzi ») ;

NOTANT que le Procureur n'a pas déposé de réplique aux réponses de la Défense ;

STATUE sur la requête, sur la seule base des mémoires déposés par les parties, conformément à l'article 73 (A) du Règlement.

Introduction

1. Le Procureur demande à la Chambre de dresser, en vertu de l'article 94 (A) du Règlement, le constat judiciaire des sept faits ci-après dont il dit qu'ils sont « de notoriété publique »[4496] :

Fait n°1

Entre le 6 avril 1994 le 17 juillet 1994, un génocide a été commis contre le groupe ethnique tutsi au Rwanda.

Fait n°2

Entre le 6 avril et le 17 juillet 1994, les citoyens rwandais autochtones étaient individuellement identifiés selon la classification ethnique suivante : Tutsis, Hutus et Twas.

OU

Entre le 6 avril 1994 et le 17 juillet 1994, au Rwanda, les Hutus, les Tutsis et les Twas étaient des groupes protégés visés par la Convention sur le génocide de 1948.

OU

Entre le 6 avril et le 17 juillet 1994, les citoyens rwandais autochtones étaient individuellement identifiés selon la classification ethnique suivante : Tutsis, Hutus et Twas, qui étaient des groupes protégés visés par la Convention de 1948 sur le génocide.

Fait n°3

La situation suivante existait au Rwanda entre le 6 avril et le 17 juillet 1994 : sur tout le territoire rwandais, des attaques généralisées ou systématiques ont été dirigées contre une population civile en raison de son appartenance ethnique tutsie. Au cours des attaques, certains Rwandais ont tué des personnes considérées comme étant des Tutsis et ont porté une atteinte grave à leur intégrité physique ou mentale. Ces attaques ont eu pour conséquence la mort d'un très grand nombre de personnes appartenant à l'ethnie tutsie.

[4495] Lorsque la Défense a déposé ladite réponse (original français), la traduction du document n'avait pas encore été révisée et n'était donc pas certifiée. [Note du traducteur].
[4496] Requête, par. 1.

Fait n°4

Entre le 6 avril 1994 et le 17 juillet 1994, il existait au Rwanda un conflit armé non international.

Fait n°5

Entre le 1er janvier et le 17 juillet 1994, le Rwanda était un des États parties à la Convention pour la prévention et la répression du crime de génocide (1948), puisqu'il y avait adhéré le 16 avril 1975.

Fait n°6

Entre le 1er janvier et le 17 juillet 1994, le Rwanda était un des États Parties aux Conventions de Genève du 12 août 1949 et au Protocole additionnel II auxdites Conventions adopté le 8 juin 1977, puisqu'il avait adhéré aux Conventions de Genève du 12 août 1949 le 5 mai 1964 et aux Protocoles additionnels à ces conventions de 1977 le 19 novembre 1984.

Fait n°7

Avant l'instauration du multipartisme au Rwanda en 1991, la fonction de bourgmestre présentait les traits suivants :

a) Le bourgmestre représentait le pouvoir exécutif à l'échelon communal.

b) Le bourgmestre était nommé par le Président de la République – qui mettait fin à ses fonctions – sur recommandation du Ministre de l'Intérieur.

c) Le bourgmestre avait autorité sur les agents de l'administration officiant dans sa commune.

d) Le bourgmestre avait des attributions de police dans le cadre du maintien de l'ordre.

2. La requête du Procureur se fonde sur une décision rendue récemment dans l'affaire *Karemera et consorts*[4497] par la Chambre d'appel qui, ayant conclu que la Chambre de première instance avait commis une erreur, a invité celle-ci à dresser, en application de l'article 94 (A) du Règlement, le constat judiciaire des faits ci-après :

> La situation suivante existait au Rwanda entre le 6 avril et le 17 juillet 1994 : sur tout le territoire rwandais, des attaques généralisées ou systématiques ont été dirigées contre une population civile en raison de son appartenance ethnique tutsie. Au cours des attaques, certains Rwandais ont tué des personnes considérées comme étant des Tutsis ou ont porté une atteinte grave à leur intégrité physique ou mentale. Ces attaques ont eu pour conséquence la mort d'un très grand nombre de personnes appartenant à l'ethnie tutsie[4498].
>
> Entre le 1er janvier 1994 et le 17 juillet 1994, un conflit armé non international s'est déroulé au Rwanda[4499].
>
> Entre le 6 avril 1994 et le 17 juillet 1994, un génocide a été perpétré au Rwanda contre le groupe ethnique tutsi[4500].

La Chambre d'appel saisie de l'affaire *Karemera,* a également conclu que la Chambre d'appel saisie de l'affaire *Semanza* avait entériné la décision de la Chambre de première instance de dresser le constat judiciaire des faits de notoriété publique suivants :

[4497] *Le Procureur c. Édouard Karemera et consorts*, affaire n°ICTR-98-44-AR73(C), Décision faisant suite à l'appel interlocutoire interjeté par le Procureur de la décision relative au constat judiciaire (Chambre d'appel), 16 juin 2006 (ci-après, la « Décision *Karemera* »).
[4498] Décision *Karemera*, par. 26 à 32.
[4499] *Id*.
[4500] *Ibid*., par. 33 à 38.

Entre le 6 avril et le 17 juillet 1994, les citoyens rwandais autochtones étaient individuellement identifiés selon la classification ethnique suivante : Tutsis, Hutus et Twas.

Entre le 1er janvier et le 17 juillet 1994, le Rwanda était un des Etats parties à la Convention pour la prévention et la répression du crime de génocide (1948), puisqu'il y avait adhéré le 16 avril 1975.

Entre le 1er janvier et le 17 juillet 1994, le Rwanda était un des États Parties aux Conventions de Genève du 12 août 1949 et au Protocole additionnel II auxdites Conventions adopté le 8 juin 1977, puisqu'il avait adhéré aux Conventions de Genève du 12 août 1949 le 5 mai 1964 et aux Protocoles additionnels à ces conventions de 1977 le 19 novembre 1984.

Avant l'instauration du multipartisme au Rwanda en 1991, la fonction de bourgmestre présentait les traits suivants :

a) Le bourgmestre représentait le pouvoir exécutif à l'échelon communal.

b) Le bourgmestre était nommé par le Président de la République – qui mettait fin à ses fonctions – sur recommandation du Ministre de l'Intérieur.

c) Le bourgmestre avait autorité sur les agents de l'administration officiant dans sa commune.

d) Le bourgmestre avait des attributions de police dans le cadre du maintien de l'ordre.

La Chambre d'appel saisie de l'affaire *Karemera* a estimé que ces faits étaient notoires et ne pouvaient raisonnablement souffrir aucune contestation.

3. Casimir Bizimungu, Jérôme Bicamumpaka et Justin Mugenzi rejettent l'intégralité de la requête. Prosper Mugiraneza a déposé des écritures relatives à la définition du caractère du conflit qui s'est déroulé au Rwanda en 1994 et exhorte la Chambre de première instance de ne pas dresser le constat judiciaire du fait n° 4 énoncé ci-dessus.

4. Une précédente requête du Procureur en constat judiciaire de faits de notoriété publique au titre de l'article 94 (A) du Règlement a été rejetée par la Chambre de première instance au motif qu'elle ne pouvait pas, au titre de l'article 94 (A), dresser le constat judiciaire de documents[4501].

Questions préliminaires

5. La Défense de Justin Mugenzi a déposé sa réponse en dehors du délai prescrit par la Chambre en expliquant qu'elle était requise par d'autres engagements. La Chambre estime que ce n'est pas un motif valable ; toutefois, eu égard à l'importance des questions en jeu, elle s'attachera à un examen approfondi des écritures de toutes les parties.

Délibération

6. L'article 94 (A) est ainsi libellé : « La Chambre de première instance n'exige pas la preuve de ce qui est de notoriété publique, mais en dresse le constat judiciaire ». Le constat judiciaire prévu par l'article 94 (A) du Règlement est obligatoire. Une fois que Chambre de première instance a conclu qu'un fait est « de notoriété publique » elle doit en dresser le constat judiciaire. C'est ainsi que la Chambre d'appel a déclaré ce qui suit dans l'arrêt *Semanza* :

> Comme la Chambre d'appel du TPIY l'a précisé dans l'affaire *Le Procureur c. Milošević*, l'article 94 (A) du Règlement fait « obligation » de dresser le constat judiciaire d'informations « notoires ». L'expression « de notoriété publique » s'applique aux faits qui ne sont pas

[4501] Décision relative à la requête du Procureur intitulée : *Prosecutor's Motion for Judicial Notice Pursuant to Rules 73, 89 and 94*, rendue le 2 décembre 2003, par. 25 et 26.

raisonnablement l'objet d'une contestation. En d'autres termes, il s'agit de faits communément admis ou universellement connus, tels que de grands faits historiques, des données géographiques ou les lois de la nature. Ces faits doivent non seulement être largement connus, mais aussi échapper à toute contestation raisonnable[4502].

La Chambre d'appel a également eu à statuer sur la définition qu'il convient de donner à la conclusion qu'un constat judiciaire doit être dressé en vertu de l'article 94 (A) du Règlement et a dit ce qui suit :

> La question de savoir si un fait remplit les conditions requises pour être considéré comme un « fait de notoriété publique » est d'ordre juridique. Par définition, la réponse ne saurait dépendre des éléments de preuve versés au dossier dans telle ou telle affaire. En conséquence, bien que la Chambre d'appel, lorsqu'elle réexamine les décisions de première instance, ait l'habitude de se ranger à la manière dont la Chambre de première instance a apprécié les éléments de preuve et aux conclusions que celle-ci en a tirées cette règle ne s'applique pas aux faits de notoriété publique[4503].

7. La Chambre de première instance ne peut admettre les arguments de la Défense selon lesquels les motifs invoqués par la Chambre d'appel à l'appui de la Décision *Karemera* et l'arrêt *Semanza* ne sont pas pertinents en l'espèce. Elle ne peut pas non plus soutenir, comme le fait Justin Mugenzi, que la question de savoir si un fait remplit les conditions requises pour être considéré comme un fait de notoriété publique est d'ordre factuel et que seule la Chambre de première instance peut y répondre. En droit, la Décision *Karemera* signifie que la décision de la Chambre d'appel de considérer qu'un fait est de notoriété publique et qu'un constat judiciaire doit en être dressé en vertu de l'article 94 (A) du Règlement s'impose à toutes les Chambres de première instance.

8. Selon Casimir Bizimungu, Jérôme Bicamumpaka et Justin Mugenzi, la Chambre de première instance ayant déjà rendu des décisions quant à la plupart des faits qui constituent le fondement de la présente requête, ceux-ci ne peuvent plus faire l'objet d'un nouveau procès, en vertu du principe de l'autorité de la chose jugée. Il appert de l'examen des décisions antérieures rendues par la Chambre de première instance relativement aux requêtes du Procureur en constat judiciaire que, sauf le fait n°4, aucun des autres faits susmentionnés n'a fait l'objet d'une requête déposée devant la Chambre de première instance en vertu de l'article 94 (A) du Règlement qui vise les faits de notoriété publique. La *première* de ces décisions, qui concernait une demande de constat judiciaire fondée sur les paragraphes (A) et (B) dudit article, n'avait trait à aucun des faits énoncés dans la requête dont la Chambre est actuellement saisie[4504]. Elle avait trait à certains *documents* et la Chambre avait conclu qu'elle ne pouvait dresser le constat judiciaire de documents au titre des faits de notoriété publique prévus à l'article 94 (A) du Règlement. La *deuxième* décision faisait suite à une requête déposée en vertu de l'article 94 (B) du Règlement qui porte uniquement sur des faits ou des moyens de preuve documentaires admis lors d'autres affaires portées devant le Tribunal[4505]. En revanche, le fait n°4 a déjà fait l'objet d'une requête déposée devant la Chambre de première instance en vertu de l'article 94 (A) du Règlement. Dans sa décision relative aux requêtes de la Défense intitulée *Decision on Defence Motions Pursuant to Rule* 98 *bis* rendue le 22 novembre 2005, la Chambre de première instance avait refusé de dresser le constat judiciaire du fait n°4 comme fait admis, ou comme fait de notoriété publique[4506]. En outre, dans une décision ultérieure relative à une requête de la Défense en autorisation d'interjeter appel de la décision intitulée *Decision on Defence Motions Pursuant to Rule* 98 *bis*, la Chambre de première instance avait conclu que la question de savoir si le conflit rwandais avait un

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[4502] Arrêt *Semanza* (ci-après, l' « arrêt *Semanza* »), par. 194.
[4503] Décision *Karemera*, par. 23.
[4504] Decision on Prosecutor's Motion for Judicial Notice Pursuant to Rules 73, 89 and 94, rendue le 2 décembre 2003.
[4505] *Le Procureur c. Casimir Bizimungu et consorts,* affaire n°ICTR-99-50-T, Décision relative à la requête du Procureur en constat judiciaire de faits admis, rendue le 10 décembre 2004.
[4506] Le Procureur c. Casimir Bizimungu et consorts, affaire n°ICTR-99-50-T, Decision on Defence Motions Pursuant to Rule 98 bis, rendue le 22 novembre 2005, par. 100.

caractère international ou non international n'avait pas encore été tranchée et qu'il était loisible à la Défense de présenter des éléments de preuve à ce sujet[4507]. La Chambre de première instance estime cependant que la décision rendue par la Chambre d'appel dans l'affaire *Karemera* s'imposant à toutes les Chambres de première instance, elle est tenue de réexaminer sa décision antérieure en la matière dans la mesure où elle est contraire à celle de la Chambre d'appel. En conséquence, l'argument fondé sur le principe de l'autorité de la chose jugée ne saurait être admis.

9. Casimir Bizimungu, Jérôme Bicamumpaka et Justin Mugenzi estiment que la requête est tardive et qu'y faire droit irait à l'encontre de l'objectif d'économie judiciaire et serait préjudiciable aux accusés qui ont déjà consenti des efforts considérables pour préparer leurs stratégies de défense[4508]. Selon la Défense de Mugenzi, faire droit à la requête serait particulièrement préjudiciable à celui-ci, étant donné que la présentation de ses moyens est presque achevée et qu'il aurait posé des questions supplémentaires à ses témoins s'il avait été informé plus tôt que le Procureur introduirait une autre requête en constat judiciaire[4509].

10. Lorsque la Chambre d'appel a dressé le constat judicaire de faits dont elle considère qu'ils sont de notoriété publique, les Chambres de première instance sont tenues de suivre ses conclusions. La Chambre doit dresser le constat judiciaire de tels faits quel que soit le stade de la procédure. La Chambre de première instance est aussi d'avis que qualifier un fait comme étant de notoriété publique va dans le sens de l'économie judiciaire en dispensant de l'obligation d'établir formellement des faits qui n'ont pas à être prouvés.

11. La Décision *Karemera*, par laquelle la Chambre d'appel invite la Chambre de première instance à réexaminer sa décision relative aux faits de notoriété publique en vertu de l'article 94 (A), porte sur les mêmes faits que ceux présentés par le Procureur dans sa requête comme faits n°1, 3 et 4. Les décisions de la Chambre d'appel s'imposant à elle, la Chambre de première instance dresse le constat judiciaire des faits n°1, 3 et 4 ci-dessus en vertu de l'article 94 (A) du Règlement.

12. La Chambre de première instance rappelle que la Chambre de première instance saisie de l'affaire *Semanza* avait notamment dressé, en vertu de l'article 94 du Règlement[4510], le constat judiciaire des faits n°5 et 6 susmentionnés et que sa décision avait été confirmée en appel par l'arrêt *Semanza*[4511] et entérinée par la Décision *Karemera*[4512]. En conséquence, la Chambre de première instance dresse, en vertu de l'article 94 (A) du Règlement, le constat judiciaire de ces deux faits qui sont des faits de notoriété publique.

13. En ce qui concerne le fait n°2, le Procureur demande que soit dressé le constat judiciaire de l'une des trois formulations qu'il a proposées. La première de celles-ci est tirée de la décision rendue par la Chambre de première instance dans l'affaire *Semanza* et approuvée par la Chambre d'appel. La deuxième est tirée de la décision rendue par la Chambre de première instance dans l'affaire *Karemera et consorts* et confirmée par la Chambre d'appel. La troisième est une fusion des deux premières. Aucune des deux premières formulations n'ayant été rejetée en appel, la Chambre dresse le constat judiciaire de la troisième formulation qui comprend l'ensemble des faits admis par la Chambre d'appel.

[4507] Le Procureur c. Casimir Bizimungu et consorts, affaire n°ICTR-99-50-T, Decision on Justin Mugenzi's Application for Certification to Appeal the Trial Chamber's Decision on Defence Motions Pursuant to Rule 98 bis, par. 11.
[4508] Réponse de Casimir Bizimungu, par. 33 à 43, 131, 134 à 149 et 150 à 158 ; *Response of Jérôme Bicamumpaka*, par. 17 à 19, 21 à 22 et 29 ; *Response of Justin Mugenzi*, par. 3 à 5.
[4509] Response of Justin Mugenzi, par. 4.
[4510] L'article 94 du Règlement correspondait exactement à l'époque, à l'article 94 (A) actuel.
[4511] Arrêt *Semanza*, par. 191 à 194.
[4512] Décision *Karemera*, par. 28 et 29.

14. Selon Casimir Bizimungu et Jérôme Bicamumpaka, le Procureur n'ayant pas établi en quoi le fait n°7 était pertinent au procès, ce fait n'a donc pas à être considéré comme un fait de notoriété publique[4513]. La Chambre de première instance partage cet avis. La Chambre d'appel, pour sa part, a relevé ceci dans l'arrêt *Semanza* :

> La Chambre d'appel souligne que l'on ne saurait se servir de l'article 94 du Règlement pour contourner la condition de base relative à la pertinence de la preuve et, partant, encombrer le dossier d'éléments qui, autrement, ne seraient pas reçus[4514].

Avant que la Chambre de première instance n'examine le point de savoir si un fait est un fait de notoriété publique dont le constat judiciaire peut être dressé en vertu de l'article 94 (A) du Règlement, encore faut-il que ce fait soit pertinent à l'espèce. Le Procureur ne s'est pas efforcé d'établir la pertinence du fait n°7 au procès, et la Chambre estime que contrairement aux faits n°1 à 6, la pertinence de ce fait n'est pas manifeste. Aussi, la Chambre ne dresse-t-elle pas le constat judiciaire du fait n°7 en vertu de l'article 94 (A) du Règlement relatif aux faits de notoriété publique.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT en partie à la requête et dresse, en vertu de l'article 94 (A) du Règlement, le constat judiciaire des faits de notoriété publique suivants :

i) Entre le 6 avril et le 17 juillet 1994, un génocide a été commis contre le groupe ethnique tutsi au Rwanda ;

ii) Entre le 6 avril et le 17 juillet 1994, les citoyens rwandais autochtones étaient individuellement identifiés selon la classification ethnique suivante : Tutsis, Hutus et Twas, qui étaient des groupes protégés visés par la Convention de 1948 sur le génocide ;

iii) La situation suivante existait au Rwanda entre le 6 avril et le 17 juillet 1994 : sur tout le territoire rwandais, des attaques généralisées ou systématiques ont été dirigées contre une population civile en raison de son appartenance ethnique tutsie. Au cours des attaques, certains Rwandais ont tué des personnes considérées comme étant des Tutsis et ont porté une atteinte grave à leur intégrité physique ou mentale. Ces attaques ont eu pour conséquence la mort d'un très grand nombre de personnes appartenant à l'ethnie tutsie ;

iv) Entre le 6 avril et le 17 juillet 1994, il existait au Rwanda un conflit armé non international ;

v) Entre le 1er janvier et le 17 juillet 1994, le Rwanda était un des Etats parties à la Convention pour la prévention et la répression du crime de génocide (1948), puisqu'il y avait adhéré le 16 avril 1975 ;

vi) Entre le 1er janvier et le 17 juillet 1994, le Rwanda était un des États Parties aux Conventions de Genève du 12 août 1949 et au Protocole additionnel II auxdites Conventions adopté le 8 juin 1977, puisqu'il avait adhéré aux Conventions de Genève du 12 août 1949 le 5 mai 1964 et aux Protocoles additionnels à ces conventions de 1977 le 19 novembre 1984 ;

REJETTE la requête en ce qui concerne le fait n°7.

Fait à Arusha, le 22 septembre 2006.

[Signé] : Khalida Rachid Khan ; Lee Gacuiga Muthoga ; Emile Francis Short

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[4513] Réponse de Casimir Bizimungu, par. 23, 163 et 164 ; *Response of Jérôme Bicamumpaka*, par. 28.
[4514] Arrêt *Semanza*, par. 189.

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The Prosecutor v. Simon BIKINDI

Case N° ICTR-2001-72

Case History

- Name: BIKINDI
- First Name: Simon
- Date of Birth: 1954
- Sex: male
- Nationality: Rwandan
- Former Official Function: Composer, singer and director of the performance group *Irindiro* Ballet
- Date of Indictment's Amendment: 22 October 2003
- Counts: Conspiracy to commit genocide, complicity in genocide, direct and public incitement to commit genocide, crimes against humanity (murder and persecution)
- Date and Place of Arrest: 12 July 2001, in Leiden, The Netherlands
- Date of Transfer: 27 March 2002
- Date of Initial Appearance: 4 April 2002
- Date Trial Began: 18 September 2006
- Date of Judgement and content of the Sentence: 2 December 2008, sentenced to 15 years imprisonment
- Case on Appeal

Decision on the Prosecutor's Motion for Protective Measures 7 June 2006 (ICTR-2001-72-PT)

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge ; Flavia Lattanzi ; Gberdao Gustave Kam

Simon Bikindi – Measures of protection for the witnesses, Need to safeguard the rights of the Accused and the security and the privacy of those victims and witnesses, Witness and Victims Support Section (WVSS) – Measures ordered

International Instruments cited :

Rules of Procedure and Evidence, rules 34 (A) (i), 54, 69, 69 (B), 73 and 75 ; Statute, art. 21

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca, presiding, Flavia Lattanzi, and Gberdao Gustave Kam;

BEING SEIZED, pursuant to Article 21 of the Statute of the Tribunal and Rules 54, 69, 73 and 75 of the Rules of Procedure and Evidence, of the Prosecutor's Confidential "Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment", filed on 12 September 2005 (Motion);

CONSIDERING the Confidential "Defence Reply to Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment", filed on 16 November 2005 (Reply);

RECALLING the Status Conference on 12 January 2006, where the Chamber requested the Prosecution to provide it with a list that specifies, for each witness or each group of witnesses, what protective measures are necessary;[1] and the Status Conference on 18 January 2006, where the Chamber again asked the Prosecution to indicate more precisely what protective measures were sought for which person, and where the Prosecution answered that all its witnesses wish not to be identified;[2]

CONSIDERING the Prosecution Confidential "Revised Request for Measures", filed on 17 January 2006 (Revised Request), where the Prosecution amended the Motion, and indicated (1) the potential Prosecution witnesses for which protection is sought, and (2) the potential Prosecution witness for which the right to protective measures is waived;

CONSIDERING Rule 34 (A) (i) of the Rules, whereby the Witness and Victims Support Section (WVSS) is expressly tasked with the duty to

> "[r]ecommend the adoption of protective measures for victims and witnesses in accordance with Article 21 of the Statute";

and Rule 69 (B) of the Rules, whereby

> "[i]n the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witness Support Unit";

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[1] Status Conference, T. 12 January 2006 p. 14.
[2] Status Conference, T. 18 January 2006 pp. 6-7.

RECALLING the Chamber's need to safeguard the rights of the Accused and the security and the privacy of those victims and witnesses who are in danger or at risk;

FOR THE ABOVE REASONS, THE CHAMBER

ORDERS that the names, addresses, whereabouts of, and any other identifying information concerning all potential Prosecution witnesses in the present case who seek protection be disclosed only to authorized WVSS personnel by the Prosecution in accordance with established procedures; and,

FURTHER ORDERS the WVSS to consult with each potential Prosecution witness seeking protective measures about the necessity for protection, and to determine the nature of the protection deemed necessary in order to implement appropriate protective measures, and to so inform the Chamber.

Arusha, 7 June 2006, in English.

[Signed] : Inés Mónica Weinberg de Roca ; Flavia Lattanzi ; Gberdao Gustave Kam

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Decision on Protective Measures for Prosecution Witnesses Article 21 of the Statute and Rules 33 (B), 54, 69, 73 and 75 of the Rules of Procedure and Evidence 4 September 2006 (ICTR-2001-72-T)

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge

Simon Bikindi – Measures of protection for the witnesses granted on a case-by-case basis, Demonstration of fears of the witnesses for their own safety or the safety of their family members justified by the general security situation in Rwanda, Use of pseudonyms, Disclosure of the identity of to the Defence in adequate time for preparation of its case, Prohibition to the Defence team and the Accused from sharing or revealing identifying information to any person or entity other than the Accused and persons designated as members of the Defence team, Need to safeguard the rights of the Accused and the security and the privacy of those victims and witnesses, Witness and Victims Support Section (WVSS) – Measures ordered

International Instruments cited :

Rules of Procedure and Evidence, rules 33 (B), 34 (A) (i), 54, 69, 69 (C), 73 and 75 ; Statute, art. 20, 21

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for M. Bernard Ntuyahaga, 13 September 1999 (ICTR-96-7) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 29 November 2001 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Jean Mpambara, Decision (Prosecutor's Motion for Protective Measures for Prosecution Witnesses), 30 May 2002 (ICTR-2001-

65) ; Trial Chamber, The Prosecutor v. Protais Zigiranyirazo, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 25 February 2003 (ICTR-2001-73) ; Trial Chamber, The Prosecutor v. Aloys Simba, Decision on Prosecution Request for Protection of Witnesses, 4 March 2004 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. Mikaeli Muhimana, Decision on Defence Motion for Protective Measures for Defence Witnesses, 6 July 2004 (ICTR-95-1B) ; Trial Chamber, The Prosecutor v. Théoneste Bagasora et al., Decision on Motion to Harmonize and Amend Witness Protection Measures, 3 June 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Tharcisse Renzaho, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes alleged in the Indictment, 17 August 2005 (ICTR-97-31) ; Trial Chamber, The Prosecutor v. Juvénal Rugambarara, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 31 January 2006 (ICTR-2000-59) ; Trial Chamber, The Prosecutor v. François Karera, Decision on Defence Motion for Protection of Witnesses, 9 February 2006 (ICTR-2001-74)

Introduction

1. The trial in the instant proceedings is set to begin the week of 11 September 2006. In its confidential Motion of 12 September 2005, the Prosecution moves the Chamber, under Article 21 of the Statute of the Tribunal (the "Statute") and Rules 54, 69, 73, and 75 of the Rules of Procedure and Evidence (the "Rules"), to issue protective orders for potential witnesses who have not affirmatively waived their rights to protective measures, and who may presently reside (i) in Rwanda, (ii) in other countries in Africa, and (iii) outside the continent of Africa.[1] The Prosecution submits that these potential witnesses fear for their safety and that these fears are justified by the dangers and insecurities described in the reports annexed to the Motion.

2. The Defence replies that the protective measures sought by the Prosecution should be denied for lack of a factual basis in support of the potential witnesses' alleged security concerns, and for infringement of the rights of the Accused.[2] The Defence argues that the Prosecution makes no attempt to show a connection between the alleged danger of threat, assault, or killing and the Accused in terms of time, place, or circumstance. The Defence further states that the Prosecution seeks to prohibit the Accused from personally possessing any material that contains any identifying information, except when he is in the presence of Counsel, and thus intrudes upon the rights of the Accused. Finally, the Defence submits that the security information provided by the Prosecution is outdated and cannot form a proper basis for an informed decision by the Chamber.

3. Pursuant to the Chamber's request at the Status Conference on 12 January 2006[3] the Prosecution amended the Motion on 17 January 2006.[4] The Prosecution indicated (1) the potential Prosecution witnesses for which protection is sought, and (2) the potential Prosecution witness for which the right to protective measures is waived.

4. In its Decision of 7 June 2006, the Chamber ordered the Witnesses and Victims Support Section ("WVSS"), pursuant to Rule 34 (A) (i) of the Rules, to "[r]ecommend the adoption of protective measures for victims and witnesses in accordance with Article 21 of the Statute".[5] The Chamber ordered WVSS

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[1] Confidential "Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment", 12 September 2005, para. 25 (the "Motion").
[2] Confidential "Defence Reply to Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment", 16 November 2005 (the "Reply").
[3] Status Conference, T. 12 January 2006, p. 14.
[4] Confidential "Revised Request for Measures", 17 January 2006 (the "Revised Request").
[5] "Decision on the Prosecutor's Motion for Protective Measures", 7 June 2006 (the "Decision of 7 June 2006").

"to consult with each potential Prosecution witness seeking protective measures about the necessity for protection, and to determine the nature of the protection deemed necessary in order to implement appropriate protective measures, and to so inform the Chamber."[6]

5. In its submissions to the Chamber pursuant to Rule 33 (B) of the Rules, the Registrar states that potential witnesses AKG, AHL, AJY, AKJ, BGH, AJS, AJC, AKK, AJZ, BHB, ALP, BHJ and AKE raised serious security concerns during interviews and in written affidavits.[7] The Registrar has recommended protective measures for these potential witnesses, which are implemented by the Chamber in the disposition below. The Registrar submits that the potential witnesses have these security concerns because of their professions, residences and names, and because some of their family members in their areas of residence were widely known during the 1994 genocide. As such, disclosure of their identities to the public may lead to serious reprisals against them.

Deliberations

6. Article 21 provides the Chamber with authority to order protective measures for victims and witnesses. Rule 75 elaborates several specific witness protection measures that may be ordered. Subject to these measures, Rule 69 (C) requires the identity of witnesses to be disclosed to the Defence in adequate time for preparation of its case.

7. Measures for the protection of witnesses are granted on a case-by-case basis. The jurisprudence of this Tribunal requires that the witnesses for whom protective measures are sought must have a real fear for their own safety or the safety of their families, and that there must be an objective justification for this fear,[8] as such protective measures are not automatically granted when security concerns are raised by the potential witnesses. These fears may be expressed by persons other than the witnesses themselves. Furthermore, measures for privacy and security of witnesses and victims must be consistent with the rights of the Accused, including his right to a fair and public trial and to adequate time and facilities for the preparation of his defence,[9] as guaranteed under Article 20 of the Statute.

8. The protective measures requested in the Motion include prohibiting public disclosure of identifying information of the potential witnesses, using pseudonyms in all communications between the Parties, and requesting the Defence team and the Accused to keep all identifying information confidential. The Chamber finds that such measures have been granted regularly by the Tribunal.

9. Both the Prosecution and the Registrar have submitted that the potential witnesses fear for their safety and that these fears are justified by the dangers and insecurities described in the reports attached as annexes to the Motion and the Registrar's Request. The Chamber has considered the general security situation in Rwanda, as well as the risks to victims and potential witnesses in and outside Rwanda described in the annexes to the Motion and the Registrar's Request. In light of the supporting material, the Chamber concludes that the fears expressed by potential Prosecution witnesses for their own safety or the safety of their family members, in and outside Rwanda, are justified.

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[6] The Decision of 7 June 2006.

[7] "The Registrar's [Confidential] Request for Protective Measures for Prosecution Witnesses", 25 August 2006, Annex I (the "Registrar's Request").

[8] *Prosecutor v. François Karera*, Decision on Defence Motion for Protection of Witnesses, 9 February 2006, para. 2; *Prosecutor v. Juvénal Rugambarara*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 31 January 2006, para. 9 (the "*Rugambarara Decision*"); *Prosecutor v. Tharcisse Renzaho,* Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 17 August 2005, paras. 7, 10 (the "*Renzaho Decision*"); *Prosecutor v. Mika Muhimana*, Decision on Defence Motion for Protective Measures for Defence Witnesses, 6 July 2004, para. 17 (the "*Muhimana Decision*"); *Prosecutor v. Aloys Simba*, Decision on Prosecution Request for Protection of Witnesses, 4 March 2004, para. 4; *Prosecutor v. Théoneste Bagosora*, Decision on the Extremely Urgent Motion Made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga, 13 September 1999, paras. 21, 28.

[9] *Rugambarara Decision*, para. 14; *Muhimana Decision*, para. 5; *Prosecutor v. Théoneste Bagosora et al.*, Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 29 November 2001, para. 16.

10. The Chamber has considered the Registrar's recommended protective measures for potential witnesses designated with the pseudonyms AKG, AHL, AJY, AKJ, BGH, AJS, AJC, AKK, AJZ, BHB, ALP, BHJ and AKE. The Chamber has carefully considered the protective measures in light of the prevailing security situation in Rwanda,[10] the fact that some of the potential witnesses continue to reside in the same areas as they did in 1994, and the fact that, if identified during their potential testimonies, before the Chamber, their lives may be endangered.

11. The Prosecution also seeks to prohibit the Accused from personally possessing any material that contains identifying information of witnesses, including redacted or unredacted witness statements, unless the Accused is, at the time of possession, in the company of Counsel. The Prosecution further requests that the authorities at the United Nations Detention Facility be instructed to ensure compliance with this prohibition. In the Chamber's view, the Accused should have access to identifying information, including witness statements.[11] Denying the Accused this right is unnecessarily restrictive in respect of his or her rights under Article 20.[12] The Chamber is satisfied that the protection of the Prosecution witnesses will be sufficiently guaranteed by prohibiting the Defence team and the Accused from sharing, or otherwise revealing, identifying information to any person or entity other than the Accused and persons designated as members of the Defence team.

12. The Prosecution moves the Chamber to grant deadlines for disclosure of non-redacted witness statements twenty-one (21) days before the witness is due to testify in court, rather than by reference to the date of commencement of the trial. Since the Prosecution disclosed identifying information and non-redacted witness statements for all potential witnesses on 11 July 2006, this request becomes moot.

FOR THE ABOVE REASONS, THE CHAMBER

I. GRANTS the Prosecution Motion in part, and accordingly

II. ORDERS that the names, addresses, whereabouts of, and other identifying information concerning potential Prosecution witnesses AKG, AHL, AJY, AKJ, BGH, AJS, AJC, AKK, AJZ, BHB, ALP, BHJ and AKE be sealed by the Registry and not included in any public or non-confidential records of the Tribunal;

III. ORDERS that the names, addresses, whereabouts of, and other identifying information concerning potential Prosecution witnesses AKG, AHL, AJY, AKJ, BGH, AJS, AJC, AKK, AJZ, BHB, ALP, BHJ and AKE be communicated only to WVSS personnel by the Registry in accordance with the established procedure, and only in order to implement protective measures for the concerned individuals;

IV. ORDERS that any names, addresses, whereabouts of, and other identifying information which might identify or assist in identifying potential Prosecution witnesses AKG, AHL, AJY, AKJ, BGH, AJS, AJC, AKK, AJZ, BHB, ALP, BHJ and AKE on file in the Tribunal's public records, or any other information which would reveal the identities of the concerned witnesses, be expunged from those documents;

V. PROHIBITS the disclosure to the public or the media, of the names, addresses, whereabouts of, and any other identifying data or any other information on file with the Registry, or any other information which would reveal the identity of potential Prosecution

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[10] The Registrar's Request, Annex II.

[11] *Rugambarara Decision,* para. 14; *Renzaho Decision,* para. 14; *The Prosecutor v. Kanyarukiga*, Decision on Prosecution Motion for Protective Measures, 3 June 2005, para. 4; *The Prosecutor v. Jean Mpambara*, Decision on Prosecutor's Motion for Protective Measures for Prosecution Witnesses, 29 May 2002, para. 22.

[12] *Rugambarara Decision,* para. 14; *The Prosecutor v. Protais Zigiranyirazo*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 25 February 2003, para. 15.

witnesses AKG, AHL, AJY, AKJ, BGH, AJS, AJC, AKK, AJZ, BHB, ALP, BHJ and AKE, as well as the photographing, audio and video recording, or sketching of any of these potential Prosecution witnesses, at any time or place, without leave of the Trial Chamber and Parties;

VI. ORDERS that the Accused or his Defence Counsel notify the Prosecution in writing and on reasonable notice of their wish to contact potential Prosecution witnesses AKG, AHL, AJY, AKJ, BGH, AJS, AJC, AKK, AJZ, BHB, ALP, BHJ and AKE. Upon receipt of such request, the Prosecution shall immediately, with the prior consent of the person sought to be contacted, undertake the necessary arrangements to facilitate such contact;

VII. ORDERS that the Defence shall provide WVSS with a designation of all persons working on the Defence team who will have access to any information concerning potential Prosecution witnesses AKG, AHL, AJY, AKJ, BGH, AJS, AJC, AKK, AJZ, BHB, ALP, BHJ and AKE, and shall advise WVSS in writing of any changes in the composition of this team and ensure that any member leaving the Defence team has remitted all materials that could lead to the identification of potential Prosecution witnesses AKG, AHL, AJY, AKJ, BGH, AJS, AJC, AKK, AJZ, BHB, ALP, BHJ and AKE.

VIII. ORDERS that the Accused and his Defence team keep confidential to themselves all information identifying potential Prosecution witnesses AKG, AHL, AJY, AKJ, BGH, AJS, AJC, AKK, AJZ, BHB, ALP, BHJ and AKE and shall not, directly or indirectly, disclose, discuss, or reveal any such information;

IX. ORDERS the Prosecution to submit a written request to the Chamber, or a Judge thereof, to lift the protective measures respecting potential Prosecution witnesses AKG, AHL, AJY, AKJ, BGH, AJS, AJC, AKK, AJZ, BHB, ALP, BHJ and AKE, should those measures no longer be necessary after appropriate investigation and verification; and

X. FURTHER ORDERS that the pseudonyms presently provided by the Prosecution be used whenever referring to potential Prosecution witnesses AKG, AHL, AJY, AKJ, BGH, AJS, AJC, AKK, AJZ, BHB, ALP, BHJ and AKE during the Tribunal proceedings, communications, and discussions between the Parties to the trial and the public.

Arusha, 4 September 2006, in English.

[Signed] : Inés Mónica Weinberg de Roca

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Decision on Transfer of Detained Witnesses and Protective Measures for Prosecution Witnesses
Article 21 of the Statute and Rules 33 (B), 54, 69, 73, 75 and 90 bis of the Rules of Procedure and Evidence
14 September 2006 (ICTR-2001-72-T)

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge

Simon Bikindi – Measures of protection for the witnesses, Demonstration of fears of the witnesses for their own safety or the safety of their family members justified by the general security situation in Rwanda – Transfer of Detained Witnesses – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 54, 69, 69 (C), 73 (A), 73 bis (B) 75 and 90 bis (B)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba, Decision on Motion to Unseal Ex Parte Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment, 3 May 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Protais Zigiranyirazo, Decision on the Transfer of Detained Witnesses, 22 September 2005 (ICTR-2001-73)

Introduction

1. Pursuant to Rules 90 *bis*, 54, 73 (A) and 73 *bis* (B) of the Rules of Procedure and Evidence (the "Rules"), the Prosecution requests, in its Motion for Transfer and in its *Corrigendum*, (i) an order temporarily transferring Witnesses BKW, ALQ, BHI, AEY and AHP, who are currently detained in Rwanda, to the Detention Facility of the Tribunal in Arusha, (ii) an order that the Registrar of the Tribunal transmit the order of transfer to the authorities of Rwanda, (iii) an order that these persons be returned at a time that the Chamber so decides to the Rwandan authorities and (iv) any other order that the Chamber deems fit and proper.[1]

2. The Prosecution estimates (a) that the presence of Witness BKW will be required by the Prosecution the week of 9 October 2006; and (b) that the presence of Witnesses ALQ, BHI, AEY and AHP will be required by the Prosecution the week of 16 October 2006.[2]

3. The Prosecution submits that it has complied with the provisions of Rule 90 *bis* (B) (i) to ensure that the presence of these witnesses is not required for any criminal proceedings in progress in Rwanda during the period the witnesses are required to be present at the Tribunal.[3]

4. The Prosecution also moves the Chamber, in its Motion for Protective Measures, under Article 21 of the Statute of the Tribunal (the "Statute") and Rules 54, 69, 73, and 75 of the Rules, to issue protective orders in identical terms to those ordered by the Chamber in its Decision of 4 September 2006[4] for Witnesses AHQ, AHO, BGU, and AJP.[5] The Prosecution submits that Witnesses AHQ, AHO and BGU appeared in the Prosecution's Submission of 17 January 2006,[6] but were unavailable in Rwanda at the time the Witnesses and Victims Support Section (the "WVSS") acted pursuant to the Chamber's Decision of 7 June 2006.[7] Further, Witness AJP was recently added to the Prosecution witness list to replace a deceased witness. The Prosecution asks the WVSS to make contact with these witnesses and make a recommendation about their protective status to the Chamber.[8]

Deliberations

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[1] "The Prosecutor's [Confidential] Request for An Order Transferring Detained Witnesses Pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence", 5 September 2006, para. 1 (the "Motion for Transfer"); "Corrigendum to the Prosecutor's [Confidential] Request for an Order Transferring Detained Witnesses Pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence", 7 September 2006 (the "Corrigendum").
[2] See the confidential "Revised Schedule of Prosecution Witnesses", 14 September 2006; *see also* the Motion for Transfer, para. 12 and the Corrigendum.
[3] The Motion for Transfer, para. 5.
[4] "Decision on Protective Measures for Prosecution Witnesses", 4 September 2006 (the "Decision of 4 September 2006").
[5] "The Prosecutor's [Confidential] Request for a Protective Measures Order for Witness AHQ, AHO, BGU and AJP", 11 September 2006, para. 1 (the "Motion for Protective Measures").
[6] "Prosecutor's [Confidential] Motion for Protective Measures: Revised Request for Measures", 17 January 2006 (the "Submission of 17 January 2006").
[7] "Decision on the Prosecutor's Motion for Protective Measures", 7 June 2006 (the "Decision of 7 June 2006").
[8] The Motion for Protective Measures, para. 3.

5. Rule 90 *bis* (B) of the Rules stipulates in its first two paragraphs that:

> (B) The transfer order shall be issued by a Judge or Trial Chamber only after prior verification that the following conditions have been met:
>
> (i) The presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;
>
> (ii) Transfer of the witness does not extend the period of his detention as foreseen by the requested State.

6. The conditions for ordering the transfer of a detained witness are not specified in the Rules, and therefore the Judge or the Chamber enjoys large discretion in considering the elements presented in the Motion for Transfer.[9] The Chamber is of the view that the letter dated 5 September 2006 from the Minister of Justice of Rwanda, the most appropriate authority to guarantee the pertinent information on the status of the detainees, read with the request submitted by the Prosecutor, fully meets both requirements as prescribed in Rule 90 *bis* (B), namely, that the detainees whom the Prosecutor wishes to call are not required for any criminal proceedings in Rwanda during the said period, and that their stay at the Tribunal will not extend the period of their detention.

7. The Chamber considered the submissions of the Registrar concerning the situation in Rwanda, as well as his recommended protective measures for witnesses in its Decision of 4 September 2006. The Chamber further considers the current Motion for Protective Measures, which requests that identical protective measures be extended to Prosecution Witnesses AHQ, AHO, BGU and AJP. The Chamber also notes that Witnesses BKW, ALQ, BHI, AEY and AHP, who are subjects of the Motion for Transfer, also affirmatively requested protective measures, as stated in the Prosecution's Submission of 17 January 2006.[10] The Chamber reaffirms its conclusion stated in the Decision of 4 September 2006 that the fears expressed by the potential Prosecution witnesses for their own safety or the safety of their family members, in and outside Rwanda, are justified. Furthermore, as the trial is set to begin on 18 September 2006, the Chamber extends the protective measures contained in its Decision of 4 September 2006 to Prosecution Witnesses AHQ, AHO, BGU, AJP, BKW, ALQ, BHI, AEY and AHP.

8. The Chamber is concerned about the confidential filing of this Motion for Transfer. It is the Chamber's view that the transparency of the proceedings are served by the filing of documents as public documents; the confidentiality should be reserved for exceptional circumstances, for instance where the protection of a witness is at stake.[11] In the present case, the Chamber considers that only the letter from the Minister of Justice could be deemed to be confidential because it contains identifying information related to the witnesses.

FOR THE ABOVE REASONS, THE CHAMBER

I. ORDERS that the confidentiality of the Motion for Transfer be lifted by the Registrar while the letter from the Minister of Justice of Rwanda remain confidential and under seal;

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[9] *The Prosecutor v. Protais Zigiranyirazo*, Decision on the Prosecutor's Motion for the Transfer of Detained Witnesses AVY and ATN (TC), 17 January 2006; *The Prosecutor v. Athanase Seromba*, Order for the Temporary Transfer of Detained Witnesses (TC), 19 August 2004, para. 3.

[10] The Submission of 17 January 2006.

[11] *The Prosecutor v. Protais Zigiranyirazo*, Decision on the Transfer of Detained Witnesses (TC), 22 September 2005, para 4; *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera*, Decision on Motion to Unseal Ex Parte Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment (TC), 3 May 2005, para. 13.

II. ORDERS, pursuant to Rule 90 *bis* (B) of the Rules, that Prosecution Witness BKW be transferred to Arusha, before 9 October 2006, until as soon as practically possible after the individual's testimony has ended;

III. ORDERS, pursuant to Rule 90 *bis* (B) of the Rules, that the presence of Witnesses ALQ, BHI, AEY and AHP will be required by the Prosecution the week of 16 October 2006, until as soon as practically possible after each individual's testimony has ended;

IV. REMINDS the Registrar of his obligations under Rule 90 *bis* of the Rules;

V. REQUESTS the Government of the Republic of Rwanda, in accordance with this Order, to cooperate with the Prosecutor and the Registrar and, in conjunction with the Government of the United Republic of Tanzania, the Registrar and the WVSS, to take the necessary measures to implement the present decision; and

VI. ORDERS that the protective measures, as previously ordered in its Decision of 4 September 2006, be extended to Witnesses AHQ, AHO, BGU, AJP, BKW, ALQ, BHI, AEY and AHP.

Arusha, 14 September 2006, in English.

[Signed]: Inés Mónica Weinberg de Roca

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Le Procureur c. Simon BIKINDI

Affaire N° ICTR-2001-72

Fiche technique

• Nom: BIKINDI

• Prénom: Simon

• Date de naissance: 1954

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: chanteur-compositeur et directeur du ballet *Irindiro*

• Date de modification de l'acte d'accusation: 22 octobre 2003

• Chefs d'accusation: entente en vue de commettre le génocide, complicité dans le génocide, incitation directe et publique à commettre le génocide, crimes contre l'humanité (assassinat et persécution)

• Date et lieu de l'arrestation : 12 juillet 2001, à Leiden, aux Pays-Bas

• Date du transfert: 27 mars 2002

• Date de la comparution initiale: 4 avril 2002

• Date du début du procès: 18 septembre 2006

• Date du jugement et contenu du prononcé: 2 décembre 2008, condamné à 15 ans d'emprisonnement

• Procès en appel

Décision relative à la requête du Procureur en prescription de mesures de protection intitulée « Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment » 7 juin 2006 (ICTR-2001-72-T)

(Original : Français)

Chambre de première instance III

Juges : Inés Mónica Weinberg de Roca, Présidente de Chambre ; Flavia Lattanzi ; Gberdao Gustave Kam

Simon Bikindi – Mesures de protection des témoins, Nécessité pour la Chambre de protéger les droits de l'accusé et de préserver la sécurité et la vie privée des victimes et témoins qui sont en danger ou menacés, Section d'aide aux victimes et aux témoins – Mesures ordonnées

Instrument international cité :

Règlement de Procédure et de preuve, art. 34 (A) (i), 54, 69, 69 (B), 73 et 75 ; Statut, art. 21

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA,

SIÉGEANT en la Chambre de première instance III, composée des juges Inés Mónica Weinberg de Roca, Président, Flavia Lattanzi et Gberdao Gustave Kam,

SAISI de la requête confidentielle du Procureur intitulée « *Prosecution's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment* », déposée le 12 septembre 2005 en application de l'article 21 du Statut et des articles 54, 69, 73 et 75 du Règlement de procédure et de preuve (la « Requête ») ;

VU la Réponse de la Défense à la requête du Procureur en prescription de mesures de protection de victimes et de témoins de crimes allégués dans l'acte d'accusation, déposée confidentiellement le 16 novembre 2005 (la « Réponse ») ;

RAPPELANT les conférences de mise en état du 12 janvier 2006, à laquelle la Chambre a demandé au Procureur de lui communiquer une liste précisant, pour chacun des témoins ou groupe de témoins, les mesures de protection nécessaires[4540], et du 18 janvier 2006, à laquelle elle lui a de nouveau demandé d'indiquer avec plus de précision les mesures de protection qu'il sollicitait et pour quels témoins, et que le Procureur a répondu que tous ses témoins souhaitent garder l'anonymat[4541] ;

VU la requête confidentielle révisée du Procureur intitulée *Revised Request for Measures,* déposée le 17 janvier 2006 (la « Requête révisée »), dans laquelle il a modifié la Requête et indiqué (1) les témoins à charge potentiels pour lesquels une protection est demandée et, (2) les témoins à charge potentiels qui ont renoncé à leur droit aux mesures de protection ;

VU l'article 34 (A) (i) du Règlement de procédure et de preuve par lequel la Section d'aide aux victimes et aux témoins est expressément chargée de

> « recommander l'adoption de mesures de protection des victimes et des témoins conformément à l'article 21 du Statut »

[4540] Conférence de mise en état, compte rendu de l'audience du 12 janvier 2006, p. 14 et 15.
[4541] Conférence de mise en état, compte rendu de l'audience du 18 janvier 2006, p. 6 à 9.

et l'article 69 (B) du Règlement de procédure et de preuve aux termes duquel

> « lorsqu'elle arrête des mesures de protection des victimes ou des témoins, la Chambre peut consulter la Section d'aide aux victimes et aux témoins » ;

RAPPELANT la nécessité pour la Chambre de protéger les droits de l'accusé, de préserver la sécurité et la vie privée des victimes et témoins qui sont en danger ou menacés ;

PAR CES MOTIFS, LA CHAMBRE

ORDONNE au Procureur de ne communiquer les noms, adresses, coordonnés et toutes informations permettant d'identifier les témoins à charge potentiels en l'espèce qui demandent une protection qu'aux personnes autorisées de la Section d'aide aux victimes et aux témoins, conformément aux procédures en vigueur ; et

ORDONNE EN OUTRE à la Section d'aide aux victimes et aux témoins de s'entretenir avec chacun des témoins à charge potentiels qui demandent protection sur la nécessité de telles mesures, de déterminer la nature de la protection requise afin de mettre en place les mesures appropriées et de la tenir informée.

Fait à Arusha, le 7 juin 2006.

[Signé] : Inés Mónica Weinberg de Roca ; Flavia Lattanzi ; Gberdao Gustave Kam

The Prosecutor v. Paul BISENGIMANA

Case N° ICTR-2000-60

Case History

• Name: BISENGIMANA

• First Name: Paul

• Date of Birth: unknown

• Sex: male

• Nationality: Rwandan

• Former Official Function: Mayor of Gikoro

• Date of Indictment: 1 July 2000

• Counts: genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

• Date and Place of Arrest: 4 December 2001, in Mali

• Date of Transfer: 11 March 2002

• Date of Initial Appearance: 18 March 2002

• Pleading: guilty

• Date Trial Began: 17 November 2005

• Date and content of the Sentence: 13 April 2006, sentenced to 15 years imprisonment

Decision on the Defence Motion for the Admission of a Written Statement in lieu of Oral Testimony in Accordance With Rule 92 bis (A) and (B) of the Rules of Procedure and Evidence
3 February 2006 (ICTR-2000-60-S)

(Original : English)

Trial Chamber II

Judges : Arlette Ramaroson, Presiding Judge ; William H. Sekule ; Solomy B. Bossa

Paul Bisengimana – Admission of a Written Statement in lieu of Oral Testimony, Commander of the United Nations Detention Facilities, Behaviour of the Accused in detention, Proof of a matter other than the acts and conduct of the Accused as charged in the Indictment, Factors to be taken into consideration in determining sentence – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A), 92 bis (A) and 92 bis (B)

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

SITTING as Trial Chamber II, composed of Judge Arlette Ramaroson, Presiding, Judge William H. Sekule and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED OF the Accused Bisengimana's « Requête de la Défense aux fins d'admission de l'attestation du commandant du quartier pénitentiaire des Nations-Unies en lieu et place d'un témoignage oral conformément à la Règle 92 bis (A) et (B) du Règlement de Procédure et de Preuve »,[1] filed on 20 January 2006 (the "Motion");

NOTING that the Prosecutor did not file any Response;

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 92 *bis* of the Rules;

HEREBY DECIDES the Motion on the basis of the written submissions of the Defence, pursuant to Rule 73 (A) of the Rules;

RECALLING that during the Pre-Sentencing Hearing held on 19 January 2006, the Chamber invited the Defence to comply with the Provisions of Rule 92 *bis* of the Rules, in particular, Sub-Rules (A) and (B), if it wished to have admitted the Declaration of 22 December 2005, allegedly made by the

[1] "Defence Motion for the admission of the written statement made by Commander of UNDP in lieu of oral testimony in accordance with Rule 92 *bis* (A) and (B)", attached to which are: (1) a Decision by the Registrar dated 23 January 2006 appointing Mr. Matar Diop as the President Officer to witness the declaration dated 22 December 2005 made by Mr. Saidou Guindo, Commander of UNDF; (2) the Attestation dated 26 January 2006 in conformity with Rule 92 *bis* (B), attesting that Mr. Saidou Guindo, in the presence of Mr. Matar Diop, confirmed that the contents of the declaration dated 22 December 2005 are true and correct to the best of his knowledge; (3) a Declaration by the Witness dated 26 January 2006 that the declaration he made on 22 December 2005 is true to the best of his knowledge; and (4) the declaration dated 22 December 2005 by Mr. Saidou Guindo concerning the character of the Accused Paul Bisengimana while he was in detention at the UNDF (the "Declaration of 22 December 2005").

Commander of the United Nations Detention Facilities (the "UNDF"), relating to the Accused's behaviour while in detention;[2]

CONSIDERING that the Defence brings the Motion pursuant to Rule 92 *bis* (A) of the Rules, which provides as follows:

> Rule 92 *bis:* Proof of Facts Other Than by Oral Evidence
>
> (A) "A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.
>
> (i) Factors in favour of admitting evidence in the form of a written statement include, but are not limited to, circumstances in which the evidence in question:
>
> (…)
>
> (e) relates to issues of the character of the Accused; or
>
> (f) relates to factors to be taken into consideration in determining sentence (…)";

CONSIDERING the Defence submissions that the Declaration of 22 December 2005 meets the criteria for admissibility under Rule 92 *bis* of the Rules as identified above, in particular because the witness declared, in the presence of an authorised official appointed by the Registrar of the Tribunal, that the contents of the requested statement are true and correct to the best of his knowledge and belief;

ALSO CONSIDERING that the Defence requests the Chamber to admit the Declaration of 22 December 2005 into evidence, taking into account its relevance and probative value in support of mitigating the sentence to be passed against the Accused especially as it bears on the good character of the Accused while in detention and as it will enlighten the Chamber in arriving at a fair and equitable sentence.

Deliberations

NOTING that the Defence request falls squarely within the ambit of Rule 92 *bis* of the Rules since the Declaration of 22 December 2005 satisfies the threshold requirements that the evidence sought to be adduced goes to proof of a matter other than the acts and conduct of the Accused as charged in the Indictment and that it in fact relates to factors to be taken into consideration in determining sentence;

NOTING ALSO that the Declaration of 22 December 2005 is accompanied by a duly witnessed declaration by the Commander of the UNDF, Mr. Saidou Guindo himself, indicating that the contents of the Declaration are true and correct to the best of his knowledge, the Chamber finds the Declaration of 22 December 2005 to be admissible under Rule 92 *bis* of the Rules.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion and admits the Declaration of 22 December 2005 in lieu of the oral testimony of the Commander of the UNDF, Mr. Saidou Guindo.

Arusha, 3 February 2006.

[Signed] : Arlette Ramaroson ; William H. Sekule ; Solomy B. Bossa

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[2] T. of 19 January 2006, pp. 32, 41.

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Judgement and Sentence
13 April 2006 (ICTR-2000-60-T)

(Original : English)

Trial Chamber II

Judges : Arlette Ramaroson, Presiding Judge ; William H. Sekule ; Solomy B. Bossa

Paul Bisengimana – Laurent Semanza, Juvenal Rugambarara – Guilty plea, Renunciation to any form of Defence, Renunciation to the Rights to a fair trial, Guilty plea informed and unequivocal – Form of perpetration of the Crime, Unity of the concept of aiding and abetting a crime, Definition of the moral and material elements of the aiding and abetting form of participation to a crime, Influence of the position of authority vis-à-vis the principal offender –Crime against Humanity, General elements of the Crime, Definition of the attack, Standard of "widespread or systematic", Definition of 'civilian population', Discriminatory grounds – Extermination as a Crime against Humanity, Standard of distinction with the murder : number of victims – Murder as a Crime against Humanity, Distinction between the murder and the crime of "assassinat", Linguistic interpretation – Cumulative convictions, Inclusion of the crime of murder in the crime of extermination – Sentence, Obligation to individualize the sentence, Aggravating circumstances to be proved beyond reasonable doubt, Aggravating circumstances found : position as bourgmestre, crime against Humanity, Mitigating circumstances to be proved on a balance of probabilities, Mitigating circumstances may not be directly related to the offence, Mitigating circumstances found : guilty plea, Sincere remorse and regrets, chances of rehabilitation, family situation, person of good character before the crimes, current age and state of health, Balance of the aggravating and mitigation circumstances, General Sentencing Practice in the Courts of Rwanda, Replacement of the sentences, Credit for Time Served in Custody, The sentence should reflect the totality of the criminal conduct of the accused – Conviction of extermination as a crime against humanity, 15 years of imprisonment

International Instruments cited :

Rules of Procedure and Evidence, rules 54, 57, 62 (B), 62 (B) (i), 62 (B) (ii), 62 (B) (iii), 62 bis, 64, 73, 100, 101, 101 (A), 101 (B), 101 (B) (ii), 101 (D), 102 (A), 103 and 103 (A) ; Statute, art. 3 (a), 3 (b), 6 (1), 22, 23 and 26

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Jean-Paul Akayesu, Judgement, 2 September 1998 (ICTR-96-4) ; Trial Chamber, The Prosecutor v. Jean Kambanda, Judgement and Sentence, 4 September 1998 (ICTR-97-23) ; Trial Chamber, The Prosecutor v. Omar Serushago, Sentence, 5 February 1999 (ICTR-98-39) ; Trial Chamber, The Prosecutor v. Clément Kayishema and Obed Ruzindana, Judgement, 21 May 1999 (ICTR-95-1) ; Trial Chamber, The Prosecutor v. Georges Anderson Rutaganda, Judgement and Sentence, 6 December 1999 (ICTR-96-3) ; Trial Chamber, The Prosecutor v. Alfred Musema, Judgement, 27 January 2000 (ICTR-96-13) ; Trial Chamber, The Prosecutor v. Georges Ruggiu, Judgement and Sentence, 1st June 2000 (ICTR-97-32) ; Appeals Chamber, The Prosecutor v. Jean-Paul Akayesu, Judgement, 1st June 2001 (ICTR-96-4) ; Trial Chamber, The Prosecutor v. Gérard et Elizaphan Ntakirutimana, Judgement, 21 February 2003 (ICTR-96-10 and ICTR-96-17) ; Trial Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgment and sentence, 1st December 2003 (ICTR-98-44A) ; Trial Chamber, The Prosecutor v. Jean de Dieu Kamuhanda, Judgement, 22 January 2004 (ICTR-99-54) ; Trial Chamber, The Prosecutor v. André Ntagerura et al., Judgement and Sentence, 25 February 2004 (ICTR-99-46) ; Trial Chamber, The Prosecutor v. Emmanuel Ndindabahizi, Judgement, 15 July 2004 (ICTR-2001-71) ; Appeals Chamber, The

Prosecutor v. Gérard and Elizaphan Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and ICTR-96-17) ; Trial Chamber, The Prosecutor v. Vincent Rutaganira, Judgement, 14 March 2005 (ICTR-95-1C) ; Trial Chamber, The Prosecutor v. Mikaeli Muhimana, Judgement and Sentence, 28 April 2005 (ICTR-95-1B) ; Appeals Chamber, The Prosecutor v. Laurent Semanza, Judgement, 20 May 2005 (ICTR-97-20) ; Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgement, 23 May 2005 (ICTR-98-44A) ; Appeals Chamber, The Prosecutor v. Jean de Dieu Kamuhanda, Judgement, 19 September 2005 (ICTR-99-54A) ; Trial Chamber, The Prosecutor v. Paul Bisengimana, Decision on the Motion for the Admission of a Written Statement in Lieu of Oral Testimony in Accordance with Rule 92 bis (A) und (B) of the Rules of Procedure and Evidence, 3 February 2006 (ICTR-2000-60)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Duško Tadić, Judgement, 7 May 1997 (IT-94-1) ; Trial Chamber, The Prosecutor v. Dražen Erdemović, Judgement II, 5 March 1998 (IT-96-22) ; Trial Chamber, The Prosecutor v. Anto Furundžija, Judgement, 10 December 1998 (IT-95-17/1) ; Trial Chamber, The Prosecutor v. Zlatko Aleksovski, Judgement, 25 June 1999 (IT-95-14/1) ; Appeals Chamber, The Prosecutor v. Zdravko Mucić et al. (Čelebići Case), Judgement, 20 January 2000 (IT-96-21) ; Appeals Chamber, The Prosecutor v. Zdravko Mucić et al., Judgment, 20 February 2001 (IT-96-21) ; Trial Chamber, The Prosecutor v. Dragoljub Kunarac et al., Judgement, 22 February 2001 (IT-96-23 and IT-96-23/1) ; Trial Chamber, The Prosecutor v. Stevan Todorović, Sentencing Judgment, 31 July 2001 (IT-95-9/1) ; Trial Chamber, The Prosecutor v. Radislav Krstić, Judgment, 2 August 2001 (IT-98-33) ; Appeals Chamber, The Prosecutor v. Zoran Kupreškić, Judgement, 23 October 2001 (IT-95-16) ; Trial Chamber, The Prosecutor v. Duško Sikirica, Sentencing Judgment, 13 November 2001 (IT-95-8) ; Trial Chamber, The Prosecutor v. Milorad Krnojelac, Judgement, 15 March 2002 (IT-97-25) ; Trial Chamber, The Prosecutor v. Mitar Vasiljevic, Judgement, 29 Novembre 2002 (IT-98-32) ; Trial Chamber, The Prosecutor v. Biljana Plavšić, Judgment, 27 February 2003 (IT-00-39 and IT-00-40/1) ; Trial Chamber, The Prosecutor v. Mladen Naletilić and Vinko Martinović, Judgment, 31 March 2003 (IT-98-34) ; Trial Chamber, The Prosecutor v. Blagoje Simić, Judgement, 17 October 2003 (IT-95-9) ; Trial Chamber, The Prosecutor v. Predrag Banović, Judgement, 28 October 2003 (IT-02-65/1) ; Trial Chamber, The Prosecutor v. Mornir Nikolić, Judgment, 2 December 2003 (IT-02-60/1) ; Trial Chamber, The Prosecutor v. Miroslav Deronjić, Judgement, 30 March 2004 (IT-02-61) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Judgement, 29 July 2004 (IT-95-14)

Table of Contents

I. Introduction

A. Overview of the Case

1. Paul Bisengimana (the "Accused"), former *bourgmestre* of Gikoro *commune* in Kigali-Rural *préfecture,* has pleaded guilty to aiding and abetting the murder and extermination of Tutsi civilians at Musha Church and Ruhanga Protestant Church and School (the "Ruhanga Complex") in Gikoro *commune* between 13 and 15 April 1994.

2. From 7 April 1994, massacres of Tutsis and murders of political opponents were perpetrated throughout the territory of Rwanda by militiamen, military personnel and *gendarmes*. In every region of the country, Tutsis fled from the massacres and sought refuge in places they thought to be safe. In many of these places, the refugees were attacked and killed, often with the complicity of the authorities.

3. The massacres in Gikoro *commune* started on 7 April 1994. Thousands of Tutsi civilians, fleeing from the on-going attacks in Kigali-rural *préfecture,* sought refuge in Musha Church in Gikoro *commune* between 8 and 13 April 1994. On or about 12 April 1994, with the knowledge of the Accused, members of the Rwandan Army distributed weapons to *Interahamwe* militiamen and civilians at Musha Church to be used to attack the refugees.

4. On or about 13 April 1994, in the presence of the Accused, Rwandan Army soldiers, *Interahamwe*, armed civilians and communal policemen launched an attack against the Tutsi civilians at Musha Church using guns, grenades, machetes and pangas. A civilian militiaman set fire to the Church during the attack. More than a thousand Tutsis were killed as a result of the attack. The Accused was present when a Tutsi civilian named Rusanganwa was murdered at that location.

5. Many Tutsi civilians had also sought refuge at the Ruhanga Protestant Church and School in Gikoro *commune* between 8 and 10 April 1994. Between 10 and 15 April 1994, an attack was launched on the Ruhanga Complex by a *brigadier*, soldiers from the Presidential Guard, civilian militiamen and communal policemen. The attackers used guns, grenades, machetes and pangas. Many Tutsi civilians were killed. Paul Bisengimana knew of the previous attack at Musha Church and,

despite his position as *bourgmestre* of Gikoro *commune*, did not take any steps to protect the Tutsis refugees.

6. On 7 December 2005, Trial Chamber II (the "Chamber") accepted the guilty plea of the Accused and found him guilty of having aided and abetted the commission of murder and extermination as crimes against humanity.

B. THE INDICTMENT

7. Under the Amended Indictment of 1 December 2005 (the "Indictment"), the Prosecution charged Paul Bisengimana for his individual responsibility on five counts: genocide (Art. 6 (1) and 6 (3) of the Statute[1]), complicity in genocide (Art. 6 (1)), and murder (Art. 6 (1)) extermination (Art. 6 (1)) and rape (Art. 6 (1) and 6 (3)) as crimes against humanity. At the second further appearance of the Accused on 7 December 2005, the Prosecution withdrew the counts of genocide, complicity in genocide and rape as crimes against humanity. The Indictment is annexed to this judgement (Annex C).

C. SUMMARY OF THE PROCEDURE

8. On 4 December 2001, Paul Bisengimana was arrested in Mali. On 11 March 2002, the Accused was transferred to the United Nations Detention Facility in Arusha (the "UNDF"). On 18 March 2002, the Accused made his initial appearance and pleaded not guilty to all counts.

9. On 19 October 2005, the Parties filed a joint motion for consideration of a guilty plea agreement between Paul Bisengimana and the Office of the Prosecutor.[2]

10. On 17 November 2005, during his further appearance, the Accused pleaded guilty to murder and extermination as crimes against humanity pursuant to Article 6 (1) of the Statute.[3] The Chamber dismissed the joint motion for consideration of a guilty plea agreement for not being unequivocal. On behalf of the Accused, the Chamber entered a plea of not guilty regarding the counts of murder and extermination and duly noted the plea of not guilty for all the other counts.[4]

11. The Indictment was filed on 1 December 2005.

12. On 7 December 2005, during his second further appearance, the Accused pleaded guilty to the counts of murder and extermination as crimes against humanity pursuant to Article 6 (1) of the Statute.[5] The Chamber found the Accused guilty of having aided and abetted the commission of murder (Count 3) and extermination (Count 4) as crimes against humanity pursuant to Article 6 (1) of the Statute.[6] The Chamber granted the Prosecution motion for withdrawal and dismissal of the remaining counts but denied the Prosecution request for acquittal on these counts because the Prosecution had failed to justify its motion on this point.[7]

13. A Pre-Sentencing Hearing was held on 19 January 2006.

14. A full review of the procedural history is annexed to this judgement (Annex A).

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[1] Statute of the Tribunal (the "Statute").
[2] Requête conjointe visant à l'examen d'un accord entre Paul Bisengimana et le Bureau du Procureur aux fins d'un plaidoyer de culpabilité, filed on 19 October 2005.
[3] T. 17 November 2005 p. 14.
[4] T. 17 November 2005 p. 26.
[5] T. 7 December 2005 pp 12-13.
[6] T. 7 December 2005 p. 17.
[7] T. 7 December 2005 p. 18.

D. The Tribunal and Its Jurisdiction

15. The Judgement in the case of *Prosecutor v. Paul Bisengimana* is rendered by Trial Chamber II of the International Criminal Tribunal for Rwanda (the "Tribunal"), composed of Judge Arlette Ramaroson, presiding, Judge William H. Sekule, and Judge Solomy B. Bossa.

16. The Tribunal is governed by the Statute annexed to Security Council Resolution 955 and by the Rules of Procedure and Evidence of the Tribunal (the "Rules").[8]

17. The Tribunal was established to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States. The Tribunal has jurisdiction over acts of genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto, committed between 1 January 1994 and 31 December 1994.

II. The Guilty Plea

A. Applicable Law

18. The Chamber notes that there is no specific provision in the Statute regarding guilty pleas and plea agreements. The relevant provisions of the Rules regarding the procedure relating to guilty pleas and plea agreements are Rule 62 (B) and Rule 62 *bis*.[9]

B. The Guilty Plea of 7 December 2005

19. On 7 December 2005, after Paul Bisengimana pleaded guilty to murder (Count 3) and extermination (Count 4) as crimes against humanity pursuant to Article 6 (1) of the Statute, the Chamber proceeded to verify the validity of the plea.

20. The Chamber summarised the consequences of the plea. It indicated that when an accused pleads not guilty, he is presumed innocent until his guilt is established beyond reasonable doubt. In consequence, an accused pleading not guilty has a right to a fair trial; to cross-examine Prosecution

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[8] Originally adopted by the Judges of the Tribunal on 5 July 1995, the Rules were last amended on 7 June 2005 during the Fifteenth Plenary Session.

[9] Rule 62: Initial Appearance of Accused and Plea

(B) If an accused pleads guilty in accordance with Rule 62 (A) (v), or requests to change his plea to guilty, the Trial Chamber shall satisfy itself that the guilty plea:

(i) is made freely and voluntarily;

(ii) is an informed plea;

(iii) is unequivocal; and

(iv) is based on sufficient facts for the crime and accused's participation in it, either on the basis of objective indicia or of lack of any material disagreement between the parties about the facts of the case.

Thereafter the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.

Rule 62 *bis*: Plea Agreement Procedure

(A) The Prosecutor and the Defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:

(i) apply to amend the indictment accordingly;

(ii) submit that a specific sentence or sentencing range is appropriate;

(iii) not oppose a request by the accused for a particular sentence or sentencing range.

(B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A)

(C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (A) (v), or requests to change his or her plea to guilty.

witnesses, to call Defence witnesses, and to testify in his defence. The Chamber asked the Accused if he understood that by pleading guilty, he was renouncing these rights. The Accused responded that he understood and that he consciously waived these rights.[10]

21. Pursuant to Rule 62 (B) (i), (ii), and (iii) of the Rules, the Chamber first asked if the guilty plea was made freely and voluntarily; in other words, if the Accused was fully aware of what he was doing and was not threatened or pressured to so plea. The Accused answered that he was aware of what he was doing, that there were no threats against him, and that he pleaded guilty of his own will.[11]

22. Secondly, the Chamber asked the Accused if the plea was informed: that is if the Accused clearly understood the nature of the charges brought against him and the consequences of the plea for each of the counts.[12] The Accused answered that he pleaded "advisedly."[13]

23. Thirdly, the Chamber asked the Accused if his plea was unequivocal: that is whether the Accused knew that the plea was not compatible with any defence that would contradict it. The Accused answered that there was absolutely no incompatibility.[14]

24. Further, the Chamber notes the following elements of the Plea Agreement: the Accused elected freely, "with full knowledge of the facts," to plead guilty;[15] the Accused decided to plead guilty after a long reflection during which he became fully aware of the scope and consequences of the offences he had committed;[16] the Accused decided to change his plea after being fully briefed on the legal consequences of so changing and having accepted these consequences;[17] the Accused's decision to plead guilty was voluntary, informed and unequivocal.[18]

25. In its oral ruling of 7 December 2005, the Chamber was satisfied that, on account of the absence of any disagreement on the part of the Prosecutor and the Accused about the facts of the case, the plea was based on sufficient facts to establish the crimes and the participation of the Accused in their commission. The Chamber stated that the requirements of Rule 62 (B) were met and it therefore declared the Accused guilty of having aided and abetted the commission of the crimes of murder and extermination as crimes against humanity pursuant to Article 6 (1) of the Statute.[19] The Chamber granted the Prosecution motion for withdrawal and dismissal of the counts to which the Accused had pleaded not guilty.[20] However, the Chamber denied the Prosecution motion for acquittal on those counts because the Prosecution had failed to justify its motion on this point.[21]

III. Case on Merits

A. THE ACCUSED

26. Paul Bisengimana was born in 1948[22] in Duha *secteur*, Gikoro *commune*, Kigali-rural *préfecture*[23] and is the son of Verdiana Nyirabatera and Gervais Ngirumpatse,[24] both of whom are deceased.[25] He spent most of his adult life in Gikoro *commune*.[26]

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[10] T. 7 December 2005 p. 14.
[11] T. 7 December 2005, p.14.
[12] T. 7 December 2005 p. 14.
[13] T. 7 December 2005 p. 15.
[14] T. 7 December 2005 p. 15.
[15] Plea Agreement, para. 5.
[16] Plea Agreement, para. 6.
[17] Plea Agreement, para. 8.
[18] Plea Agreement, para. 9.
[19] T. 7 December 2005 p. 17.
[20] T. 7 December 2005 p. 17-18.
[21] T. 7 December 2005 p. 18.
[22] Plea Agreement, para. 24; T.17 November 2005 p. 11; T. 7 December 2005 p. 11.

27. Paul Bisengimana is married and is the father of ten children. He had seven children with his first wife, Dorca Kantarama, who died in 1991. He later married Marie Hérondine Mukandagijimana, with whom he had two children. He adopted his second wife's child.[27]

28. Paul Bisengimana went to primary school in Gikoro *commune*. He completed the "*premier cycle*" of his secondary education in Rwamagana in three years. He then went to Byumba *école normale*, which he left in 1970 with a teacher's D 5 certificate.[28]

29. From 1970 to 1974, Paul Bisengimana worked in his native *commune* as a teacher. From 1974 to 1978, he was headmaster of a secondary school in Nyanza. From 1978 to 1981, he was Presiding Judge of the Cantonal Court of Nyamata, Kigali *préfecture*.[29] In May 1981, he was appointed *bourgmestre* of Gikoro *commune*, a position he held until 1994, when he went into exile.[30]

B. Factual and Legal Findings

1. Individual Criminal Responsibility for Aiding and Abetting Pursuant to Article 6 (1) of the Statute

a. The Indictment

30. In support of the counts of murder and extermination, the Indictment alleges that during April 1994, in the Bugesera region of Kigali-Rural *préfecture*, Paul Bisengimana acting individually and/or in concert with others, was responsible for killing or causing persons to be killed during mass killing events in Gikoro *commune* and its environs, as part of a widespread and systematic attack against a civilian population on political, ethnic or racial grounds.[31] For all the acts adduced in support of this charge, the Prosecutor alleges that the Accused either planned, or otherwise aided and abetted in the planning, preparation or execution of the said offence pursuant to Article 6 (1) of the Statute.[32]

b. Applicable Law

31. Article 6 (1) reflects the principle that criminal responsibility for any crime in the Statute is incurred not only by individuals who physically commit the crime, but also by individuals who participate in and contribute to the commission of the crime in other ways, such as by aiding and abetting.[33]

32. "Aiding" means assisting another to commit a crime.[34] "Abetting" means facilitating, encouraging, advising or instigating the commission of a crime.[35] In legal usage, including that of the

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[23] Plea Agreement, para. 24; Indictment, para. 2.
[24] T. 17 November 2005 p. 11; T. 7 December 2005 p. 11.
[25] T. 17 November 2005 p. 11.
[26] Plea Agreement, para. 24.
[27] T. 17 November 2005 p. 11; T.7 December 2005 p. 12.
[28] T. 17 November 2005 p. 11; T. 7 December 2005 p. 12.
[29] T. 17 November 2005 p. 11; T. 7 *décembre* 2005 p. 13.
[30] Plea Agreement, paras. 24-25; T. 17 November 2005 p. 11; Indictment, para. 3; T. 7 December 2005 p. 12.
[31] Indictment, paras. 35 and 40.
[32] Indictment, paras. 36 and 41.
[33] *Kajelijeli*, Judgement (TC), para. 757; *Semanza,* Judgement (TC), para. 377; *Kayishema and Ruzindana*, Judgement (AC) para. 185; *Musema*, Judgement (TC), para. 114; *Rutaganda,* Judgement (TC), para. 33; *Kayishema and Ruzindana,* Judgement (TC) paras. 196-197; *Akayesu,* Judgement (TC), para. 473.
[34] *Kajelijeli*, Judgement (TC), para. 765, *Semanza,* Judgement (TC), para. 384; *Ntakirutimana*, Judgement (TC), para. 787; *Akayesu*, Judgement (TC), para. 484.
[35] Id.

Statute and of the case law of the Tribunal and the International Criminal Tribunal for the Former Yugoslavia (the "ICTY"), the two terms are so often used conjunctively that they are treated as a single broad legal concept.[36]

33. Aiding and abetting is a form of accessory liability. The *actus reus* of the crime is not performed by the accused but by another person referred to as the principal offender.[37] The accused's participation may take place at the planning, preparation or execution stage of the crime and may take the form of a positive act or omission, occurring before or after the act of the principal offender.[38] The Prosecution is required to demonstrate that the accused carried out an act of substantial practical assistance, encouragement, or moral support to the principal offender, culminating in the latter's actual commission of the crime.[39] While the assistance need not be indispensable to the crime,[40] it must have a substantial effect on the commission of the crime.[41]

34. Mere presence at the crime scene may constitute aiding and abetting where it is demonstrated to have a significant encouraging effect on the principal offender, particularly if the individual standing by was the superior of the principal offender or was otherwise in a position of authority.[42] In those circumstances, an omission may constitute the *actus reus* of aiding and abetting, provided that this failure to act had a decisive effect on the commission of the crime.[43]

35. However, it is not necessary that the person aiding and abetting the principal offender be present during the commission of the crime.[44]

36. The *mens rea* of aiding and abetting is demonstrated by proof that the aider and abettor is aware that his act is assisting the commission of the crime by the principal offender.[45] The aider and abettor must have known the intent of the principal offender, and although he need not know the precise offence being committed by the principal offender, he must be aware of the essential elements of the crime.[46] With respect to an aider and abettor who is in a position of authority *vis-à-vis* the principal offender, his *mens rea* may be deduced from the fact that he knew that his presence would be interpreted by the principal offender as a sign of support or encouragement.[47]

C. THE PLEA AGREEMENT

37. Paul Bisengimana was appointed *bourgmestre* of Gikoro *commune* by the President of the Republic of Rwanda[48] upon the recommendation of the Minister of the Interior. He acknowledges that as *bourgmestre*, he represented executive power at the communal level.[49] Further, he had

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[36] *Kajelijeli,* Judgement (TC), para. 765; *Semanza*, Judgement (TC), para. 384, referring to Mewett & Manning, *Criminal Law* (3rd ed. 1994) p. 272 (noting that aiding and abetting are "almost universally used conjunctively")
[37] *Kunarać et al*., Judgement (TC), para. 391.
[38] *Kajelijeli,* Judgement (TC), para.766; *Semanza,* Judgement (TC), para. 386; *Rutaganira*, Judgement (TC) para. 64.
[39] *Kayishema and Ruzindana,* Judgement (AC), para. 186; *Kajelijeli,* Judgement (TC), paras. 763, 766; *Kamuhanda*, Judgement (TC), para. 597; *Akayesu,* Judgement (TC), paras. 473-475; *Rutaganda,* Judgement (TC), para. 43.
[40] Ibid.
[41] *Bagilishema,* Judgement (TC), para. 33, *Kamuhanda*, Judgement (AC), para.70.
[42] *Akayesu,* Judgement (TC), para. 693; *Kajelijeli,* Judgement (TC), para. 769; *Furundžija,* Judgement (TC), paras. 34, 35.
[43] *Blaškic*, Judgement (TC), para. 284; *Tadić*, Judgement (TC), para. 686, *Mucić et al*. , Judgement (TC), para. 842 ; *Akayesu,* Judgement (TC), para. 705.
[44] *Musema,* Judgement (TC), para. 125.
[45] *Blaškic*, Judgement (AC), para. 49, *Kayishema and Ruzindana* (AC), para.186.
[46] *Kajelijeli,* Judgement (TC), para. 768; *Kayishema and Ruzindana,* Judgement (AC), paras. 186-187; *Semanza,* Judgement (TC), para. 387; *Bagilishema,* Judgement (TC), para. 32; *Kayishema and Ruzindana,* Judgement (TC), para. 201, *Kayishema and Ruzindana,* Judgement (AC), para. 186.
[47] *Kayishema and Ruzindana,* Judgement (TC), paras. 200, 201; *Bagilishema,* Judgement (TC), paras. 34-36; *Kamuhanda,* Judgement (TC), para. 600, *Kamuhanda,* Judgement (AC), paras. 70, 71.
[48] Plea Agreement, para. 25, Indictment, para. 3.
[49] Plea Agreement, para. 25; Indictment, para. 4.

administrative authority over the entire *commune* and was responsible for ensuring peace, public order and the safety of persons and property, and for the implementation of local laws and regulations, as well as government policy.[50] The Accused admits that he had a duty to protect the population, prevent or punish the illegal acts of the perpetrators of attacks against persons or property.[51] Further, he was responsible for informing the central government of any situation worthy of interest in Gikoro *commune*.[52]

38. By his own account, the Accused's position as *bourgmestre* meant that he exercised both *de jure* and *de facto* authority over all public servants and other holders of public office within Gikoro *commune*,[53] including, but not limited to, the *conseillers de secteur*.[54] The *conseillers de secteur* represented executive power at the *secteur* level and were responsible for maintaining law and order in their respective *secteurs*.[55]

39. Paul Bisengimana acknowledges that he had a duty to protect the population, prevent or punish the illegal acts of the perpetrators of the attacks at Musha Church and Ruhanga Complex but that he failed to do so.[56] He admits that he had the means to oppose the killings of Tutsi civilians in Gikoro *commune*, but that he remained indifferent to the attacks.[57] With respect to the Musha Church massacres, Paul Bisengimana acknowledges that his presence during the attack would have had an encouraging effect on the perpetrators and given them the impression that he endorsed the killing.[58]

40. In the following sections, the Chamber will consider the individual criminal responsibility of the Accused under Article 6 (1) of the Statute in relation to the counts to which he has pleaded guilty.

2. Crimes Against Humanity (Article 3 of the Statute)

a. General Elements of the Crime

41. For an enumerated act under Article 3 of the Statute to qualify as a crime against humanity, it must be proved that the crime was committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.

i. The Attack

42. The Chamber recalls that 'attack' has been defined as "an unlawful act, event, or series of events of the kind listed in Article 3 (a) through (i) of the Statute."[59]

43. The Chamber notes that, based on the practice of this Tribunal and the ICTY, the applicable standard is "widespread or systematic" and not "widespread and systematic."[60]

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[50] Plea Agreement, paras. 26, 29; Indictment, para. 7.
[51] Plea Agreement, para. 29; Indictment, para. 7.
[52] Plea Agreement, para. 26.
[53] Plea Agreement, para. 27; Indictment, para. 5.
[54] Plea Agreement, para. 27.
[55] Plea Agreement, para. 28.
[56] Plea Agreement, para. 29; Indictment, para.7.
[57] Plea Agreement, para. 32; Indictment, para. 8.
[58] Plea Agreement, para. 36.
[59] *Kajelijeli*, Judgement (TC), para. 867; *Semanza*, Judgement (TC), para. 327.
[60] The French version of the Statute requires that the attack be widespread and systematic, whereas the English version requires that the attack be widespread or systematic. In the practice of both the ICTR and the ICTY, the English version has been accepted, accepted as being consonant with customary international law, *Kunarac et al.,* Judgement (AC), para. 93.

44. The "widespread" element of the attack has been given slightly different meanings in the Tribunal's judgements.[61] The Chamber notes, however, that this element is always taken to refer to the scale of the attack, and sometimes to the number of victims. The Chamber adopts the *Kajelijeli* Judgement definition, which is "large scale, involving many victims."[62]

45. The Chamber, agreeing with the *Kajelijeli* Judgement, finds that "systematic" describes the organised nature of the attack.[63]

46. In the Plea agreement, the Accused admits that from 7 April 1994, massacres of the Tutsi population and the murder of numerous political opponents were perpetrated throughout the territory of Rwanda, including Gikoro *commune*. These crimes were carried out by militiamen, military personnel, and *gendarmes*.[64]

47. Based on the facts contained in the Plea Agreement, the Chamber is convinced that widespread attacks were committed in Gikoro *commune* in April 1994 because the attacks resulted in a lager number of victims.

ii. The Attack Must Be Directed Against a Civilian Population

48. The *Akayesu* Judgement definition of 'civilian population' has been consistently followed in the jurisprudence of the Tribunal:[65]

> […] people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause. Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character.[66]

49. As noted in *Blaškić* Judgement,

> "the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian."[67]

50. Moreover, the term "population" does not require that crimes against humanity be directed against the entire population of a geographical territory or area.[68] The Trial Chamber in *Semanza* Judgement further clarified that:

> The victim(s) of the enumerated act need not necessarily share geographic or other defining features with the civilian population that forms the primary target of the underlying attack, but such characteristics may be used to demonstrate that the enumerated act forms part of the attack.[69]

51. The Chamber agrees with this jurisprudence.

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[61] *Kajelijeli*, Judgement (TC), para. 871.
[62] *Kajelijeli*, Judgement (TC) para. 871.
[63] *Kajelijeli*, Judgement (TC) para. 872.
[64] Plea Agreement, para. 30.
[65] *Kajelijeli*, Judgement (TC), para. 873; *Rutaganda*, Judgement (TC) para. 72; *Musema*, Judgement (TC), para. 207; *Semanza*, Judgement (TC), para. 330.
[66] *Akayesu*, Judgement (TC), para. 582, cited in *Kajelijeli*, Judgement (TC) para. 873.
[67] *Blaškic* Judgement (TC) para. 214, cited in *Bagilishema*, Judgement (TC) para. 79 and *Kajelijeli*, Judgement (TC) para. 874.
[68] *Kajelijeli*, Judgement (TC) para. 875; *Bagilishema*, Judgement (TC) para. 80; *Tadić*, Judgement (TC), para. 644.
[69] *Semanza*, Judgement (TC), para. 330, cited in *Kajelijeli*, Judgement (TC), para. 875.

52. In the Plea Agreement, the Accused admits that massacres of the Tutsi population and the murder of numerous political opponents were perpetrated.[70] He further admits that the attacks against Tutsi civilians gathered at Musha Church and at Ruhanga Protestant Church and School in Gikoro *commune* were part of the ongoing attacks against Tutsi civilians occurring in most parts of Rwanda during April 1994.[71]

53. Based on the facts contained in the Plea Agreement, the Chamber is convinced that the widespread attacks in Gikoro *commune* were committed against a civilian population.

iii. The Attack Must Be Committed on Discriminatory Grounds

54. The Chamber recalls the *Akayesu* Judgement where the "discriminatory grounds" element was considered to be jurisdictional in nature, limiting the jurisdiction of the Tribunal to crimes committed on "national, political, ethnic, racial or religious grounds."[72] Nonetheless, in the *Kajelijeli* Judgement the Chamber noted that:

> such acts committed against persons outside the discriminatory categories need not necessarily fall out with the jurisdiction of the Tribunal, if the perpetrator's intention in committing these acts is to support or further the attack on the group discriminated against on one of the enumerated grounds.[73]

55. In the Plea Agreement, Paul Bisengimana acknowledges that massacres of the Tutsi population and the murder of numerous political opponents were perpetrated.[74] He acknowledges that from 7 April 1994, in all regions of the country, Tutsis fleeing from massacres sought refuge in locations that they considered to be safe. In many of these places, the refugees were attacked, abducted, and massacred, often with the complicity of some of the authorities.[75]

56. Based on the Plea Agreement, the Chamber finds that the widespread attacks against the civilian population were committed on discriminatory grounds because most of the victims were Tutsis.

iv. The Mental Element of Crimes Against Humanity

57. The Chamber agrees with the reasoning in the *Kajelijeli* Judgement that "the accused must have acted with knowledge of the broader context of the attack and knowledge that his act formed part of the attack on the civilian population."[76]

58. In the Plea Agreement, the Accused admits that from 7 April 1994, massacres of the Tutsi population and the murder of numerous political opponents were perpetrated in Gikoro *commune*.[77] He acknowledges that the attacks against the Tutsi civilians gathered at Musha Church and at Ruhanga Protestant Church and School were part of the ongoing attacks against Tutsi civilians which were occurring in most parts of Rwanda.[78]

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[70] Plea Agreement, para. 30.
[71] Plea Agreement, paras. 39, 42.
[72] *Akayesu*, Judgement (AC), paras. 464-465, also cited in *Kajelijeli*, Judgement (TC), para. 877.
[73] *Kajelijeli*, Judgement (TC), para. 878; *Rutaganda*, Judgement (TC), para. 74; *Musema*, Judgement (TC), para. 209; *Semanza*, Judgement (TC), para. 331.
[74] Plea Agreement, para. 30.
[75] Plea Agreement, para. 31.
[76] *Kajelijeli*, Judgement (TC), para. 880, *Semanza*, Judgement (TC), para. 332; *Musema*, Judgement (TC), para. 206; *Ntakirutimana and Ntakirutimana*, Judgement (TC), para. 803; *Bagilishema*, Judgement (TC), para. 94; *Kayishema and Ruzindana*, Judgement (TC), para. 134, *Kunarać et al*., Judgement (AC), para. 102.
[77] Plea Agreement, para. 30.
[78] Plea Agreement, paras. 39, 42.

59. Based on the Plea Agreement, the Chamber is convinced that the Accused knew the broader context of the attacks occurring in Rwanda in April 1994 and knew that his acts formed part of widespread attacks committed against Tutsi civilians.

b. Findings

60. The Chamber finds that the attacks at Musha Church and at Ruhanga Protestant Church and School in Gikoro *commune* in April 1994 were launched against Tutsi civilians on discriminatory grounds and were of a widespread nature because they resulted in a large number of victims.

3. Crimes Against Humanity – Extermination

a. Indictment

61. Count 4 of the Indictment charges the Accused with extermination as a crime against humanity under Article 3 (b) of the Statute and states that:

> During the month of April 1994, in the Bugesera region of Kigali-Rural *préfecture*, Republic of Rwanda, Paul Bisengimana acting individually and in concert with others, was responsible for killing or causing persons to be killed, during mass killing events in Gikoro *commune* and its environs, as part of a widespread and systematic attack against a civilian population on political, ethnic or racial grounds.[79]
>
> Between 6 and 21 April 1994, there existed widespread or systematic attacks occurring throughout Rwanda, directed against a civilian population on political, ethnic or racial grounds.[80]
>
> Paul Bisengimana aided and abetted in the planning, preparation, or execution of the killing of Tutsi civilians and by his acts or through persons he assisted with his knowledge and consent.[81]
>
> As a direct consequence of his conduct including the provision of moral support to the attackers by Paul Bisengimana, thousands of civilian men, women and children were killed.[82]
>
> Paul Bisengimana's affirmative acts during the month of April 1994, viz: aiding and abetting in the killing of Tutsi civilians in Musha church in Gikoro *commune* and at the Ruhanga Protestant Church, Ruhanga *cellule*, Gicaca *secteur*, Gikoro *commune* are specified at paragraphs 17 – 20 and 24 – 28 above, and are hereby reiterated and incorporated herein by reference.[83]

b. The Plea Agreement

62. Paul Bisengimana acknowledges his guilt for having aided and abetted the commission of extermination as a crime against humanity.[84]

i. Events at Musha Church

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[79] Indictment, para. 40.
[80] Indictment, para. 42.
[81] Indictment, para. 43.
[82] Indictment, para. 44.
[83] Indictment, para. 45.
[84] Plea Agreement, para. 5

63. The Accused acknowledges that between 8 and 13 April 1994, more than a thousand Tutsi civilians sought refuge at Musha Church, situated in Rutoma *secteur*, Gikoro *commune*, Kigali-Rural *préfecture*, having fled from attacks against Tutsi civilians occurring throughout the *préfecture*.[85]

64. The Chamber notes that whereas the Indictment mentions that Juvénal Rugambarara was among the persons present during the attack on Musha Church,[86] his name is not mentioned in the Plea Agreement.[87] The Chamber has noted this difference but is of the opinion that it does not affect the validity of the Accused's plea, nor his responsibility for the commission of the offence.

65. The Accused acknowledges that:

a) On or about 12 April 1994, weapons such as guns and grenades were distributed to *Interahamwe* militiamen and other armed civilians at Musha Church by members of the Rwandan Army.[88]
b) He was aware of this and the fact that these weapons would be used to attack Tutsi civilians seeking refuge at Musha Church.[89]
c) On or about 13 April 1994, an attack was launched against the Tutsi civilians seeking refuge at Musha Church. The attackers used guns, grenades, machetes, pangas and other traditional weapons.[90]
d) This attack resulted in the killing of more than a thousand Tutsi civilians.[91]
e) During the attack, a civilian militiaman named Manda set fire to the Church, causing the death of many refugees.[92]
f) The Accused was present during the attack, along with Laurent Semanza, soldiers from the Rwandan Army, *Interahamwe* militiamen, armed civilians and communal policemen.[93]
g) His presence at Musha Church during the attack would have had an encouraging effect on the perpetrators and given them the impression that he endorsed the killing of Tutsi civilians gathered there.[94]

66. Paul Bisengimana acknowledges that he had the means to oppose the killings of Tutsi civilians in Gikoro *commune*, but that he remained indifferent to the attack.[95]

ii. Events at Ruhanga Protestant Church and School

67. The Accused acknowledges that between 8 and 10 April 1994, many Tutsi civilians sought refuge at Ruhanga Protestant Church and School, situated in Ruhanga *cellule*, Gicaca *secteur*, Gikoro *commune,* Kigali-Rural *préfecture,* having fled from attacks against Tutsi civilians occurring throughout the *préfecture*.[96]

68. The Accused acknowledges that

a) Between 10 and 15 April 1994, Brigadier Rwabukumba, along with soldiers from the Presidential Guard, civilian militiamen, and communal policemen, launched an attack against the Tutsi civilians seeking refuge in Ruhanga Complex.[97]

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[85] Plea Agreement, para. 33; Indictment, para. 17.
[86] Indictment, para. 19.
[87] Plea Agreement, para. 35.
[88] Plea Agreement, para. 34.
[89] Plea Agreement, para. 34.
[90] Plea Agreement, para. 35.
[91] Plea Agreement, para. 35.
[92] Plea Agreement, para. 35.
[93] Plea Agreement, para. 35.
[94] Plea Agreement, para. 36.
[95] Plea Agreement, para. 32.
[96] Plea Agreement, para. 40, Indictment, para. 24.
[97] Plea Agreement, para. 41.

b) During this attack, the attackers used guns, grenades, machetes, pangas and other traditional weapons, killing many of the Tutsi refugees.[98]
c) Despite his position as *bourgmestre*, and his knowledge of the facts that the refugees at Musha church had been attacked on 13 April 1994, he took no active steps to protect the Tutsi refugees who sought refuge at Ruhanga Complex between 10 and 15 April 1994.[99]

69. Paul Bisengimana acknowledges that he had the means to oppose the killings of Tusti civilians in Gikoro *commune*, but that he remained indifferent to the said attacks.[100]

c. Applicable Law

70. The Chamber recalls that extermination consists of an act or a combination of acts, which contributes to the killing of a large number of individuals.[101] It is irrelevant that the Accused's participation in the act is remote or indirect. It is the large number of killings that distinguishes the crime of extermination from the crime of murder.[102]

71. To establish the *mens rea* of extermination, the Prosecution must prove that the accused intended the killings, or was reckless or grossly negligent as to whether the killings would result and was aware that his acts or omissions formed part of a mass killing event.[103] The accused must also be shown to have known of the vast scheme of collective murders directed against a civilian population on discriminatory grounds and to have been willing to take part in that scheme.[104] As an aider or abettor of extermination as a crime against humanity, the Chamber should consider whether the Accused knew of the criminal intent of the principal perpetrator and knew that his actions assisted in the commission of the crime.

72. Therefore, in order to be convicted of extermination as a crime against humanity, an accused must have (i) participated in the mass killing of others, or in the creation of conditions of life leading to the mass killing of others; (ii) intended the killings, or been reckless or grossly negligent as to whether the killings would result; and (iii) been aware that his acts or omissions formed part of a mass killing event.[105]

d. Findings

i. Musha Church Massacres

73. Based on the facts admitted by the Accused and recalling the Chamber's findings that the attack on Musha Church in Gikoro *commune* was launched against Tutsi civilians on discriminatory grounds, was widespread and resulted in a large number of victims, the Chamber finds that this attack amounts to extermination.

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[98] Plea Agreement, para. 41; Indictment, para. 25.
[99] Plea Agreement, para. 42.
[100] Plea Agreement, para. 32.
[101] *Kayishema and Ruzindana,* Judgement (TC), paras. 144-147 ; *Rutaganda* Judgement (TC), paras. 82-83; *Musema,* Judgement (TC), para. 217; *Kamuhanda,* Judgement (TC), paras. 691, 692, *Ndindabahizi,* Judgement (TC), para. 479.
[102] *Kajelijeli,* Judgement (TC), para. 893.
[103] *Kajelijeli,* Judgement (TC), para. 894, 895; *Kayishema and Ruzindana,* Judgement (TC), paras. 144, 146; *Bagilishema,* Judgement (TC), para. 89; *Semanza* Judgement (TC), para. 341.
[104] *Kayishema and Ruzindana,* Judgement (TC), paras. 144, 145; *Rutaganda,* Judgement (TC), paras. 83, 84; *Musema,* Judgement (TC), para. 218; *Bagilishema,* Judgement (TC), para. 94; *Semanza,* Judgement (TC), para. 341; *Kamuhanda,* Judgement (TC), para. 696; *Kajelijeli,* Judgement (TC), para. 894.
[105] *Kayishema and Ruzindana,* Judgement (TC), para. 144; *Bagilishema,* Judgement (TC), para. 89.

74. The Chamber finds that the Accused participated in the attack against Musha Church by being present and that he was aware that his presence would have encouraged the criminal conduct of the perpetrators of the attack.

75. The Chamber is convinced that the Accused knew of the criminal intent of the principal perpetrators because of his admission that he was aware that arms had been distributed to *Interahamwe* militiamen and other armed civilians at Musha Church and that these weapons would be used to attack the Tutsi population who had sought refuge there.

76. Accordingly, the Chamber is satisfied that Paul Bisengimana's presence at Musha Church on or about 13 April 1994 aided and abetted the extermination of Tutsi civilians there.

ii. Ruhanga Protestant Church and School Massacres

77. Based on the facts admitted by the Accused and recalling the Chamber's findings that the attack on Ruhanga Protestant Church and School in Gikoro *commune* which occurred after the attack on Musha Church was launched against Tutsi civilians on discriminatory grounds, was widespread and resulted in a large number of victims, the Chamber finds that this attack amounts to extermination.

78. The Chamber finds that although the Accused may not have been present during the attack, he had reason to know that an attack would be launched against the Tutsi civilians gathered there because of the earlier attack on Musha Church. Moreover, the Chamber finds that despite the Accused's position as *bourgmestre* of Gikoro *commune*, he did not take any active steps to protect these Tutsi civilians. Although the Accused acknowledges that he had a duty to protect these civilians, the Chamber considers that the Accused failed protect the refugees.

79. The Chamber is convinced that, as a person of authority, the Accused's omission to act to prevent the attack amounts to gross negligence. The Chamber finds that the Accused must have known that his omission to act would allow the massacres to take place.

80. In light of these circumstances, the Chamber is satisfied that the Accused knew the criminal intent of the perpetrators of the attack on the Ruhanga Complex.

81. Therefore, the Chamber considers that the Accused's omission to act aided and abetted the commission of the extermination of Tutsi civilian refugees at Ruhanga Protestant Church and School.

iii. General Findings

82. The Chamber finds that the Accused is individually criminally responsible pursuant to Article 6 (1) of the Statute for aiding and abetting the extermination of members of the Tutsi population at Musha Church and Ruhanga Church and School in Gikoro *commune* in April 1994. The Chamber finds the Accused guilty of extermination as a crime against humanity under Article 3 (b) of the Statute and convicts him accordingly.

4. Crimes Against Humanity – Murder

a. Indictment

83. Count 3 of the Indictment charges the Accused with murder as a crime against humanity under Article 3 (a) of the Statute and states that:

> During the month of April 1994, in the Bugesera region of Kigali-Rural *préfecture*, Republic of Rwanda, Paul Bisengimana acting individually was responsible for killing or causing persons to

be killed in Gikoro *commune* and its environs, as part of a widespread and systematic attack against a civilian population on political, ethnic or racial grounds.[106]

Paul Bisengimana aided and abetted in the planning, preparation, or execution of the killing of Tutsi civilians, by his acts or through persons he assisted, with his knowledge and consent.[107]

Among the Tutsi civilians killed as a consequence of Paul Bisengimana's conduct are a Tutsi man called Rusanganwa. In that regard, Paul Bisengimana was present during the attack at Musha church in Rutoma *secteur*, Gikoro *commune*, on 13 April 1994, when Rusanganwa, who had sought refuge at the said location, was murdered.[108]

b. The Plea Agreement

84. The Accused acknowledges his guilt for having aided and abetted the commission of murder as a crime against humanity.[109]

85. The Accused acknowledges that during the attack at Musha Church on 13 April 1994, he was present when a Tutsi man called Rusanganwa, who had sought refuge there, was murdered.[110]

86. The Accused acknowledges that he had the means to oppose the killings of Tutsi civilians in Gikoro *commune*, but that he remained indifferent to the attack.[111]

c. Applicable Law

87. The Chamber recalls that murder is the intentional killing of a person, or the intentional infliction of grievous bodily harm knowing that such harm is likely to cause the victim's death or being reckless as to whether death will result, without lawful justification or excuse.[112] Murder is punishable as a crime against humanity when committed as part of a widespread or systematic attack against a civilian population on discriminatory grounds. The Chamber recalls that it is the scale of the killings that distinguishes extermination from murder as a crime against humanity.[113]

88. With respect to the Accused's *mens rea* as an aider or abettor of murder as a crime against humanity, the Chamber should consider whether the Accused knew of the criminal intent of the principal perpetrator and knew that his actions assisted in the commission of the crime.

d. Findings

89. As a preliminary matter, the Chamber recalls that the French version of the Statute describes the culpable act in Article 3 (a) of the Statute as '*assassinat*', that is premeditated murder, whereas the English version of the same article describes it as 'murder.'[114] The Chamber further recalls that in the

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[106] Indictment, para. 35.
[107] Indictment, para. 38.
[108] Indictment, para. 39.
[109] Plea Agreement para. 5.
[110] Plea Agreement, para. 37.
[111] Plea Agreement, para. 32.
[112] *Akayesu* Judgement (TC), para. 586; *Ndindabahizi* Judgement, (TC), para. 487.
[113] *Kajelijeli,* Judgement (TC), para. 893.
[114] *Semanza*, Judgement (TC), para. 589; *Musema*, Judgement (TC), para. 84; *Rutaganda*, Judgement (TC), para. 80; *Akayesu*, Judgement (TC), para. 585; *Bagilishema*, Judgement (TC), paras. 84, 85; *Kayishema and Ruzindana*, Judgement (TC), para. 140; *Ntakirutimana*, Judgement (TC), paras. 803, 804 and 808.

original French version of the Plea Agreement, Rusanganwa was '*assassiné*'[115] that is murdered with premeditation. This fact is not disputed. However, the Chamber recalls that it is not alleged that the Accused directly committed the murder nor that he shared the intent of the principal offender, but that he aided and abetted the crime. Therefore, the Chamber must examine if the *mens rea* of the Accused was that of an aider and abettor when Rusanganwa's murder was committed, in other words whether he knew the criminal intent of the principal perpetrator and he knew that his presence encouraged the commission of the crime.

90. The Chamber also notes that a reading of the Indictment[116] suggests that there are several murder charges against the Accused. However, the Plea Agreement only refers to the murder of Rusanganwa, committed during the attack at Musha Church.[117] Accordingly, the Chamber has only examined the facts in support of the specific murder alleged in the Indictment and acknowledged by the Accused, where one victim is clearly identified.

91. The Chamber has already found that the attack at Musha Church was a widespread attack against a civilian population on discriminatory grounds.

92. It is not disputed that a Tutsi man named Rusanganwa was murdered with premeditation. On the basis of the facts admitted by the Accused, the Chamber finds that the Accused was present when Rusanganwa was murdered during the attack at Musha Church.

93. The Chamber is convinced that Paul Bisengimana knew that the murder of Rusanganwa was part of a widespread attack against Tutsis civilians on ethnic grounds. The Chamber is also convinced, based on the factual circumstances of the case that Paul Bisengimana knew the criminal intent of the perpetrator of the murder of Rusanganwa. The Chamber recalls its reasoning at Paragraph 75 in support of this finding.

94. The Chamber finds that the Accused participated in Rusanganwa's murder by being present when the crime was committed. The Accused was aware that his presence would encourage the criminal conduct of the principal perpetrator and give the impression that he endorsed the murder. Moreover, the Chamber recalls that the Accused acknowledges that he had the means to oppose the killings of the Tutsi civilians but that he remained indifferent to the attacks.

95. The Chamber is satisfied that the Accused is individually criminally responsible pursuant to Article 6 (1) of the Statute for aiding and abetting the murder of a Tutsi civilian named Rusanganwa at Musha Church in Gikoro *commune* in April 1994. Consequently, the Chamber finds the Accused guilty of murder as a crime against humanity under Article 3 (a) of the Statute.

e. Cumulative Convictions

i. Applicable Law

96. The Chamber recalls that the general test for cumulative convictions was reaffirmed in the *Krstić* Judgement:

> The established jurisprudence of the Tribunal is that multiple convictions entered under different statutory provisions, but based on the same conduct, are permissible only if each statutory provision has a materially distinct element not contained within the other. An element

[115] The French version of the Plea Agreement which is the original states that Rusanganwa was "*assassiné*" during the attack at paragraph 37.
[116] Indictment, para. 39.
[117] Plea Agreement, para. 37.

is materially distinct from another if it requires proof of a fact not required by the other element. Where this test is not met, only the conviction under the more specific provision will be entered. The more specific offence subsumes the less specific one, because the commission of the former necessarily entails the commission of the latter.[118]

97. The *Čelebići* Judgement explains that when facts are regulated by two different provisions, a conviction should be entered only under the provision that contains an additional materially distinct element.[119]

98. The Chamber takes note that the distinct elements test for permissible cumulative convictions should not be applied mechanically or blindly. The ICTY Appeals Chamber has urged that this test be applied carefully to avoid prejudice to the accused. [120]

ii. Findings

99. The Chamber has reflected on the fact that the Plea Agreement was initially based on the 31 October 2005 Indictment which charged the Accused for his direct participation in the murder of Rusanganwa.[121] This Indictment charged the Accused for cutting the arm of Rusanganwa with a machete, after which Rusanganwa bled to death. In contrast, the 1 December 2005 Indictment on which the Plea Agreement is now based only refers to the Accused's presence during the attack at Musha Church when a Tutsi man called Rusanganwa was killed.[122]

100. In the instant case, both Rusanganwa's murder the extermination at Musha Church were planned and prepared by the principal perpetrators. The Chamber considers that the murder of Rusanganwa is included in the crime of extermination committed at Musha Church because Rusanganwa was one of the civilian victims killed during this widespread attack on discriminatory ground.

101. In the instant case, the Chamber has found that the Accused had the required *mens rea* of an aider and abettor: he knew the criminal intent of the principal perpetrators of extermination and murder, that those crimes were planned and that his presence assisted the commission of the crime. Upon reflection, the Chamber considers that the same set of facts proves the mental element of aiding and abetting murder and extermination as crimes against humanity at Musha Church.

102. The Chamber observes that the charges of extermination and murder at Musha Church are supported by the same set of facts and that the offences were committed with the same mode of participation on the part of the Accused. Thus, in that regard, the crimes of aiding and abetting murder and extermination as crimes against humanity are not materially distinct.

103. The Chamber considers that the murder of Rusanganwa is best understood as an offence included in the crime of extermination committed at Musha Church. Consequently, two convictions on the basis of ideal concurrence of crimes would not be justified in these circumstances as they would not provide a better or more complete description of the entire criminal conduct of the Accused. The Chamber considers that the Accused should only be convicted of extermination as a crime against humanity for the offences committed at Musha Church, this crime being more specific than the crime of murder in light of its large scale which is an additional materially distinct element.

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[118] *Krstić*, Judgement (AC), para. 218 also cited in *Semanza* Judgement (AC), para. 315; see also *Ntakirutimana* Judgement (AC), para. 542.
[119] *Mucić et al*., Judgement (AC), para. 413.
[120] *Kunarać*, Judgement (AC), paras. 168-198.
[121] Indictment, 31 October 2005, para. 22.
[122] Indictment, para. 39.

104. The Chamber recalls that on 7 December 2005, the Accused was found guilty of murder and extermination as crimes against humanity after it accepted the guilty plea of the Accused.

105. At this stage of the proceedings, the Chamber decides that it is in the interests of justice and the fairness of the proceedings to enter a conviction only with respect to the count of extermination as a crime against humanity and not with respect to the count of murder. Accordingly, the Chamber will sentence the Accused only with respect to the extermination conviction.

IV. Issues Relating to the Sentence

A. Applicable Texts and Principles

106. The Chamber recalls that the Tribunal was established to contribute to the process of national reconciliation and to the restoration and maintenance of peace and to ensure that the violations of international humanitarian law in Rwanda were halted and effectively redressed.[123] The Chamber considers that a fair trial and, in the event of a conviction, a just sentence, contribute towards these goals.

107. The Chamber will sentence Paul Bisengimana pursuant to the provisions of Articles 22 and 23 of the Statute and Rules 100 and 101 of the Rules. The Chamber notes that the only penalty the Tribunal can impose is a prison term. Under Rule 101 (A) of the Rules, such a term shall not exceed life imprisonment.

108. The Statute and the Rules do not provide for specific penalties for any of the crimes within the jurisdiction of the Tribunal.

109. Consequently, the determination of the sentence is left to the discretion of the Chamber. In exercising that discretion, the Chamber shall, pursuant to Article 23 (2) of the Statute and Rule 101 (B) of the Rules, consider a number of factors including the gravity of the offence, any aggravating or mitigating circumstances, the personal circumstances of the convicted person and the general practice regarding prison sentences in the courts of Rwanda.

110. The Chamber understands its obligation to ensure that the sentence is commensurate with the individual circumstances of the offender.[124]

111. The Chamber recalls that aggravating circumstances must be proved beyond reasonable doubt, while mitigating circumstances must be proved on a balance of probabilities.[125]

B. Aggravating Circumstances

1. Prosecution's Submissions on the Gravity of the Offence and the Official Position of the Accused

112. The gravity and heinous nature of extermination and murder as crimes against humanity and their absolute prohibition render their commission inherently aggravating. Further, the magnitude of the crimes committed in Rwanda in 1994, resulting in the killing of several thousand civilians within 100 days, shock the collective conscience[126] and constitutes an aggravating factor.[127] Paul Bisengimana's actions and omissions directly resulted in the massacre of many Tutsi civilians.[128]

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[123] Security Council Resolution 955, 8 November 1994.
[124] *Mucić et al*., Judgement (AC), paras. 717-719; *Muhimana*, Judgement (TC), para. 594.
[125] *Kajelijeli* Judgement (AC), para. 294., see also reference in the Defence Sentencing Brief, para. 19; Prosecution Sentencing Brief, para. 34, and T. 19 January 2006 pp. 6, 35.
[126] Prosecution Sentencing Brief, para. 35; T. 19 January 2006 p. 5.

113. Paul Bisengimana, as *bourgmestre* of Gikoro *commune,* bore special responsibilities: he had the duty and the authority to protect the population, prevent, or punish illegal acts.[129] Paul Bisengimana was under a duty to uphold a higher degree of morality than is usually demanded.[130] Paul Bisengimana's education enabled him to know and appreciate the dignity and value of human life.[131] He was enlightened enough to be aware of the need for and value of a peaceful co-existence between communities.[132]

114. The involvement of the peasant population in the massacres was facilitated by their misplaced belief in their leadership and an understanding that the encouragement of the authorities guaranteed that they could kill Tutsi civilians and loot their property with impunity.[133]

115. In spite of all these factors, Paul Bisengimana took no active steps to protect Tutsi refugees, but stood aside and watched.[134]

116. The Chamber notes that the Defence did not make any submissions on aggravating circumstances.

2. Findings

117. The Chamber recalls that the seriousness of the crimes and the extent of the involvement of the Accused in their commission are factors to be considered in assessing aggravating circumstances. Crimes against humanity are inherently aggravating offences because they are heinous in nature and shock the collective conscience of mankind.[135]

118. The Chamber recalls that the Accused acknowledges that his crime consisted of direct and indirect acts leading to physical or mental torture and death as part of a widespread or systematic attack against a civilian population on ethnic grounds.[136]

119. The Chamber finds that the Accused's participation in aiding and abetting extermination and murder as crimes against humanity constitute a gross violation of international humanitarian law and is an aggravating factor.

120. The Chamber finds that the Accused's position as *bourgmestre* of Gikoro *commune* during the events, and the fact that he was an educated person, are aggravating factors. As representative of the executive power at the communal level, the Chamber finds that the Accused had a duty to protect the population in the *commune*, he did not take any action to prevent the massacres which occurred there. Instead, he knowingly encouraged the killers at Musha Church by being present when the attack was launched that resulted in the death of more that a thousand Tutsi refuges. Further, he failed to prevent the subsequent massacres at Ruhanga Protestant Church and School, which resulted in many Tutsis being killed. The Chamber finds that Paul Bisengimana was an educated person who could appreciate the dignity and value of human life and was aware of the need for and value of a peaceful co-existence between communities.

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[127] Prosecution Sentencing Brief, para. 35; T. 19 January 2006 p. 6.
[128] Prosecution Sentencing Brief, para. 50; T. 19 January 2006 p. 7.
[129] Prosecution Sentencing Brief, paras. 36, 40; T. 19 January 2006 p. 6.
[130] Prosecution Sentencing Brief, para. 41; T. 19 January 2006 p. 6.
[131] Prosecution Sentencing Brief, para. 42; T. 19 January 2006 pp. 6-7.
[132] Prosecution Sentencing Brief, para. 43; T. 19 January 2006 p. 7.
[133] Prosecution Sentencing Brief, para. 44; T. 19 January 2006 p. 7.
[134] Prosecution Sentencing Brief, paras. 48-49; T. 19 January 2006 p. 7.
[135] *Ruggiu*, Judgement (TC), para. 48.
[136] Plea Agreement, para. 14.

121. However, there is no evidence to support the Prosecution's allegation that the involvement of the peasant population in the massacres was facilitated by their misplaced belief in their leadership and their understanding that the encouragement of the authorities guaranteed that they could kill Tutsi civilians and loot their property with impunity.

C. MITIGATING CIRCUMSTANCES

1. Parties' General Submissions

122. The Prosecution submits that there are "compelling mitigating circumstances."[137] The Prosecution stresses that a finding that there are mitigating circumstances relates to the assessment of the sentence and in no way derogates from the gravity of the crime. Such a finding mitigates the punishment, not the crime.[138]

123. The Defence submits that the Chamber has a large discretionary power with regard to the mitigating circumstances[139] and recalls that many mitigating circumstances have been found both by this Tribunal and by the ICTY.[140]

124. The Defence raised eight mitigating circumstances which in its view may assist the Chamber in determining a fair sentence. The Defence is fully aware that mitigation of punishment in no way reduces the gravity of the crime or the guilty verdict.[141]

2. Applicable Law

125. The Chamber recalls that mitigating circumstances may not be directly related to the offence[142]

126. The Chamber notes that the jurisprudence of the Tribunal and the ICTY has identified several reasons why the guilty plea may have a mitigating effect: the showing of remorse,[143] repentance,[144] the contribution to reconciliation,[145] the establishment of the truth,[146] the encouragement of other perpetrators to come forward,[147] the sparing of a lengthy investigation and trial and thus time, effort and resources[148] and the fact that witnesses are relieved from giving evidence in court.[149] The timing of the guilty plea is also a factor.[150]

127. With respect to the issue of substantial cooperation of the Accused with the Prosecutor, under Rule 101 (B) (ii), the Chamber recalls that the Defence indicated that the Accused did not cooperate with the Prosecutor.[151] The Chamber considers at the outset of its deliberations on mitigating

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[137] Prosecution Sentencing Brief, para. 52; T. 19 January 2006 p. 8.
[138] Prosecution Sentencing Brief, para. 52, quoting *Kambanda*, Judgement (TC), paras. 56-57; T. 19 January 2006 p. 8.
[139] Defence Sentencing Brief, para. 18, quoting *Naletilić et al*., Judgement (TC), para. 742; T. 19 January 2006 p. 34.
[140] Defence Sentencing Brief, para. 18.
[141] Defence Sentencing Brief, para. 20, quoting *Ruggiu*, Judgement (TC), para. 80; T. 19 January 2006 p. 35.
[142] *Nikolić*, Judgement (TC), para. 145; *Deronjić*, Judgement (TC), para. 155.
[143] *Plavšić,* Judgement (TC), para. 73.
[144] *Ruggiu,* Judgement (TC), para. 55.
[145] *Plavšić,* Judgement, (TC), para.70.
[146] *Nikolić,* Judgement, (TC), para. 248.
[147] *Erdemović,* Judgement, (TC) (1998), para.16; *Ruggiu,* Judgement (TC), para. 55.
[148] *Ruggiu,* Judgement (TC), para. 53.
[149] *Erdemović,* Judgement (TC) (1998), para. 450.
[150] *Sikirica et al*., Judgement (TC), para.150.
[151] T.19 January 2006 p. 34.

circumstances that the lack of cooperation by the Accused with the Office of the Prosecutor[152] can not be considered as an aggravating factor.[153]

3. The Guilty Plea with Publicly Expressed Regrets

a. Prosecution Submissions

128. The Prosecution submits that in most jurisdictions, including Rwanda, a guilty plea is considered as a mitigating factor.[154] Paul Bisengimana's guilty plea will assist in the administration of justice and in the process of national reconciliation in Rwanda. It will also save the victims of the attacks from the ordeal of coming to testify before the Tribunal.[155]

129. The Prosecution also states that by pleading guilty, the Accused should be seen as setting an example that may encourage others to acknowledge their personal involvement in the massacres committed in Rwanda in 1994.[156]

130. The Prosecution refers to the Plea Agreement in which Paul Bisengimana has shown some degree of remorse for the crimes he is charged with, acknowledges full responsibility for his actions and omissions, and is convinced that it is only the full truth that can restore national unity and foster reconciliation in Rwanda.[157] The Accused has also indicated his deep and genuine desire to tell the whole truth and expressed his profound and heartfelt apologies to all the direct and indirect victims of the offences he has been charged with.[158]

131. The Prosecution adds that the guilty plea was timely and saved the Tribunal considerable expenses.[159] The Prosecution submits that in light of the Tribunal's completion strategy, the Accused deserves credit.[160]

b. Defence Submissions

132. The Defence submits that the jurisprudence recognizes that the guilty plea of an accused constitutes a mitigating factor, provided that it is accompanied by publicly expressed sincere regrets or remorse.[161] According to the Defence, Paul Bisengimana has already expressed his deepest apologies to the victims of the Rwandan genocide in the Plea Agreement. He also sincerely regrets not having had the courage to personally oppose the massacres and having supported them by his presence. He hopes that his expressions of regret will be heard by Rwandans and the international community, and will help contribute to the process of peace and national reconciliation in Rwanda.[162] The Defence particularly stresses that the Accused acknowledges that his presence gave the impression that he approved of the massacre at Musha Church, and encouraged Rusanganwa's murder. Further, the Accused has admitted that he took no steps to protect the refugees at Ruhanga Protestant Church and School, despite his position as *bourgmestre* and his knowledge of the earlier attack.[163]

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[152] Defence Sentencing Brief, paras.16-17.
[153] *Plavšić*, Judgement (TC), paras. 63-64.
[154] Prosecution Sentencing Brief, para. 53, quoting *Kambanda*, Judgement (TC); T. 19 January 2006 p. 8.
[155] Prosecution Sentencing Brief, para. 53, quoting *Todorović*, Judgement (TC), para. 80; T. 19 January 2006 p. 8.
[156] Prosecution Sentencing Brief, para. 58, quoting *Kambanda*, Judgement (TC), para. 53 and *Erdemović*, Judgement (TC) (1998), p. 16; T. 19 January 2006 p. 9.
[157] Prosecution Sentencing Brief, para. 54; T. 19 January 2006 p. 8.
[158] Prosecution Sentencing Brief, para. 55; T. 19 January 2006 p. 8.
[159] Prosecution Sentencing Brief, para. 57, quoting *Kambanda*, Judgement (TC), para. 54; T. 19 January 2006 pp. 8-9.
[160] Prosecution Sentencing Brief, para. 57; T. 19 January 2006 pp. 9.
[161] Defence Sentencing Brief, para. 21; T. 19 January 2006 p. 35.
[162] Defence Sentencing Brief, paras. 27-28; Paul Bisengimana, T. 19 January 2006 pp. 44-45.
[163] T. 19 January 2006 p. 10; Paul Bisengimana, T. 19 January 2006 pp. 45-46.

133. The Defence adds that the sentiments of the Accused must be evaluated in the light of his statements and conduct.[164]

134. The Defence further states that a guilty plea should give rise to a reduction in the sentence the Accused would have received had he not pleaded guilty.[165]

135. The Defence submits that whilst a guilty plea is always important in establishing the truth, it can only assist if it is entered before the commencement of trial, when it can save valuable time and resources.[166] In the present case, Paul Bisengimana decided to plead guilty before the commencement of his trial and even before a date had been set by the Registry for the hearing of his case. He has thus assisted the Tribunal and the international community in making substantial savings in terms of time, human and financial resources.[167]

c. Findings

136. The Chamber recalls that in the Plea Agreement Paul Bisengimana states that by pleading guilty he indicates his genuine and deep desire to tell the whole truth and to contribute to the search for the truth by revealing the knowledge and information he possesses.[168] The Chamber recalls that the Accused hopes to be setting an example that will help others to contribute to the search for the truth.[169]

137. The Chamber notes that at the Pre-Sentencing Hearing, the Accused admitted that he had failed in his duty to protect human life and that he did not show the courage that his citizens expected from their *bourgmestre*. He asked for pardon from the families that lost people in his *commune* and he publicly expressed remorse for not having been able to save those innocent people, which was his first duty.[170]

138. The Chamber finds that both in the Plea Agreement and during the Pre-Sentencing hearing, the Accused publicly expressed regrets and remorse for the crimes that he committed.

139. The Chamber observes that an acknowledgement of guilt may constitute proof of the honesty of the perpetrator. The Chamber concurs with the opinions in *Erdemović* and *Ruggiu* Judgements that some form of consideration should be given to those who have confessed their crimes in order to encourage others to come forward.[171] Moreover, the Chamber is of the view that the guilty plea of the Accused may contribute to the process of national reconciliation in Rwanda.

140. The Chamber finds that Paul Bisengimana's change of plea to a guilty plea is a mitigating circumstance. The plea is accompanied by publicly expressed remorse and a recognition of his responsibility.[172] Further, the timely nature of the guilty plea facilitates the administration of justice and saves the Tribunal's resources.[173]

4. Personal and Family Situation

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[164] Defence Sentencing Brief, paras. 25-26, quoting *Serushago*, Judgement (TC), para. 41.
[165] Defence Sentencing Brief, para. 22, quoting *Todorović*, Judgement (TC), para. 80.
[166] Defence Sentencing Brief, para. 23, quoting *Todorović*, Judgement (TC), para. 81; *Rutaganira*, *Jugement* (TC), para. 151.
[167] Defence Sentencing Brief, para. 24; T. 19 January 2006 p. 37.
[168] Plea Agreement, para.7.
[169] Plea Agreement, para. 11.
[170] T. 19 January 2006 pp. 45-46.
[171] *Erdemović* Judgement (TC) (1998), para. 11; *Ruggiu,* Judgement (TC), para. 55.
[172] *Ruggiu*, Judgement (TC), para. 54.
[173] *Ruggiu* Judgement (TC), para. 53.

a. Defence Submissions

141. The Defence submits that being married and having children have been deemed to be mitigating circumstances[174] and that the social, professional and family background of an accused also has to be taken into account.[175] The Defence recalls that Paul Bisengimana is married and has ten children, and that the youngest two children, who are four and six years old,[176] live in France with their mother,[177] the Accused's wife, and have recently obtained refugee status,[178] which will allow their mother to resume work as a nurse. This personal and family situation offers real hope for the Accused's rehabilitation after his release.[179]

142. The Prosecution did not make any submissions on this matter.

b. Findings

143. The Chamber notes that the fact that the Accused is married and has children may, in the circumstances, be considered mitigating.[180] The Chamber agrees that the social, professional and family background of the Accused also has to be taken into account.[181]

144. Based on the Defence submissions and on the Accused's statement during his Further Appearance, the personal and family situation of the Accused, a married man with children, lead the Chamber to believe in his chances of rehabilitation, and the Chamber therefore finds this situation to be a mitigating circumstance.

5. Character of the Accused

a. Prosecution Submissions

145. The Prosecution notes that as far as is known, Paul Bisengimana was of good character and had no record of extremism before 1994.[182]

b. Defence Submissions

146. The Defence submits that an accused's character should be examined to assess his possibility of rehabilitation[183] and should be taken into account in the determination of the sentence.[184]

147. The Defence submits that Paul Bisengimana was a person of good moral conduct before 1994. He was esteemed as a *bourgmestre*, he brought prosperity and development to Gikoro *commune*

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[174] Defence Sentencing Brief, para. 29, quoting *Kunarać et al*., Judgement (AC), para. 362; *Vasiljević*, Judgement (TC), para. 300; *Serushago*, Judgement (TC), para. 39; *Rutaganira*, *Jugement* (TC), paras. 120-121.
[175] Defence Sentencing Brief, para. 30, quoting *Blaškic*, Judgement (TC), para. 779.
[176] Defence Sentencing Brief, para. 31. The Chamber notes that the Accused's daughter, Claudine Uwera Bisengimana, testified that his two youngest children are nine and four years' old, see T. 19 January 2006, Claudine Uwera Bisengimana, p. 24.
[177] Defence Sentencing Brief, para. 32; T. 19 January 2006, Claudine Uwera Bisengimana, p. 24; T. 19 January 2006, p. 38.
[178] Defence Sentencing Brief, para. 32; T. 19 January 2006, Claudine Uwera Bisengimana, p. 24.
[179] Defence Sentencing Brief, paras. 32-33.
[180] *Kunarać et al*., Judgement (AC), para. 362; *Vasiljević*, Judgement (TC), para. 300; *Serushago*, Judgement (TC), para. 39; *Rutaganira*, *Jugement* (TC), paras. 120-121.
[181] *Blaškic*, Judgement (TC), para. 779.
[182] Prosecutor's Sentencing Brief, para. 56, quoting *Banović*, Judgement (TC), paras. 75-76; T. 19 January 2006, p. 8.
[183] Defence Sentencing Brief, para. 34, quoting *Blaškic*, Judgement (TC), para. 780; *Ruggiu*, Judgement (TC), para. 68.
[184] Defence Sentencing Brief, para. 34, quoting *Mucić et al*. Judgement (AC)(2001), para. 788; *Serushago*, Judgement (TC), para. 18; *Ruggiu*, Judgement (TC), para. 68; *Rutaganira*, *Jugement* (TC), para. 127.

throughout his term of office and he worked relentlessly to improve the lot of its population.[185] The Accused never discriminated against Tutsis on a personal or professional level before or during the events of 1994.[186] The Accused had a high sense of responsibility.[187]

148. The Defence thus submits that Paul Bisengimana's obvious qualities demonstrate his potential for rehabilitation.[188]

c. Findings

149. The Chamber considers that the Accused was an educated person with a high level of responsibility in Gikoro *commune* at the time of the events. The Chamber recalls that Witnesses Gervais Condo and RKV testified that Paul Bisengimana was esteemed as a *bourgmestre*, that he brought prosperity and development to Gikoro *commune* throughout his term of office and that he worked to improve the life of its population.[189] These witnesses also testified about development projects carried out in Gikoro *commune* by the Accused.[190] Further, according to Witnesses Gervais Condo and Claudine Uwera Bisengimana, Paul Bisengimana had a strong sense of responsibility because of his role as a widower, father and *bourgmestre*.[191]

150. The Chamber is satisfied by the witnesses' testimonies that the Accused was a person of good character before he got involved in the crimes committed in Gikoro *commune* in April 1994 and that this constitutes a mitigating factor.

6. Assistance Given to Certain Victims

a. Defence Submissions

151. The Defence states that assistance given to victims has been assessed as a mitigating circumstance,[192] since such assistance indicates that the accused is capable of rehabilitation.[193]

152. The Defence submits that immediately after President Habyarimana's death, a dozen Tutsi civilians asked Paul Bisengimana for protection. The Defence states that he gave them refuge and thus saved their lives.[194]

153. The Prosecution did not make any submissions on this matter.

b. Findings

154. The Chamber recalls that Witness Claudine Uwera Bisengimana, the second daughter of the Accused[195] is the only witness who testified that in 1994 about twelve Tutsis took refuge in her

[185] T. 19 January 2006, Gervais Condo, p. 14; T. 19 January 2006, Witness RKV, p. 21; Paul Bisengimana, T. 19 January 2006 p. 38, 45.
[186] Defence Sentencing Brief, para. 36.
[187] Defence Sentencing Brief, para. 37.
[188] Defence Sentencing Brief, para. 38.
[189] T. 19 January 2006, Gervais Condo, pp. 13-14; T. 19 January 2006, Witness RKV, p. 21.
[190] T. 19 January 2006, Gervais Condo, p. 14; T. 19 January 2006, Witness RKV, p. 21.
[191] T. 19 January 2006, Gervais Condo, p. 18; T. 19 January 2006, Claudine Uwera Bisengimana, p. 25.
[192] Defence Sentencing Brief, para. 39, quoting *Sikirica et al*., Judgement (TC), paras. 195, 229; *Serushago*, Judgement (TC), para. 38; *Ruggiu*, Judgement (TC), paras. 73-74; *Rutaganira*, Judgement (TC), para. 155; *Blaškic*, Judgement (TC), para. 781.
[193] Defence Sentencing Brief, para. 39.
[194] Defence Sentencing Brief, para. 40.
[195] T. 19 January 2006, Claudine Uwera Bisengimana, p.24.

home.[196] Among them, she remembered Laurent and his four children, his wife, cousin, and sister, and also Mukarubayiza, who was a lady from Duha, and her three children.[197] The Witness stated that the refugees stayed there until the RPF took over the area, at which point the refugees and her family fled together.[198] The Witness was 14 years old at the time of the events.[199]

155. Witness Claudine Uwera Bisengimana stated that "killers" threatened her family and described them as accomplices because they were hiding Tutsis, and that such threats were addressed to Paul Bisengimana, their father. However, Claudine Uwera Bisengimana did not remember any particular incident in that respect.[200]

156. When questioned by the Bench, Witness Claudine Uwera Bisengimana testified that Laurent's wife and her children were still alive. However, Laurent, his sister, and their cousin were killed. The Witness was not sure if Marie Mukarubayiza and her children were still alive. The Witness stated that some of the refugees survived, whereas others were killed on the way to Kabuga,[201] although she did not know under what circumstances.[202]

157. Witness Claudine Uwera Bisengimana explained that she, her family and the refugees all left the house together. She and her family were then dropped off by her father at a school in Bicumbi. Her father then went back to pick those persons up but the RPF were behind them and he had to move his family towards Kabuga, so those persons remained behind. When her father wanted to go back and pick them up, it rained and it was not possible for him to go and collect them. The Witness added that the family remained in Kabuga and that they subsequently learnt that those persons had been killed but that she did not know who had killed them.[203]

158. The Chamber notes that no other witness testified to the fact that the Accused assisted Tutsi refugees and neither did the Accused. The Chamber notes that the Prosecution did not challenge this assertion.

159. The Chamber has carefully considered the testimony of Claudine Uwera Bisengimana and considers on a balance of probabilities that it is established that some Tutsis civilians were temporarily sheltered at Paul Bisengimana's house in 1994. However, based on the same testimony, the Chamber considers that it is also established that Paul Bisengimana fled with his family and left the refugees behind and that some of the refugees were subsequently killed. Having considered the totality of this testimony, the Chamber does not find, in the circumstances and, that it is established that the Accused protected Tutsis refugees and thus saved their lives as submitted by the Defence. Accordingly, the Chamber rejects this alleged mitigating circumstance.

7. Lack of Prior Criminal Convictions and Good Conduct in Detention

a. Defence Submissions

160. The Defence submits that the Accused's lack of prior criminal convictions[204] and his good conduct in detention[205] can be mitigating circumstances.

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[196] T. 19 January 2006, Claudine Uwera Bisengimana, pp. 26, 27.
[197] T. 19 January 2006, Claudine Uwera Bisengimana, p. 25.
[198] T. 19 January 2006, Claudine Uwera Bisengimana, p. 26.
[199] T. 19 January 2006, Claudine Uwera Bisengimana, p. 25.
[200] T. 19 January 2006, Claudine Uwera Bisengimana, p. 26.
[201] T. 19 January 2006, Claudine Uwera Bisengimana, pp. 27-28.
[202] T. 19 January 2006, Claudine Uwera Bisengimana, pp. 27-28.
[203] T. 19 January 2006, Claudine Uwera Bisengimana, p. 28.
[204] Defence Sentencing Brief, para. 41, quoting *Simić*, Judgement (TC), para. 108; *Nikolić*, Judgement (TC), para. 265; *Ruggiu*, Judgement (TC), paras. 59-60; *Rutaganira*, *Jugement* (TC), paras. 129-130.

161. The Defence states that the Accused has no criminal convictions, while admitting that obtaining a copy of his criminal record from the Rwandan authorities has proved difficult.[206]

162. The Defence further submits that Paul Bisengimana's conduct in detention has been exemplary.[207]

163. The Prosecution did not make any submissions on this matter.

b. Findings

164. The Chamber recalls that it admitted on 3 February 2006 the Certificate of Good Conduct signed by the Commander of the UNDF.[208] This Certificate indicates that between the Accused's transfer to the UNDF on 11 March 2002 and the date of the Certificate (22 December 2005), the Accused was never the subject of any disciplinary action and conducted himself well at all times.

165. The Chamber has considered the Defence submissions and the fact that the Accused had been *bourgmestre* of Gikoro *commune* from May 1981 until 19 April 1994. The Chamber finds on a balance of probabilities that the Accused had no previous criminal record. The Chamber considers that this finding constitutes a mitigating circumstance.[209]

8. Age and Ill-Health

a. Defence Submissions

166. The Defence submits that significant weight has been attached to the advanced years of accused persons by this Tribunal and the ICTY,[210] and refers particularly to the *Rutaganira* Judgement.[211]

167. The Defence states the judges should take the age of the Accused into account, for two reasons. Firstly, the same sentence is harder for an older accused than for a younger accused because of the physical deterioration associated with advanced years. Secondly, as observed in the *Holyoak* Decision issued by the New South Wales Court of Appeal, an offender of advanced years may have little worthwhile life left upon release.[212]

168. The Defence submits that Paul Bisengimana is 57 years old.[213]

169. The Defence recalls that ill-health has been admitted as a factor in sentencing by both this Tribunal[214] and the ICTY.[215]

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[205] Defence Sentencing Brief, para. 41, quoting *Simić*, Judgement (TC), para. 112; *Rutaganira*, Jugement (TC), para. 131; *Krnojelać* Judgement(TC), para. 520, *Krstić* Judgement (TC), para. 715.
[206] Defence Sentencing Brief, para. 42; T. 19 January 2006 pp. 39.
[207] Defence Sentencing Brief, para. 43; T. 19 January 2006 p. 38.
[208] Decision on the Motion for the Admission of a Written Statement in Lieu of Oral Testimony in Accordance with Rule 92 *bis* (A) and (B) of the Rules of Procedure and Evidence, 3 February 2006.
[209] *Ruggiu*, Judgement (TC), paras. 59-60.
[210] Defence Sentencing Brief, para. 44, quoting *Banović*, Judgement (TC), paras. 75-76 and *Rutaganira*, *Jugement* (TC), para. 136.
[211] Defence Sentencing Brief, para. 44, quoting *Rutaganira, Jugement* (TC), para. 136.
[212] Defence Sentencing Brief, para. 45, quoting *Plavšić,* Judgement (TC), para. 105.
[213] Defence Sentencing Brief, para. 46; T. 19 January 2006 p. 38.
[214] Defence Sentencing Brief, para. 48, quoting *Rutaganira, Jugement* (TC), para. 136.
[215] Defence Sentencing Brief, para. 47, quoting *Simić,* Judgement (TC), para. 98.

170. The Defence submits that Paul Bisengimana has been suffering from diabetes and hepatitis B for several years.[216] These two diseases cause the Accused serious physiological problems, which are inevitably exacerbated by his age and detention.

171. The Defence also recalls that in 1994, Paul Bisengimana was suffering from an acute liver ailment as a result of his hepatitis B.[217] According to the Defence, his fragile health during the events must be taken into account to determine a fair sentence.[218]

172. The Prosecution did not make any submissions on this matter.

b. Findings

173. The Chamber has decided to examine the Accused's age and his alleged ill-heath together.[219] The Chamber has noted the content of the confidential Medical Report drafted by Doctor Epée which was admitted into evidence during the Pre-Sentencing Hearing on 19 January 2006 and which indicates that the Accused is being treated for several illnesses.[220]

174. The Chamber finds no merit in the Defence's submission that the Accused's alleged fragile health at the time of the events should be considered in the determination of a fair sentence. The Chamber has heard the testimonies of the three Defence character witnesses on this point but notes that those witnesses are not medical experts. Moreover, even if it was established that the Accused did suffer from his liver condition at the time of the events, there is no evidence that this would have had an impact on his participation in the massacres.

175. Nonetheless, the Chamber considers that the combination of the Accused's age and his current state of health, as established by the Medical Report, constitutes a mitigating circumstance.

9. Lack of Personal Participation in the Offences

a. Defence Submissions

176. The Defence submits that indirect participation may be a mitigating circumstance. Assisting a crime is often considered to be less serious than actually perpetrating a crime and may warrant a lighter sentence.[221] While this principle has been admitted by the Tribunal in *Ruggiu*,[222] it was not accepted in *Rutaganira* because the lack of personal participation was already reflected in the mode of responsibility, namely omission.[223] The Defence states that it is for this reason that Paul Bisengimana pleads this mitigating circumstance only in relation to the Musha Church site. According to the Defence, Paul Bisengimana did nothing more than be present at a given time during the attack perpetrated against the Tutsis who had taken refuge at Musha Church and during the murder of

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[216] Defence Sentencing Brief, para. 49; T. 19 January 2006, Witness RKV, p. 22; T. 19 January 2006, Claudine Uwera Bisengimana, p. 26; T. 19 January 2006, p. 38.
[217] Defence Sentencing Brief, para. 50; T. 19 January 2006, Gervais Condo, p. 17; T. 19 January 2006, Claudine Uwera Bisengimana, p. 26; T. 19 January 2006, Paul Bisengimana, p. 45.
[218] Defence Sentencing Brief, para. 50.
[219] *Rutaganira, Jugement* (TC), para. 136.
[220] The Medical Report concerning Paul Bisengimana was admitted under Rule 92 *bis* of the Rules after Dr Epée had confirmed that she was its author, see T. 19 January 2006 pp. 43-44.
[221] Defence Sentencing Brief, para. 51, quoting *Krstić*, Judgement (TC), para. 714.
[222] Defence Sentencing Brief, para. 52, quoting *Ruggiu*, Judgement (TC), para. 78; T. 19 January 2006 p. 37.
[223] Defence Sentencing Brief, para. 52, quoting *Rutaganira*, *Jugement* (TC), paras. 137-138; T. 19 January 2006 p. 37.

Rusanganwa. Further, the fact that he did nothing about the crimes being committed there served as a motivation to the main perpetrators.[224]

177. The Prosecution did not make any submissions on this matter.

b. Findings

178. The Chamber is mindful of the need to take into account the particular circumstances of the case including the form and the degree of the participation of the Accused in the crime.[225] The Chamber recalls that Paul Bisengimana did not personally commit any violent act during the massacres.

179. However, the Chamber does not agree with the Defence's submissions "that Paul Bisengimana did nothing more than be present at a given time during the attack perpetrated against the Tutsis who had taken refuge at Musha Parish Church." The Chamber recalls that the Accused was aware that an attack would be launched against the refugees at Musha Church using weapons that had been distributed, and that he had the means to oppose the killings but chose not to act. Moreover, the Chamber recalls that the Accused was present when the attack was launched and more than a thousand people were murdered at Musha Church, including Rusanganwa, and that he knew that his presence would have an encouraging effect on the criminal actions of the perpetrators. Therefore, recalling that the Accused was a person of authority with an obligation to protect the refugees, the Chamber does not consider his form of participation in the Musha Church massacres to be a mitigating circumstance.

D. FINDINGS ON AGGRAVATING AND MITIGATING CIRCUMSTANCES

180. The Chamber finds the gravity of the crimes and the official position of the Accused to be aggravating circumstances but the Chamber also finds the following circumstances to be mitigating: the Accused's guilty plea with publicly expressed remorse, his family situation, his good character prior to the events, his lack of prior criminal convictions, his good conduct in detention and his age and ill-health.

181. However, after considering the gravity of the crime and the official position of the Accused, the Chamber finds that limited mitigation is warranted.

182. The Chamber considers that, in the circumstances of the case, Paul Bisengimana's official position as *bourgmestre* is an overwhelmingly aggravating circumstance. The Chamber considers that the Accused is an educated person who administered Gikoro *commune* for a period long enough to gain full knowledge of his duties and responsibilities. The Chamber recalls that despite knowing that Tutsi civilians had taken refuge at Musha Church and Ruhanga Complex and that weapons had been distributed to be used to attack them, and despite having the means to oppose the killings, Paul Bisengimana did nothing to stop the killings.

183. The Chamber is aware of the reasoning in the *Semanza* Judgement that a higher sentence is likely to be imposed on "one who orders rather than merely aids and abets exterminations."[226] However, the Chamber recalls that in the instant case, it did not accept the Accused's form of participation as a mitigating circumstance.[227] Regarding the Musha Church massacres, the Chamber does not consider that the Accused omitted to act. The Accused had a duty to act to protect the

[224] Defence Sentencing Brief, paras. 53-54; T. 19 January 2006, Paul Bisengimana, pp. 37, 45-46.
[225] *Mucić et al*. Judgement, (AC), para. 731 quoting *Kupreskić*, Judgement, (AC) para. 852 cited in *Aleksovski,* Jugement (TC), para. 182.
[226] *Semanza,* Judgement (AC), para. 388.
[227] Judgement, paras. 178, 179.

population and that he knew that his presence when the attack was launched would encourage the attackers by giving them the impression that he approved of their criminal actions. The Chamber considers that the Accused's presence is a very serious form of participation even if it is not alleged or established that he was a co-perpetrator or that he directly committed a criminal act during the massacre. The Chamber recalls that more than a thousand Tutsi civilians died as a result of the massacres at Musha Church and Ruhanga Complex.

E. SENTENCING RECOMMENDATIONS BY THE PARTIES

184. The Plea Agreement signed by the Parties recommends that the Accused be sentenced to between 12 and 14 years' imprisonment, with credit given for the time already served.[228] The Parties indicate that they clearly understand that their sentencing recommendation do not bind the Chamber.[229]

1. The Prosecution

185. The Prosecution recalls that the Tribunal was established by the Security Council to prosecute and punish the perpetrators of the atrocities committed in Rwanda, in order to end impunity and thereby to promote national reconstruction, the restoration of peace, and reconciliation.[230]

186. In the Sentencing Brief and at the Pre-Sentencing Hearing, the Prosecution recommends that the Accused receives a term of imprisonment of not less than 14 years with credit given for the time already served.[231]

187. The Prosecution indicates that in accordance with the Plea Agreement, it would support any application by the Accused to serve his sentence in a prison facility in Europe.[232]

2. The Defence

188. The Defence requests that Paul Bisengimana be sentenced to not more than 12 years' imprisonment, with credit given for the time spent in custody.[233]

189. The Defence stresses that when sentencing Paul Bisengimana, the basic question must be, "What would we have done if we were in his shoes? Would we have stood up in a timely manner to stop these massacres, even if it meant putting our necks on the line?"[234]

190. The Defence states that Paul Bisengimana requests that France, where his wife and two youngest children live, be designated as the State where he will serve his sentence.[235] In the alternative, Paul Bisengimana requests that one of the other European states which have indicated their willingness to accept convicted persons from the Tribunal, be designated.[236] The Defence stresses that this would enable him to receive the health care he "so desperately needs."[237]

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[228] Plea Agreement, para. 48.
[229] Plea Agreement, para. 50.
[230] T. 19 January 2006 p. 3.
[231] Prosecution Sentencing Brief, para.60; T.19 January 2006, p. 9.
[232] Prosecution Sentencing Brief, para. 60; T. 19 January 2006 p. 9.
[233] Defence Sentencing Brief, paras. 56-58; T. 19 January 2006 pp. 40-41.
[234] T. 19 January 2006, p. 41.
[235] Defence Sentencing Brief, para. 59; T. 19 January 2006 p. 40.
[236] Defence Sentencing Brief, para. 59.
[237] T. 19 January 2006 p. 40.

191. Finally, the Defence reminds the Chamber that pursuant to Article 26 of the Statute, sentences passed by the Tribunal shall be served in accordance with the applicable law of the State concerned, subject to the supervision of the Tribunal.[238]

F. FINDINGS

1. The General Sentencing Practice in the Courts of Rwanda

192. The Chamber recalls Article 23 of the Statute and Rule 101 of the Rules, which indicates that the Tribunal shall take into account the general practice regarding prison sentences in the courts of Rwanda.

193. The Chamber notes that for serious offences such as murder, the Rwandan Penal Code states that the maximum sentence is life imprisonment or the death penalty.[239] Article 89 of the Code specifically provides that accomplices may be subject to the same sentence as the principal perpetrator.

194. The Chamber considers that the Rwandan Organic Law setting up "Gacaca Jurisdictions"[240] and the Organic Law modifying and completing it[241] are relevant in the instant case because they address the procedure for persons pleading guilty to crimes against humanity. A person acting in a position of authority at the municipal level,[242] who has encouraged others to commit a crime against humanity, may, after pleading guilty and under certain conditions,[243] be sentenced to a term of imprisonment ranging from 25 years to life.[244]

195. The Chamber is also mindful of Article 83 of the Rwandan Penal Code which provides that where there are mitigating circumstances, sentences shall be amended or reduced as follows: a death penalty shall be replaced by a sentence of imprisonment of no less than five years; a life imprisonment sentence shall be replaced by an imprisonment sentence of no less than two years; and an imprisonment sentence of five to 20 years or more than 20 years may be reduced to an imprisonment sentence of one year.[245]

2. Credit for Time Served in Custody

196. Pursuant to Rule 101 (D) of the Rules, "credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal."

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[238] Defence Sentencing Brief, para. 60.
[239] *Code Pénal Rwandais*, *Décret-Loi* n°21/77, 18 August 1977, modified by *Décret-Loi* n°23/81, 13 October 1981, Articles 311-317.
[240] Organic Law setting up "Gacaca Jurisdictions" and organizing prosecutions for offences constituting the crime of genocide or crimes against humanity committed between October 1990 and December 31, 1994, N.40/2000 of 26/01/2001, Official Gazette of the Republic of Rwanda, Year 40, n°6, 15th March 2001 ("Organic Law of 26 January 2001").
[241] Organic Law modifying and completing Organic Law n°40/2000 of January 26, 2001 setting up "Gacaca Jurisdictions" and organizing prosecutions for offences constituting the crime of genocide or crimes against humanity, committed between October 1, 1990 and December 31, 1994, Official Gazette of the Republic of Rwanda, Year 40, n°14, 15th July 2001 ("Organic Law Modifying and Completing the Organic Law of 26 January 2001").
[242] Article 51 of Organic Law of 26 January 2001 and Article 1 of the Organic Law Modifying and Completing Organic Law of 26 January 2001.
[243] Article 56 of the Organic Law of 26 January 2001.
[244] Article 68 of the Organic Law of 26 January 2001.
[245] *Code Pénal Rwandais*, *Décret-Loi* n°21/77, 18 August 1977.

197. The Chamber regards 4 December 2001 as the starting date of the detention in custody of the Accused.[246] The Chamber recognizes that the Accused is entitled to credit for all the time since this date, including the additional time he may serve pending the determination of an appeal.

198. The Chamber bears in mind the need for consistency in sentencing for similar cases but is also mindful of the *Kupreškic* Judgement holding that a Chamber is "under no obligation to expressly compare the case of one accused to that of another."[247] The Chamber also understands its obligation to ensure that the sentence is commensurate with the individual circumstances of the offender.[248]

3. Conclusion

199. On examination of the sentencing practice of this Tribunal and the ICTY, the Chamber notes that principal perpetrators convicted of crimes against humanity such as murder and extermination have received sentences ranging from ten years' to life imprisonment.[249] Persons convicted of secondary forms of participation have generally received lower sentences.[250] The sentence should reflect the totality of the criminal conduct of the accused.[251]

200. The Chamber will not enter a sentence for Count 3, murder as a crime against humanity under Article 3 (a) of the Statute, for the reasons explained above.[252]

201. The Chamber reiterates that an acknowledgement of guilt may constitute proof of the honesty of the perpetrator and that some form of consideration should be given to those who have confessed their crimes in order to encourage others to come forward. Moreover, the Chamber is of the view that the guilty plea of the Accused may contribute to the process of national reconciliation in Rwanda.[253]

202. However, despite the fact that the Chamber is not sentencing Paul Bisengimana for the count of murder as a crime against humanity, the Chamber is of the view that considering the official position of the Accused and the number of persons killed – more than a thousand – in his presence at Musha Church and many others with his knowledge at Ruhanga Complex, a higher sentence than the range proposed by the Parties is justified for the single count of extermination.

V. Verdict

203. Having considered the Statute and the Rules, the general practice regarding prison sentences in Rwanda, the Parties' submissions and evidence during the Sentencing Hearing and having weighed the aggravating and mitigating circumstances, the Chamber convicts and sentences Paul Bisengimana for Count 4, extermination as a crime against humanity pursuant to Article 3 (b) of the Statute to

15 years' imprisonment

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[246] Letter from the *Procureur Général près la Cour d'Appel de Bamako* dated 14 January 2002, filed on 15 January 2002 indicating that Paul Bisengimana was detained since 4 December 2001 in Bamako, Mali.
[247] *Kupreškic*, Judgement (AC), para. 443.
[248] *Mucić et al*., Judgement (AC), paras. 717-719; *Muhimana,* Judgement (TC), para. 594.
[249] *Muhimana*, Judgement (TC), para. 618; *Ntagerura et al*., Judgement (TC), paras. 822, 825; *Ntakirutimana*, Judgement (TC), paras. 922, 924.
[250] Laurent Semanza was sentenced to eight years' imprisonment for instigating the murder of six persons as a crime against humanity (*Semanza,* Judgement (TC), para. 588) and Vincent Rutaganira to six years' imprisonment for his complicity by omission in extermination as a crime against humanity (*Rutaganira*, *Jugement* (TC), para. 40);. Elizaphan Ntakirutimana was sentenced to ten years' imprisonment for aiding and abetting genocide (*Ntakirutimana,* Judgement (TC), paras. 790, 921) has been upheld by the Appeals Chamber (*Ntakirutimana,* Judgement (AC), para. 570.)
[251] *Mucić et al*., Judgement (AC), para.771.
[252] Judgement, paras. 99-105.
[253] Judgement, para. 139.

204. The Chamber finds that Paul Bisengimana is entitled to credit for the time served since the start of his detention on 4 December 2002 to the date of this judgement.

205. In accordance with Rule 102 (A) of the Rules, the sentence shall run as of the date of this judgement.

206. Pursuant to Rule 103 of the Rules, Paul Bisengimana shall remain in the custody of the Tribunal pending a decision on where his sentence will be served pursuant to Article 26 of the Statute and Rule 103 (A). The Chamber has noted the Parties' submissions with respect to the State in which the sentence will be served, but recalls that the President of the Tribunal, in consultation with the Chamber, will designate the State. The Government of Rwanda and the designated State shall be notified of such designation by the Registrar.

207. Pursuant to Rule 102 (A) of the Rules, if notice of appeal is given, the enforcement of this judgement shall be stayed until the decision on appeal has been delivered, with the convicted person meanwhile remaining in detention.

Done in English.

Arusha, 13 April 2006.

[Signed] : Arlette Ramaroson ; William H. Sekule ; Solomy B. Bossa

VI. Annexes

A. THE PROCEDURE

208. On 10 July 2000, the Prosecution filed an indictment against the Accused dated 1 July 2000, which was confirmed by Judge Pavel Dolenc on 17 July 2000.[1]

209. The Prosecution charged the Accused with the following twelve counts: genocide; complicity in genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; murder as a crime against humanity; extermination as a crime against humanity; torture as a crime against humanity; rape as a crime against humanity; other inhumane acts as crimes against humanity; and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, as provided for by Articles 4 (a), 4 (e) and 4 (f) of the Statute.

210. On 8 August 2001, at the request of the Prosecution, Judge Pavel Dolenc issued a warrant for the arrest of the Accused, pursuant to Rules 54, 57 and 64 of the Rules. The warrant was addressed to all States and included an order for the Accused's transfer to and detention at the UNDF, and an order for search and seizure.[2]

211. On 4 December 2001, the Accused was arrested in Mali. On 11 March 2002, the Accused was transferred to the UNDF.

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[1] Confirmation of the Indictment and Order for Non-Disclosure of the Indictment and for Protection of Victims and Witnesses, 17 July 2000.
[2] Warrant of Arrest and Orders for Transfer and Detention and for Search and Seizure, 9 August 2001.

212. On 18 March 2002, the Accused made his initial appearance before Judge Lloyd G. Williams and pleaded not guilty to all twelve counts in the 1 July 2000 Indictment.[3]

213. On 17 June 2005, the Prosecution filed a motion for leave to amend the 1 July 2000 Indictment.[4] On 23 June 2005, a *corrigendum* thereof was filed.[5]

214. On 19 August 2005, the Prosecution filed a motion to withdraw both its motion for leave to amend the 1 July 2000 Indictment and its *corrigendum* thereof.[6]

215. On 24 August 2005, Judge Arlette Ramaroson dismissed the Prosecution motion to withdraw both its motion for leave to amend the 1 July 2000 Indictment and its *corrigendum* for being moot.[7]

216. On 21 September 2005, the Prosecution filed a new motion for leave to amend the 1 July 2000 Indictment.[8]

217. On 19 October 2005, the Prosecution and the Defence filed a joint motion for consideration of a guilty plea agreement between Paul Bisengimana and the Office of the Prosecutor.[9]

218. On 27 October 2005, the Chamber granted the Prosecution motion for leave to amend the 1 July 2000 Indictment.[10]

219. On 31 October 2005, the Prosecution filed an amended indictment charging the Accused with the following five counts: genocide; complicity in genocide; murder, extermination and rape as crimes against humanity.

220. On 17 November 2005, during his further appearance, the Accused pleaded guilty to murder and extermination as a crime against humanity,[11] both pursuant to Article 6 (1) of the Statute.[12] The Accused pleaded not guilty to genocide;[13] complicity in genocide;[14] murder as a crime against humanity pursuant to Article 6 (3) of the Statute,[15] extermination as a crime against humanity pursuant to Article 6 (3) of the Statute,[16] and rape as a crime against humanity.[17]

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[3] T. 18 March 2002 pp. 24-31.
[4] Prosecutor's Request for Leave to Amend an Indictment Pursuant to Rules 73, 50 and 51 of the Rules of Procedure and Evidence filed on 17 June 2005.
[5] Corrigendum to the Prosecutor's Request for Leave to Amend an Indictment Pursuant to Rules 73, 50 and 51 of the Rules of Procedure and Evidence, filed on 23 June 2005.
[6] Prosecutor's Request to Withdraw Prosecutor's Request for Leave to Amend the Indictment and Corrigendum Thereof, filed on 19 August 2005.
[7] Decision on the Prosecutor's Request to Withdraw Prosecutor's Request for Leave to Amend the Indictment and Corrigendum Thereof issued on 24 August 2005.
[8] Prosecutor's Request for Leave to Amend an Indictment Pursuant to Rules 73, 50, and 51of the Rules of Procedure and Evidence, filed on 21 September 2005.
[9] « Requête conjointe visant à l'examen d'un accord entre Paul Bisengimana et le Bureau du Procureur aux fins d'un plaidoyer de culpabilité », filed on 19 October 2005.
[10] Decision on the Prosecutor's Request for Leave to Amend the Indictment, 27 October 2005.
[11] T. 17 November 2005 pp. 13, 14.
[12] T. 17 November 2005 pp. 13, 14.
[13] T. 17 November 2005 p. 12.
[14] T. 17 November 2005 p. 12.
[15] T. 17 November 2005 p. 14.
[16] T. 17 November 2005 p. 15.
[17] T. 17 November 2005 p. 14.

221. On the basis of the Plea Agreement reached between the Parties, which had been filed with the Chamber on 19 October 2005,[18] the Prosecution orally moved the Chamber to dismiss those counts to which the Accused had pleaded not guilty and to enter a verdict of not guilty regarding those count pursuant to Rules 73, 54 and 51.[19] The Chamber declined to rule on this request at this stage of the proceedings.

222. The Chamber unsealed the aforementioned Plea Agreement in open session pursuant to Rule 62 *bis*. The Chamber listed discrepancies between the facts supporting the counts to which the Accused had pleaded guilty and the facts in the Plea Agreement.[20] The Prosecution submitted that since the Accused had pleaded guilty to Counts 3 and 4 pursuant to Article 6 (1) of the Statute, it would amend paragraphs 8, 19, 20, 21, 22, 28, 38, 39, and 42 of the Amended Indictment to avoid the aforementioned discrepancies and would file a revised amended indictment thereafter. The Defence indicated that it only considered the contents of the Plea Agreement valid and would therefore support the Prosecution in its intention to file a revised amended indictment.[21]

223. The Chamber orally denied the joint motion for consideration of a guilty plea agreement between Paul Bisengimana and the Office of the Prosecutor for not being unequivocal. Pursuant to Rule 62 (A) (iii) and on behalf of the Accused, the Chamber entered a plea of not guilty regarding Counts 3 and 4 of the Amended Indictment and duly noted the plea of not guilty for all the other counts.[22] The Chamber noted the Prosecution's undertaking to revise the Amended Indictment to make it consistent with the facts on which the Parties had agreed.[23]

224. On 28 November 2005, the Prosecution filed a second amended indictment dated 23 November 2005 in English.

225. On 1 December 2005, the Prosecution and the Defence filed a new joint motion for consideration of a guilty plea agreement between Paul Bisengimana and the Office of the Prosecutor dated 30 November 2005, with an attached Plea Agreement between the Accused and the Prosecutor, signed by the Accused and his counsel on 4 October 2005 and by the Prosecutor on 17 October 2005. The same day, the Prosecution filed a new amended indictment, dated 23 November 2005, in English and French.

226. Following an enquiry by the Chamber about a missing portion of the French transcripts of 17 November 2005, revised transcripts of the Bisengimana hearing of 17 November 2005 were filed on 16 December 2005.[24]

227. On 7 December 2005, during a Status Conference, the Defence made two oral motions: the first requested that the person in charge of the UNDF provide the Defence with an attestation concerning the detention of the Accused; the second requested that Dr. Epée provide the Defence with an attestation concerning the medical situation of the Accused.[25]

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[18] « Requête conjointe visant à l'examen d'un accord entre Paul Bisengimana et le Bureau du Procureur aux fins d'un plaidoyer de culpabilité », filed on 19 October 2005, along with the « Accord de reconnaissance de culpabilité conclu entre Mr Paul Bisengimana et le Bureau du Procureur.»
[19] T. 17 November 2005 pp. 15-16.
[20] T. 17 November 2005 pp. 18-21.
[21] T. 17 November 2005 pp. 24-25.
[22] T. 17 November 2005 p. 26.
[23] T. 17 November 2005 p. 26.
[24] On 7 December 2005, at the requests of the Defence, a Status Conference was held in closed session in the presence of the Accused. Defence Counsel observed that it appeared from the French transcript of 17 November 2005 that the Accused had not been asked to enter a plea in relation to Count 5 of the Amended Indictment. The Chamber indicated in open court that there must have been an error in the French transcripts because the Accused had indeed pleaded to this count, as was reflected in the English transcripts.
[25] T. 7 December 2005 p. 3 (Status Conference) (ICS).

228. On 7 December 2005, during his second further appearance, the Accused pleaded guilty to the following counts: murder as a crime against humanity pursuant to Article 6 (1) of the Statute[26] and extermination as a crime against humanity pursuant to Article 6 (1) of the Statute.[27] The Accused pleaded not guilty to the following counts: genocide pursuant to Articles 6 (1) and 6 (3) of the Statute;[28] complicity in genocide pursuant to Article 6 (1) of the Statute;[29] and rape as a crime against humanity pursuant to Articles 6 (1) and 6 (3) of the Statute.[30]

229. Based on the Plea Agreement reached between the Parties,[31] the Prosecution orally moved the Chamber to withdraw and to dismiss the counts to which the Accused had pleaded not guilty and to acquit him on these counts, pursuant to Rules 51, 54, and 73 of the Rules.[32]

230. Pursuant to Rule 62 *bis,* the Chamber asked for the unsealing of the Plea Agreement and for its disclosure to the public.[33] The Defence moved the Chamber to make public only chapters 3, 4 and 5 of the Plea Agreement, arguing that it was not necessary to make the remaining chapters public.[34] The Chamber orally denied this motion, having found that the Defence had failed to show good cause why only portions of the Plea Agreement should be made public.[35]

231. The Chamber granted the joint motion for consideration of the Plea Agreement between Paul Bisengimana and the Office of the Prosecutor.[36] The Chamber stated that the requirements of Rule 62 (B) were met and it therefore declared the Accused guilty of having aided and abetted the commission of the crimes of murder (Count 3) and extermination (Count 4) as crimes against humanity pursuant to Article 6 (1) of the Statute.[37] The Chamber granted the Prosecution motion for withdrawal and dismissal of the counts to which the Accused had pleaded not guilty (genocide, complicity in genocide, and rape as a crime against humanity).[38] However, the Chamber denied the request for acquittal because the Prosecution had failed to justify its motion on this point.[39] As regards the Defence request for issuance of attestations regarding the detention of the Accused and his medical situation, the Chamber directed the Defence to seize the Registry on these matters.[40] Finally, the Chamber ordered that the Accused be detained under conditions which guaranteed his security.[41]

232. During the same hearing, the Defence indicated that it intended to call character witnesses. On 16 December 2005, the Defence filed a motion for protective measures for its character witnesses.[42] On 20 December 2005, the Chamber granted this motion in part.

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[26] T. 7 December 2005 p. 12.
[27] T. 7 December 2005 p. 13.
[28] T. 7 December 2005 p. 12.
[29] T. 7 December 2005 p. 12.
[30] T. 7 December 2005 p. 13.
[31] The Motion titled «Requête conjointe visant à l'examen d'un accord entre Paul Bisengimana et le Bureau du Procureur aux fins d'un plaidoyer de culpabilité » was filed on 1 December 2005 along with the « Accord de reconnaissance de culpabilité conclu entre Mr Paul Bisengimana et le Bureau du Procureur » dated 30 November 2005.
[32] T. 7 December 2005 pp. 13-14. Those counts are as follows: Count 1, genocide pursuant to Articles 6 (1) and 6 (3) of the Statute, Count 2, complicity in genocide pursuant to Article 6(1) of the Statute and Count 5, rape as a crime against humanity pursuant to Articles 6 (1) and 6 (3) of the Statute.
[33] T. 7 December 2005 p. 15.
[34] T. 7 December 2005 p. 15.
[35] T. 7 December 2005 p. 18.
[36] T. 7 December 2005 p. 17.
[37] T. 7 December 2005 p. 17.
[38] T. 7 December 2005 p. 18.
[39] T. 7 December 2005 p. 18.
[40] T. 7 December 2005 p. 18; T. 7 *décembre* 2005, p. 22.
[41] T. 7 December 2005, p. 19.
[42] The Motion is entitled « Requête en extrême urgence de la défense aux fins de prescription de mesures de protection des témoins de moralité » and was filed on 16 December 2005.

232. The Defence filed its Pre-Sentencing Brief in French on 20 December 2005 and the Prosecution filed its Pre-Sentencing Brief in English on 16 January 2006. On 19 January 2006, the Pre-Sentencing Hearing was held. The Chamber heard the Prosecution, the Defence, three character witnesses for the Defence and the Accused. The medical report concerning the Accused was admitted under Rule 92 *bis* after Dr Epée testified that she was its author.[43]

233. The attestation of good conduct by the Commander of the UNDF was admitted under Rule 92 *bis* on 3 February 2006.[44]

[43] T. 19 January 2006 pp. 43-44.
[44] Decision on the Defence Motion for the Admission of a Written Statement in Lieu of Oral Testimony in Accordance with Rule 92 *bis* (A) and (B) of the Rules of Procedure and Evidence, 3 February 2006.

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Corrigendum-Judgement and Sentence 20 April 2006 (ICTR-2000-60-T)

(Original : English)

Trial Chamber II

Judges : Arlette Ramaroson, Presiding Judge ; William H. Sekule ; Solomy B. Bossa

Paul Bisengimana – Corrigendum, Date error

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

SITTING as Trial Chamber II, composed of Judge Arlette Ramaroson, Presiding, Judge William H. Sekule, and Judge Solomy B. Bossa (the "Chamber");

NOTING that there is an error in the date mentioned at Paragraph 204 of the Judgement of 13 April 2006 in the *Prosecutor v. Paul Bisengimana;*

The Chamber hereby CORRECTS this paragraph and decides that Paragraph 204 should read as follows:

> "The Chamber finds that Paul Bisengimana is entitled to credit for the time served since the start of his detention on 4 December 2001 to the date of this judgement."

Arusha, 20 April 2006.

[Signed] : Arlette Ramaroson ; William H. Sekule ; Solomy B. Bossa

Le Procureur c. Paul BISENGIMANA

Affaire N° ICTR-2000-60

Fiche technique

• Nom: BISENGIMANA

• Prénom : Paul

• Date de naissance: inconnue

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: bourgmestre de Gikoro

• Chefs d'accusation: génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II auxdites Conventions de 1977

• Date et lieu de l'arrestation: 4 décembre 2001, au Mali

• Date du transfert: 11 mars 2002

• Date de la comparution initiale: 18 mars 2002

• Précision sur le plaidoyer: coupable

• Date du début du procès: 17 novembre 2005

• Date et contenu du prononcé: 13 avril 2006, condamné à 15 ans d'emprisonnement

Jugement portant condamnation
13 avril 2006 (ICTR-2000-60-T)

(Original : Anglais)

Chambre de première instance II

Juges : Arlette Ramaroson, Présidente de Chambre ; William H. Sekule ; Solomy B. Bossa

Paul Bisengimana – Laurent Semanza, Juvénal Rugambarara – Plaidoyer de culpabilité, Renonciation à toute forme de défense, Renonciation aux droits à un procès équitable, Plaidoyer de culpabilité en connaissance de cause et sans équivoque – Forme de commission du crime, Unité du concept d'aide et encouragement à la commission d'un crime, Définition des éléments matériel et moral de l'aide et l'encouragement à la commission d'un crime, Influence de la position d'autorité du complice sur l'agent principal de l'infraction – Crime contre l'humanité, Eléments généraux du crime, Définition de l'attaque, Caractère généralisé ou systématique, Définition de la population civile, Motifs discriminatoires – Extermination en tant que crime contre l'humanité, Critère de distinction avec le meurtre : nombre de victimes – Assassinat en tant que crime contre l'humanité, Distinction entre le meurtre et l'assassinat, Interprétation linguistique – Cumul des déclarations de culpabilité, Crime de meurtre inclus dans le crime d'extermination – Peine, Obligation qui lui est faite d'individualiser la peine, Circonstances aggravantes prouvées au-delà de tout doute raisonnable, Circonstances aggravantes retenues : occupation du poste de bourgmestre, crimes contre l'humanité, Circonstances atténuantes prouvées sur la base de l'hypothèse la plus probable, Circonstances atténuantes peuvent ne pas avoir de rapport direct avec l'infraction, Circonstances atténuantes retenues : plaidoyer de culpabilité, expression de remords et de regrets sincères, chances de réinsertion, situation familiale, personne de bonne moralité avant les crimes, âge et état de santé actuel, Balance entre les circonstances aggravantes et atténuantes, Grille générale des peines d'emprisonnement appliquée par les tribunaux du Rwanda, Commutation des peines, Déduction du temps passé en détention provisoire, La peine devrait refléter l'ensemble de la conduite criminelle reprochée à l'accusé – Condamnation pour extermination constitutive de crime contre l'humanité, 15 ans d'emprisonnement

Instrument international cité :

Règlement de Procédure et de preuve, art. 54, 57, 62 (B), 62 (B) (i) , 62 (B) (ii) , 62 (B) (iii), 62 bis, 64, 73, 100, 101, 101 (A), 101 (B), 101 (B) (ii), 101 (D), 102 (A), 103 et 103 (A) ; Statut, art. 3 (a), 3 (b), 6 (1), 22, 23 et 26

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Jean-Paul Akayesu, Jugement, 2 septembre 1998 (ICTR-96-4) ; Chambre de première instance, Le Procureur c. Jean Kambanda, Jugement et sentence, 4 septembre 1998 (ICTR-97-23) ; Chambre de première instance, Le Procureur c. Omar Serushago, Sentence, 5 février 1999 (ICTR-98-39) ; Chambre de première instance, Le Procureur c. Clément Kayishema et Obed Ruzindana, Jugement, 21 mai 1999 (ICTR-95-1) ; Chambre de première instance, Le Procureur c. Georges Anderson Rutaganda, Jugement et sentence, 6 décembre 1999 (ICTR-96-3) ; Chambre de première instance, Le Procureur c. Alfred Musema, Jugement portant condamnation, 27 janvier 2000 (ICTR-96-13) ; Chambre de première instance, Le Procureur c. Georges Ruggiu, Jugement et sentence, 1er juin 2000 (ICTR-97-32) ; Chambre d'appel, Le Procureur c. Clément Kayishema et Obed Ruzindana, Motifs de l'arrêt, 1er juin 2001 (ICTR-95-1) ; Chambre de première instance, Le Procureur c. Ignace Bagilishema, Jugement, 7 juin 2001 (ICTR-95-1A) ; Chambre de première instance, Le Procureur c. Elizaphan Ntakirutimana et Gérard Ntakirutimana, Jugement et sentence, 21 février 2003 (ICTR-96-10 et ICTR-96-17) ; Chambre de première instance, Le Procureur c. Juvénal Kajelijeli, Jugement et sentence, 1er décembre 2003 (ICTR-

98-44A) ; Chambre de première instance, Le Procureur c. Jean de Dieu Kamuhanda, Jugement, 22 janvier 2004 (ICTR-99-54) ; Chambre de première instance, Le Procureur c. André Ntagerura et consorts, Jugement, 25 février 2004 (ICTR-99-46) ; Chambre de première instance, Le Procureur c. Emmanuel Ndindabahizi, Jugement, 15 juillet 2004 (ICTR-2001-71) ; Chambre d'appel, Le Procureur c. Gérard et Elizaphan Ntakirutimana, Jugement, 13 décembre 2004 (ICTR-96-10 et ICTR-96-17) ; Chambre de première instance, Le Procureur c. Vincent Rutaganira, Jugement, 14 mars 2005 (ICTR-95-1C) ; Chambre de première instance, Le Procureur c. Mikaeli Muhimana, Jugement et sentence, 28 avril 2005 (ICTR-95-1B) ; Chambre d'appel, Le Procureur c. Laurent Semanza, Arrêt, 20 mai 2005 (ICTR-97-20) ; Chambre d'appel, Le Procureur c. Juvénal Kajelijeli, Arrêt, 23 mai 2005 (ICTR-98-44A) ; Chambre d'appel, Le Procureur c. Jean de Dieu Kamuhanda, Arrêt, 19 septembre 2005 (ICTR-99-54) ; Chambre de première instance, Le Procureur c. Paul Bisengimana, Decision on the Motion for the Admission of a Written Statement in Lieu of Oral Testimony in Accordance with Rule 92 bis (A) und (B) of the Rules of Procedure and Evidence, 3 février 2006 (ICTR-2000-60)

T.P.I.Y. : Chambre de première instance, Le Procureur c. Duško Tadić, Jugement, 7 mai 1997 (IT-94-1) ; Chambre de première instance, Le Procureur c. Dražen Erdemović, Jugement II, 5 mars 1998 (IT-96-22) ; Chambre de première instance, Le Procureur c. Anto Furundžija, Jugement, 10 décembre 1998 (IT-95-17/1) ; Chambre de première instance, Le Procureur c. Zlatko Aleksovski, Jugement, 25 juin 1999 (IT-95-14/1) ; Chambre d'appel, Le Procureur c. Zdravko Mucić et consorts (Affaire Čelebići), Jugement, 20 janvier 2000 (IT- 96-21) ; Chambre d'appel, Le Procureur c. Zdravko Mucić et consorts, Arrêt, 20 février 2001 (IT-96-21) ; Chambre de première instance, Le Procureur c. Dragoljub Kunarac et consorts, Jugement, 22 février 2001 (IT-96-23 and IT-96-23/1) ; Chambre de première instance, Le Procureur c. Stevan Todorović, Jugement portant condamnation, 31 juillet 2001 (IT-95-9/1) ; Chambre de première instance, Le Procureur c. Radislav Krstić, Jugement, 2 août 2001 (IT-98-33) ; Chambre d'appel, Le Procureur c. Zoran Kupreškić, Arrêt, 23 octobre 2001 (IT-95-16) ; Chambre de première instance, Le Procureur c. Duško Sikirica, Jugement relatif à la peine, 13 novembre 2001 (IT-95-8) ; Chambre de première instance, Le Procureur c. Milorad Krnojelac, Jugement, 15 mars 2002 (IT-97-25) ; Chambre de première instance, Le Procureur c. Mitar Vasiljević, Jugement, 29 novembre 2002 (IT-98-32) ; Chambre de première instance, Le Procureur c. Biljana Plavšić, Jugement, 27 février 2003 (IT-00-39 et IT-00-40/1) ; Chambre de première instance, Le Procureur c. Mladen Naletilić et Vinko Martinović, Jugement, 31 mars 2003 (IT-98-34) ; Chambre de première instance, Le Procureur c. Blagoje Simić, Jugement, 17 octobre 2003 (IT-95-9) ; Chambre de première instance, Le Procureur c. Predrag *Banović*, Jugement, 28 octobre 2003 (IT-02-65/1) ; Chambre de première instance, Le Procureur c. Mornir Nikolić, Jugement, 2 décembre 2003 (IT-02-60/1) ; Chambre de première instance, Le Procureur c. Miroslav Deronjić, Jugement, 30 mars 2004 (IT-02-61) ; Chambre d'appel, Le Procureur c. Tihomir Blaškić, Jugement, 29 juillet 2004 (IT-95-14)

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I. Introduction

A. Rappel des faits de la cause

1. Paul Bisengimana (l'« accusé »), ancien bourgmestre de la commune de Gikoro, dans la prefecture de Kigali-rural, a plaidé coupable de complicité dans le meurtre et l'extermination de civils tutsis à l'eglise de Musha, ainsi qu'à l'église et à l'école protestantes de Ruhanga (le « complexe de Ruhanga ») (commune de Gikoro) entre le 13 et le 15 avril 1994.

2. A partir du 7 avril 1994, des massacres de Tutsis et assassinats d'opposants politiques ont été perpétrés sur tout le territoire du Rwanda par des miliciens, des militaires et des gendarmes. Dans toutes les regions du pays, des Tutsis fuyant les massacres se sont réfugiés dans des endroits qu'ils pensaient être sûrs. Dans la plupart de ces endroits, ils ont été attaqués et massacrés, souvent avec la complicité des autorités.

3. Dans la commune de Gikoro, les massacres ont commencé le 7 avril 1994. Fuyant les attaques en cours dans la préfecture de Kigali-rural, des milliers de civils tutsis se sont refugiés dans l'église de Musha, dans la commune de Gikoro, entre le 8 et le 13 avril 1994. Le 12 avril 1994 ou vers cette date, au su de l'accusé, des éléments de l'armée rwandaise ont distribué des armes aux miliciens *Interahamwe* et à des civils à l'église de Musha pour qu'ils attaquent les réfugiés.

4. Le lendemain (13 avril 1994) ou vers cette date, en présence de l'accusé, des soldats de l'armée rwandaise, des *Interahamwe*, des civils et policiers communaux armés ont attaqué les civils tutsis qui s'étaient refugiés à l'église de Musha avec des armes à feu, des grenades, des machettes et des pangas. Lors de cette attaque, un milicien civil a mis le feu à l'église. Plus d'un millier de Tutsis ont péri. L'accusé était présent quand un civil tutsi du nom de Rusanganwa a été tué.

5. Des nombreux civils tutsis s'étaient refugiés dans l'église et l'école protestantes de Ruhanga (commune de Gikoro) entre le 8 et le 10 avril 1994. Entre le 10 et le 15 avril 1994, un brigadier, des militaires de la Garde presidentielle, des miliciens civils et des policiers communaux ont lancé une attaque contre le complexe de Ruhanga. Les assaillants etaient munis d'armes à feu, de grenades, de machettes et de pangas, de nombreux civils tutsis ont été tués. Paul Bisengimana était au courant de l'attaque précédente qui avait été lancée contre l'église de Musha et, bien qu'il fût bourgmestre de la commune de Gikoro, il n'a pris aucune mesure pour protéger les réfugiés tutsis.

6. Le 7 decembre 2005, la Chambre de première instance II (la « Chambre ») a accepté le plaidoyer de culpabilité de l'accusé et l'a déclaré coupable d'avoir aidé et encouragé à commettre le meurtre et de l'extermination constitutifs de crimes contre l'humanité.

B. L'ACTE D'ACCUSATION

7. En vertu de l'acte d'accusation modifié du 1er décembre 2005 (l'« acte d'accusation »), le Procureur accuse Paul Bisengimana d'être individuellement responsable pour cinq chefs suivants : génocide (art. 6 (1) et 6 (3) du Statut[4841]), complicité dans le génocide (art. 6 (1)), meurtre (art. 6(1)), extermination (art. 6 (1)) et viol (art. 6 (1) et 6(3)) en tant que crimes contre l'humanité. Lors de la seconde comparution de l'accusé, le 7 décembre 2005, le Procureur a retiré les chefs de génocide, de complicité dans le génocide et de viol constitutif de crimes contre l'humanité. L'acte d'accusation figure à l'annexe C du présent jugement.

C. RÉSUMÉ DE LA PROCÉDURE

8. Paul Bisengimana avait été arrêté au Mali le 4 décembre 2001. Il a été transféré au centre de détention du Tribunal, Arusha, (le « centre de detention ») le 11 mars 2002. Le 18 mars 2002, il a fait sa première comparution et a plaidé non coupable de tous les chefs d'accusation.

9. Le 19 octobre 2005, les parties ont deposé une requête conjointe visant à l'examen d'un accord entre Paul Bisengimana et le Bureau du Procureur aux fins d'un plaidoyer de culpabilité[4842].

10. Le 17 novembre 2005, lors d'une autre comparution, l'accusé a plaidé coupable de meurtre et extermination constitutifs de crimes contre l'humanité en vertu de l'article 6 (1) du Statut[4843]. La Chambre a rejeté la requête conjointe au motif que la reconnaissance de culpabilité n'était pas sans équivoque. Au nom de l'accusé, la Chambre a retenu qu'en ce qui concerne les chefs de meurtre et d'extermination, il a plaidé non coupable ; pour tous les autres chefs d'accusation, elle a dûment pris acte du plaidoyer de non-culpabilité[4844].

11. L'acte d'accusation a été déposé le 1er décembre 2005.

12. Le 7 decembre 2005, lors de sa deuxième comparution, l'accusé a plaidé coupable des chefs de meurtre et extermination constitutifs de crimes contre l'humanité en vertu de l'article 6 (1) du Statut[4845]. La Chambre l'a declaré coupable d'avoir aidé et encouragé la commission de meurtre (chef 3) et d'extermination (chef 4) constitutifs de crimes contre l'humanité en vertu de l'article 6 (1) du Statut[4846]. Elle a fait droit à la requête du Procureur aux fins du retrait des autres chefs d'accusation restants mais a rejeté la demande d'acquittement de ces chefs faite par le Procureur parce que sa requête sur ce point n'était pas dement motivée[4847].

13. Une audience préalable au prononcé de la sentence a été tenue le 19 janvier 2006.

14. Un historique détaillé de la procédure est joint en annexe au présent jugement (annexe A).

[4841] Statut du Tribunal (le « Statut »).
[4842] Requete conjointe visant a l'examen d'un accord entre Paul Bisengimana et le Bureau du Procureur aux fins d'un plaidoyer de culpabilité, deposée le 19 octobre 2005.
[4843] Compte rendu de l'audience du 17 novembre 2005, p. 16 et 17.
[4844] *Ibid*., p. 31 et 32.
[4845] Compte rendu de l'audience du 7 décembre 2005, p 13 et 14.
[4846] *Ibid*., p. 19 à 22.
[4847] *Ibid*., p. 22 et 23.

D. Le Tribunal et sa compétence

15. Le jugement dans l'affaire *Le Procureur c. Paul Bisengimana* est rendu par la Chambre de première instance II du Tribunal pénal international pour le Rwanda (le « Tribunal »), composée des juges Arlette Ramaroson, Présidente, William H. Sekule et Solomy B. Bossa.

16. Le Tribunal est régi par le Statut annexe à la resolution 955 du Conseil de sécurité et par le Règlement de procédure et de preuve (le « Règlement[4848] »).

17. Le Tribunal a été crée pour juger les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire du Rwanda et les citoyens rwandais présumés responsables de telles violations commises sur le territoire d'Etats voisins. Les infractions qui relèvent de la compétence du Tribunal sont le génocide, les crimes contre l'humanité et les violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II auxdites Conventions, commises entre le 1er janvier et le 31 decembre 1994.

II. Le plaidoyer de culpabilité

A. Le droit applicable

18. La Chambre fait observer qu'il n'existe dans le Statut aucune disposition précise concernant les plaidoyers de culpabilité et les accords y relatifs. Les dispositions correspondantes du Règlement sont les articles 62 (B) et 62 *bis*[4849].

B. Le plaidoyer de culpabilité du 7 décembre 2005

19. Le 7 décembre 2005, après que Paul Bisengimana eut plaidé coupable de meurtre (chef 3) et d'extermination (chef 4) constitutifs de crimes contre l'humanité en vertu de l'article 6 (1) du Statut, la Chambre a entrepris de vérifier la validité de son plaidoyer.

20. Résumant les conséquences d'un tel plaidoyer, la Chambre a rappelé que lorsqu'un accusé plaide non coupable, il est présumé innocent jusqu'à ce que sa culpabilité soit établie au-dela de tout

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[4848] Initialement adopté par les juges du Tribunal le 5 juillet 1995, le Reglement a été modifié pour la dernière fois le 7 juin 2005, au cours de la quinzième session plénière

[4849] Article 62 : Comparution initiale de l'accusé et plaidoyer
(B) Si un accusé plaide coupable conformément au paragraphe (A) (v) ou demande à revenir sur son plaidoyer de non culpabilité, la Chambre doit s'assurer que l'aveu de culpabilité :
i) est fait librement et volontairement,
ii) est fait en connaissauce de cause,
iii) est sans équivoque, et
iv) repose sur des faits suffisants pour établir le crime et la participation de l'accusé à sa commission, compte tenu soit d'indices objectifs, soit de l'absence de tout sérieux désaccord entre le Procureur et l'accusé sur les faits de la cause, la Chambre peut déclarer l'accusé coupable et donner instruction an Greffier de fixer la date de l'audience pour le prononcé de la peine.
Article 62 *bis* : Procédure en cas d'accord sur le plaidoyer
(A) Le Procureur et la Défense peuvent convenir que, après que l'accusé aura plaidé coupable de l'ensemble des chefs d'accusation, de l'un ou de plusieurs de ces chefs, le Procureur prendra tout ou partie des dispositions suivantes devant la Chambre de première instance :
i) demandera l'autorisation de modifier l'acte d'accusation en conséquence ;
ii) proposera une peine déterminée ou une fourchette de peines qu'il estime appropriées ;
iii) ne s'opposera pas à la demande par l'accusé d'une peine déterminée ou d'une fourchette de peines.
(B) La Chambre de première instance n'est pas tenue par l'accord visé au paragraphe (A).
(C) Si les parties ont conclu un accord de reconnaissance de culpabilité, la Chambre de première instance demande la divulgation de l'accord en question, soit en audience publique soit, si des motifs convaincants ont été présentés, à huis clos, au moment ou l'accusé plaide coupable conformement à l'article 62 (A) (v), ou demande à revenir sur son plaidoyer de non-culpabilité.

doute raisonnable. En conséquence, un accusé qui plaide non coupable a le droit de bénéficier d'un procès équitable, de contre-interroger les témoins à charge, de citer des témoins à décharge et de témoigner en sa défense. La Chambre a demandé à l'accusé s'il comprenait bien qu'en plaidant coupable, il renonçait à ces droits. L'accusé a répondu qu'il le comprenait bien et qu'il renonçait à ces droits en toute connaissance de cause[4850].

21. Conformément aux dispositions des alineas (i), (ii), et (iii) de l'article 62 (B) du Règlement, la Chambre a d'abord demandé si le plaidoyer de culpabilité était fait librement et volontairement, s'assurant ainsi que l'accusé était pleinement conscient de ce qu'il faisait et qu'il ne plaidait pas de la sorte sous la menace ou la pression. L'accusé a repondu qu'il était conscient de ce qu'il faisait, qu'il n'avait nullement été intimidé et que c'était de son plein gré qu'il plaidait coupable[4851].

22. Ensuite, la Chambre a demandé à l'accusé si le plaidoyer est fait en connaissance de cause, s'assurant ainsi qu'il comprenait clairement la nature des accusations portées contre lui, de même que les conséquences de son plaidoyer sur chacun des chefs d'accusation[4852]. L'accusé a repondu qu'il plaidait « en connaissance de cause »[4853].

23. Enfin, la Chambre lui a demandé si son plaidoyer était sans équivoque : c'est-à-dire s'il savait qu'un tel plaidoyer n'était compatible avec aucune forme de défense qui le contredirait. L'accusé a répondu qu'il n'y avait absolument aucune compatibilité[4854].

24. La Chambre relève encore les éléments suivants de l'accord sur le plaidoyer : l'accusé a choisi librement et « en connaissance de cause » de plaider coupable[4855] ; il a decidé de plaider coupable après mûre réflexion durant laquelle il a pris pleinement conscience de la portée et des conséquences des infractions qu'il avait commises[4856] ; il a decidé de changer son plaidoyer après avoir été bien informé des conséquences juridiques d'un tel revirement et les avoir acceptées[4857] ; la décision de l'accusé de plaider coupable était volontaire, faite en connaissance de cause et sans équivoque[4858].

25. Dans sa décision orale rendue le 7 decembre 2005, la Chambre a acquis la conviction qu'en l'absence de tout désaccord de la part du Procureur et de l'accusé sur les faits de la cause, le plaidoyer était fondé sur des éléments suffisants pour établir les crimes et la participation de l'accusé à leur commission. La Chambre a declaré que les conditions posées par l'article 62 (B) étaient ainsi remplies et a en conséquence declaré l'accusé coupable d'avoir aidé et encouragé à la commission des crimes de meurtre et d'extermination constitutifs de crimes contre l'humanité en vertu de l'article 6 (1) du Statut[4859]. La Chambre a fait droit à la requête du Procureur aux fins de retrait et rejet des chefs d'inculpation pour lesquels l'accusé avait plaidé non coupable[4860]. En revanche, elle a rejeté la requête du Procureur aux fins d'acquittement sur ces mêmes chefs parce que le Procureur n'avait pas motivé sa requête sur ce point[4861].

III. Sur le fond

[4850] Compte reudu de l'audience du 7 decembre 2005, p. 15 à 17.
[4851] *Id*.
[4852] *Id*.
[4853] Compte rendu de l'audience du 7 décembre 2005, p. 17 à 19.
[4854] *Id*.
[4855] Accord sur la reconnaissance de culpabilité, par. 5.
[4856] *Ibid*., par. 6.
[4857] *Ibid*., par. 8.
[4858] *Ibid*., par. 9.
[4859] Compte rendu de l'audience du 7 décembre 2005, p. 20 à 22.
[4860] *Ibid*., p. 19 à 21.
[4861] *Ibid*., p. 22 et 23.

A. L'ACCUSÉ

26. Paul Bisengimana est né en 1948[4862], dans le secteur de Duha, commune de Gikoro, préfecture de Kigali-rural[4863]; il est le fils de Verdiana Nyirabatera et de Gervais Ngirumpatse[4864] tous deux décédés[4865]. Il a passé presque toute sa vie adulte dans la commune de Gikoro[4866].

27. Paul Bisengimana est marié et père de 10 enfants. Il en a eu sept avec sa première femme, Dorca Kantarama, décédée en 1991. Il s'est remarié par la suite à Marie Herondine Mukandagijimana, avec qui il a eu deux enfants. Il a adopté l'enfant de sa seconde épouse[4867].

28. Paul Bisengimana a fait ses études primaires dans la commune de Gikoro. En trois ans il a achevé ses etudes du premier cycle du secondaire à Rwamagana. Ensuite, il est entre à l'école normale de Byumba, dont il est sorti en 1970 avec le diplôme d'instituteur (D 5)[4868].

29. De 1970 à 1974, Paul Bisengimana a travaillé comme instituteur dans sa commune natale. De 1974 à 1978, il a été directeur d'une école secondaire à Nyanza. De 1978 à 1981, il a été juge, président du tribunal cantonal de Nyamata, dans la préfecture de Kigali[4869]. En mai 1981, il a été nommé bourgmestre de la commune de Gikoro, fonction qu'il a occupée jusqu'en 1994, date de son départ en exil[4870].

B. CONCLUSIONS DE FAIT ET DE DROIT

1. Responsabilité pénale individuelle pour aide et encouragement conformément à l'article 6 (1) du Statut

a. L'acte d'accusation

30. A l'appui aux chefs d'accusation de meurtre et extermination, l'acte d'accusation allègue qu'en avril 1994, dans la région de Bugesera, préfecture de Kigali-rural, Paul Bisengimana, agissant seul ou de concert avec d'autres, a tué ou fait tuer des personnes lors de massacres perpétrés dans la commune de Gikoro et ses alentours, dans le cadre d'une attaque généralisée et systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale[4871]. Faisant fond sur l'ensemble des actes invoqués à l'appui de ce chef, le Procureur allègue, en application de l'article 6 (1) du Statut, que l'accusé a planifié ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter le crime susvisés[4872].

b. Le droit applicable

31. L'article 6 (1) illustre le principe selon lequel, non seulement les auteurs matériels d'un crime, mais aussi les individus qui participent et contribuent à la commission dudit crime en d'autres

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[4862] Accord de reconnaissance de culpabilité, par. 24 ; comptes rendus des audiences du 17 novembre 2005, p. 11 à 13 ; et du 7 décembre 2005, p. 11 à 13.
[4863] Accord de reconnaissance de culpabilité, par. 24 ; acte d'accusation, par. 2.
[4864] Comptes rendus des audiences du 17 novembre 2005, p. 11 à 13 ; et du 7 décembre 2005 p. 11 à 13.
[4865] Compte rendu de l'audience du 17 novembre 2005, p. 11 à 13.
[4866] Accord de reconnaissance de culpabilité, par. 24.
[4867] Comptes rendus des audiences du 17 novembre 2005, p. 11 à 13 ; et du 7 décembre 2005, p. 13.
[4868] *Id*.
[4869] Comptes rendus des audiences du 17 novembre 2005, p. 11 à 13 ; et du 7 décembre 2005, p. 13.
[4870] Accord de reconnaissance de culpabilité, par. 24 et 25 ; Compte rendu de l'audience du 17 novembre 2005, p. 11 à 13 ; Acte d'accusation, par. 3 ; Compte rendu de l'audience du 7 décembre 2005, p. 13 et 14.
[4871] Acte d'accusation, par. 35 et 40.
[4872] *Ibid*., par. 36 et 41.

manières, telles que l'aide et l'encouragement, assument la responsabilité pénale pour tout crime visé dans le statut[4873].

32. « Aider » consiste à porter assistance à quelqu'un dans le cadre de la commission d'un crime[4874]. « Encourager » consiste à poser des actes de nature à favoriser la perpétration d'un crime ou à conseiller ou provoquer autrui à le commettre[4875]. Dans l'usage juridique, notamment dans le Statut et la jurisprudence du TPIR et du Tribunal pénal international pour l'ex-Yougoslavie (le « TPIY »), ces deux termes sont si fréquemment employés ensemble qu'on les considère comme constituant un seul et même concept juridique[4876].

33. L'aide et l'encouragement sont une forme de responsabilité accessoire. L'élément matériel du crime n'est pas accompli par l'accusé mais par une autre personne, appelée l'agent principal de l'infraction[4877]. La participation de l'accusé peut intervenir au stade de la planification, de la préparation ou de l'exécution du crime et peut revêtir la forme d'un acte positif ou d'une omission ; elle peut être antérieure ou postérieure à l'acte accompli par l'agent principal de l'infraction[4878]. Le Procureur est tenu de démontrer que l'accusé a fourni à l'agent principal de l'infraction une assistance, un encouragement ou un soutien moral pratique et substantiel, qui a abouti à la commission effective du crime par ce dernier[4879]. Si cette assistance n'est pas indispensable pour la perpétration du crime[4880], elle doit avoir eu une incidence substantielle sur la commission du crime par l'auteur principal[4881].

34. La seule présence de l'intéressé sur le lieu du crime peut constituer une forme d'aide et d'encouragement s'il est demontré qu'elle a eu un effet encourageant significatif sur l'agent principal de l'infraction, en particulier si l'individu qui assistait passivement était le supérieur de l'agent principal de l'infraction ou était à d'autres égards dans une position d'autorité[4882]. Dans ces circonstances, une omission peut constituer l'élément matériel de l'aide et de l'encouragement, à condition que cette omission ait eu un effet decisif sur la perpétration du crime[4883] .

35. Toutefois, peu importe que la personne qui aide ou encourage autrui à commettre une infraction soit présente ou non lors de la commission de ladite infraction[4884].

36. L'élément moral *(mem rea)* de l'aide et de l'encouragement est demontré en rapportant la preuve que la personne qui aide et encourage est consciente du fait que son acte concourt à la commission du crime par l'agent principal de l'infraction[4885]. Il n'est pas nécessaire que le complice connaisse l'infraction précise qui est en train d'être commise par l'auteur principal, mais il doit avoir connaissance des éléments essentiels du crime matériel[4886]. Quant au complice qui est en position

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[4873] Jugement *Kajelijeli,* par. 757 ; jugement *Semanza,* par. 377 ; Arrêt *Kayishema et Ruzindana,* par. 185 ; jugement *Musema,* par. 114 ; jugement *Rutaganda,* par,. 33 ; jugement *Kayishema et Ruzindana,* par. 196 et 197 ; jugement *Akayesu,* par. 473.
[4874] Jugement *Kajelijeli,* par. 765 ; jugement *Semanza,* par. 384 ; jugement *Ntakirutimana,* par. 787 ; jugement *Akayesu,* par. 484.
[4875] Id.
[4876] Jugement *Kajelijeli,* par. 765 ; jugement *Semanza,* par. 384 ; se réferant à Mewett & Manning, *Criminal Law* (3rd ed. 1994), p. 272 (faisant observer que l'aide et l'encouragement sont « presque universellement employés ensemble »).
[4877] Jugement Kunarać et consorts, par. 391.
[4878] Jugement *Kajelijeli*, par. 766 ; jugement *Semanza*, par. 386 ; jugement *Rutaganira*, par. 64.
[4879] Arret *Kayishema et Ruzindana*, par. 186 ; jugement *Kajelijeli*, par. 763 et 766 ; jugement *Kamuhunda*, par. 597 ; jugement *Akayesu*, par. 473 à 475 ; jugement *Rutaganda*, par. 43.
[4880] *Id*.
[4881] Jugement *Bagilishema*, par. 33 ; arrêt *Kamuhanda*, par. 70.
[4882] Jugement *Akayesu*, par. 693 ; jugement *Kajelijeli*, par. 769 ; jugement *Furundžija*, par. 34 et 35.
[4883] Jugement *Blaškić*, par. 284 ; jugement *Tadić*, par. 686 ; jugement *Mucić et consorts*, par. 842 ; jugement *Akayesu*. par. 705.
[4884] Jugement *Musema*, par. 125.
[4885] Arrêt *Blaškić*, par. 49 ; arrêt *Kayishema et Ruzindana*, par. 186.
[4886] Jugement *Kajelijeli*, par. 768 ; arrêt *Kajelijeli*, par. 186 et 187 ; jugement *Semanza*, par. 387 ; jugement *Bagilishema*, par. 32 ; jugement *Kayishema et Ruzindana*, par. 201.

d'autorité par rapport à l'agent principal de l'infraction, son intention criminelle peut être déduite du fait qu'il savait que sa présence serait interprêtée par l'agent principal de l'infraction comme un signe d'adhésion ou d'encouragement[4887].

C. L'ACCORD DE RECONNAISSANCE DE CULPABILITÉ

37. Paul Bisengimana a été nommé bourgmestre de Gikoro par le Président de la République[4888], sur proposition du Ministre de l'intérieur. Il reconnait qu'en sa qualité de bourgmestre, il représentait le pouvoir exécutif dans ladite commune de Gikoro[4889]. En outre, il exerçait l'autorité administrative sur la commune tout entière et était chargé de maintenir la paix, l'ordre public et la sûreté des personnes et des biens, ainsi que de l'application de la loi et des règlements au plan local, et de la politique gouvernementales[4890]. L'accusé reconnait qu'il avait le devoir de protéger la population, de prévenir ou de punir les actes illégaux des auteurs d'attaques contre des personnes ou leurs biens[4891]. Il avait pour mission d'informer le pouvoir central de tout événement digne d'intérêt qui se produisait dans la commune de Gikoro[4892].

38. De son propre aveu, de par sa position de bourgmestre, l'accusé exerçait l'autorité *de jure* et *de facto* sur tous les agents de l'Etat et autres fonctionnaires au niveau de la commune de Gikoro[4893], y compris les conseillers de secteurs[4894]. Ceux-ci représentaient le pouvoir exécutif au niveau du secteur et étaient responsables du maintien de l'ordre dans leurs secteurs respectifs[4895].

39. Paul Bisengimana reconnait qu'il avait le devoir de protéger la population, d'empêcher ou de punir les actes illégaux des auteurs des attaques menées à l'église de Musha et au complexe de Ruhanga, mais qu'il ne l'a pas fait[4896]. Il reconnait qu'il avait les moyens de s'opposer au massacre de civils tutsis dans la commune de Gikoro, mais qu'il est resté indifférent à ces attaques[4897]. En ce qui concerne les massacres de l'église de Musha, Paul Bisengimana reconnait que sa présence à l'église pendant l'attaque était de nature à encourager les assaillants et à leur donner l'impression qu'il approuvait le massacre[4898].

40. Dans les sections qui suivent, la Chambre se penchera sur la responsabilité pénale individuelle de l'accusé en vertu de l'article 6 (1) du Statut eu égard aux chefs d'accusation dont il a plaidé coupable.

2. Crimes contre l'humanité (article 3 du Statut)

a. Les éléments généraux du crime

41. Pour qu'un acte visé à l'article 3 du Statut puisse être qualifié de crime contre l'humanité, il faut prouver que le crime a été commis dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile, quelle qu'elle soit, en raison de son appartenance nationale, politique, ethnique, raciale ou religieuse.

[4887] Jugement *Kayishema et Ruzindana*, par. 200 et 201 ; jugement *Bagilishema*, par. 34 **à** 36 ; jugement *Kamuhunda*,par. 600 ; arrêt *Kamuhunda,* par. 70 et 71.
[4888] Accord de reconnaissance de culpabilité, par. 25 ; acte d'accusation, par. 3.
[4889] Accord de reconnaissance de culpabilité, par. 25 ; acte d'accusation, par. 4.
[4890] Accord de reconnaissance de culpabilité, par. 26 et 29 ; acte d'accusation, par. 7
[4891] Accord de reconnaissance de culpabilité, par. 29 ; acte d'accusation, par. 7.
[4892] Accord de reconnaissance de culpabilité, par. 26.
[4893] *Ibid*., par. 27 ; acte d'accusation, par. 5.
[4894] Accord de reconnaissance de culpabilité, par. 27.
[4895] *Ibid*., par. 28.
[4896] *Ibid*., par. 29 ; acte d'accusation, par. 7.
[4897] *Ibid*., par. 32 ; acte d'accusation, par. 8.
[4898] Accord de reconnaissance de culpabilité, par. 36.

i. L'attaque

42. La Chambre rappelle que la notion d'« attaque » s'entend de

> « tout acte, de tout fait ou de toute pluralité de faits contraires à la loi et s'apparentant à ceux énumérés aux alinéas (a) à (i) de l'article 3 du Statut[4899] ».

43. Elle fait observer que, compte tenu de la pratique du Tribunal de céans et du TPIY, la formule « généralisée ou systématique » constitue la norme applicable et non pas la formule « généralisée et systématique[4900] ».

44. L'interprétation du caractère « généralisé » de l'attaque diffère également dans les jugements rendus par le Tribunal[4901]. Toutefois, la Chambre fait remarquer que cet élément renvoie toujours à l'ampleur de l'attaque et parfois au nombre des victimes. La Chambre fait sienne la définition donnée dans le jugement *Kajelijeli,* qui est « à grande échelle et dirigée contre un grand nombre de victimes »[4902].

45. S'accordant avec le jugement *Kajelijeli,* la Chambre conclut que le caractère « systématique » de l'attaque s'entend du caractère organisé de celle-ci[4903].

46. Dans l'accord de culpabilité, l'accusé reconnaît qu'à compter du 7 avril 1994, la population tutsie a été massacrée et de nombreux opposants politiques ont été assassinés sur toute l'étendue du territoire rwandais, y compris dans la commune de Gikoro. Ces crimes ont été commis par des miliciens, des militaires et des gendarmes[4904].

47. Compte tenu des faits contenus dans l'accord de reconnaissance de culpabilité, la Chambre est convaincue que des attaques généralisées ont été commises dans la commune de Gikoro en avril 1994 du fait qu'elles ont entrainé la mort d'un nombre très important de victimes.

ii. L'attaque doit être dirigée contre une population civile

48. La définition de la « population civile » donnée dans le jugement *Akayesu* est constamment suivie dans la jurisprudence du Tribunal[4905].

> [...] les personnes qui ne participent pas directement aux hostilités, y compris les membres des forces armées qui ont déposé les armes et les personnes qui ont été mises hors de combat par maladie, blessure, détention ou pour toute autre cause. La présence au sein de la population civile de personnes isolées ne repondant pas à la définition de personnes civiles ne prive pas cette population de sa qualité[4906].

49. Comme il est souligné dans le jugement *Blaškić,*

[4899] Jugement *Kajelijeli,* par. 867 ; jugement *Semanza,* par. 327.
[4900] La version française du Statut exige que l'attaque soit généralisée et systématique tandis que dans la version anglaise, elle n'a pas besoin de revêtir ce double caractère. Dans la pratique des deux Tribunaux, la version anglaise a été acceptée comme étant conforme au droit international coutumier, arrêt *Kunarac et consorts,* par. 93.
[4901] Jugement *Kajelijeli,* par. 871.
[4902] *Id.*
[4903] Jugement *Kajelijeli,* par. 871.
[4904] Accord de reconnaissance de culpabilité, par. 30.
[4905] Jugement *Kajelijeli,* par. 873 ; jugement *Rutuganda,* par. 72 ; jugement *Musema,* par. 207 ; jugement *Semanza,* par. 330.
[4906] Jugement *Akayesu,* par. 582, cité dans le jugement *Kajelijeli,* par. 873.

> « c'est la situation concrète de la victime au moment où les crimes sont commis, plutôt que son statut, [qui] doit être prise en compte pour déterminer sa qualité de civil[4907] ».

50. De plus, l'emploi du terme « population » ne signifie pas que l'attaque doive avoir été dirigée contre toute la population du territoire ou de l'entité géographique dans laquelle elle s'est déroulée[4908]. Dans le jugement *Semanza,* la Chambre a aussi precisé ce qui suit :

> Il n'est pas nécessaire que la victime ou les victimes de l'acte visé partagent avec la population civile qui constitue la cible principale de l'attaque des caractéristiques fondamentales, notamment géographiques, sauf à remarquer que ces caractéristiques peuvent servir à démontrer que l'acte en question s'inscrit dans le cadre de l'attaque[4909].

51. La Chambre est d'accord avec cette jurisprudence.

52. Dans l'accord de reconnaissance de culpabilité, l'accusé reconnaît que la population tutsie a été massacrée et que de nombreux opposants politiques ont été assassinés[4910]. Il admet en outre que les attaques dirigées contre des civils tutsis rassemblés à l'église de Musha, ainsi qu'à l'église et à l'école protestantes de la commune de Gikoro s'inscrivaient dans le cadre des attaques incessantes que les civils tutsis ont subies dans la plupart des régions du Rwanda tout le mois d'avril 1994[4911].

53. Compte tenu des faits contenus dans l'accord de culpabilité, la Chambre est convaincue que les attaques généralisées commises dans la commune de Gikoro l'ont été contre une population civile.

iii. L'attaque doit avoir été inspirée par des motifs discriminatoires

54. La Chambre rappelle l'arrêt *Akayesu* dans lequel la Chambre d'appel a considéré que les « motifs discriminatoires » touchent par essence à la compétence du Tribunal puisque celle-ci se limite aux crimes commis pour des motifs fondés sur « l'appartenance nationale, politique, ethnique, raciale ou religieuse » des victimes[4912]. Néanmoins, dans le jugement *Kajelijeli,* la Chambre a souligné que :

> Les actes perpétrés contre des personnes qui ne rentrent pas dans les catégories protégées ne doivent pas nécessairement échapper à la compétence du Tribunal si l'intention de leur auteur était de concourir à la réalisation de l'attaque lancée contre le groupe victime de la discrimination pour l'un quelconque des motifs enumérés[4913].

55. Dans l'accord de reconnaissance de culpabilité, Paul Bisengimana reconnaît que la population tutsie a été massacrée et que de nombreux opposants politiques ont été assassinés[4914]. Il reconnaît qu'à compter du 7 avril 1994, dans toutes les régions du pays, les Tutsis qui fuyaient les massacres en cours se réfugiaient dans des lieux qu'ils croyaient être sûrs. Dans la plupart de ces endroits, les réfugiés ont été attaqués, enlevés et massacrés, souvent avec la complicité de certaines autorités[4915].

56. Compte tenu des faits contenus dans l'accord, la Chambre conclut que les attaques généralisées lancées contre la population civile ont été commises pour des motifs discriminatoires parce la plupart des victimes étaient tutsies.

iv. L'élément moral des crimes contre l'humanite

[4907] Jugement *Blaškić,* par. 214, cité dans les jugements *Bagilishema,* par. 79 et *Kajelijeli,* par. 874.
[4908] Jugement *Kajelijeli,* par. 875 ; jugement *Bagilishema,* par. 80 ; jugement *Tadić,* par. 644.
[4909] Jugement *Semanza,* par. 330, cité dans le jugement *Kajelijeli,* par. 875.
[4910] Accord de reconnaissance de culpabilité, par. 30.
[4911] *Ibid*., par. 39 et 42.
[4912] Arrêt *Akayesu,* par. 464 et 465, également cité dans le jugement *Kajelijeli,* par. 877.
[4913] Jugement *Kajelijeli,* par. 878 ; jugement *Rutaganda,* par. 74 ; jugement *Musema,* par. 209 ; jugement *Semanza,* par. 331.
[4914] Accord de reconnaissance de culpabilité, par. 30.
[4915] *Ibid*., par. 31.

57. La Chambre souscrit au raisonnement suivi dans le jugement *Kajelijeli* selon lequel

> « l'accusé doit avoir eu connaissance du contexte général dans lequel s'inscrit l'attaque et savoir que ses actes font partie intégrante d'une attaque généralisée dirigée contre une population civile »[4916].

58. Dans l'accord de reconnaissance de culpabilité, l'accusé reconnaît qu'à compter du 7 avril 1994, la population tutsie a été massacrée et de nombreux opposants politiques ont été assassinés dans la commune de Gikoro[4917]. Il reconnaît que les attaques lancées contre les civils tutsis qui s'étaient rassemblés à l'église de Musha et à l'école et l'église protestantes de Ruhanga s'inscrivaient dans le cadre des attaques continues que les civils tutsis ont subies dans la plupart des régions du Rwanda[4918].

59. Compte tenu de l'accord de reconnaissance de culpabilité, la Chambre est convaincue que l'accusé avait connaissance du contexte plus large dans lequel s'inscrivaient les attaques qui avaient lieu au Rwanda en avril 1994 et qu'il savait que ses actes participaient d'attaques généralisées commises contre des civils tutsis.

b. Conclusions

60. La Chambre conclut que les attaques à l'église de Musha, et à l'école protestantes de la commune de Gikoro en avril 1994 ont été lancées contre des civils tutsis pour des motifs discriminatoires et avaient un caractère généralisé parce qu'elles ont entrainé la mort de nombreuses victimes.

3. Crimes contre l'humanité – Extermination

a. L'acte d'accusation

61. Le quatrième chef d'accusation met à la charge de l'accusé le crime d'extermination constitutive de crime contre l'humanité en vertu de l'article 3 (b) du Statut et précise que :

> En avril 1994, dans la région de Bugesera, préfecture de Kigali-rural, République rwandaise, Paul Bisengimana, agissant seul et de concert avec d'autres, a tué ou fait tuer des personnes lors de massacres perpétrés dans la commune de Gikoro et ses alentours, dans le cadre d'une attaque généralisée et systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale[4919].
>
> Entre le 6 et le 21 avril 1994, des attaques généralisées ou systématiques dirigées contre une population civile en raison de son appartenance politique, ethnique ou raciale ont été perpétrées partout au Rwanda[4920].
>
> Paul Bisengimana a aidé et encouragé à planifier, préparer ou exécuter le meurtre de civils tutsis, par ses actes ou par l'intermédiaire des personnes qu'il a aidées et ce, en toute connaissance de cause et en adhérant à leurs actes[4921].

[4916] Jugement *Kajelijeli,* par. 880 ; jugement *Semanza,* par. 332 ; jugement *Musema,* par. 206 ; jugement *Ntakirutimana et Ntakirutimana,* par. 803 ; jugement *Bagilishema,* par. 94 ; jugement *Kayishema et Ruzindana,* par. 134, arrêt *Kunarac et consorts,* par. 102.
[4917] Accord de reconnaissance de culpabilité, par. 30.
[4918] *Ibid*., par. 39 et 42.
[4919] Acte d'accusation, par. 40.
[4920] *Ibid*, par. 42.
[4921] *Ibid*., par. 43.

L'une des conséquences directes de la conduite de Paul Bisengimana, notamment de l'appui moral qu'il a apporté aux assaillants, a été le massacre de milliers d'hommes, de femmes et d'enfants appartenant à la population civile[4922].

Les actes positifs posés par Paul Bisengimana pendant le mois d'avril 1994, à l'effet d'aider et d'encourager à commettre le massacre de civils tutsis à l'église de Musha, sise dans la commune de Gikoro, ainsi qu'à l'église et l'école protestantes de Ruhanga, cellule de Ruhanga, secteur de Gicaca, commune de Gikoro, sont articulés aux paragraphes 17 à 20 et 24 à 28 du présent acte d'accusation et ne sont repris ici que pour mémoire[4923].

b. L'accord de reconnaissance de culpabilit6

62. Paul Bisengimana reconnait qu'il est coupable d'avoir aidé et encouragé à la commission de l'extermination constitutive de crime contre l'humanité[4924].

i. Les faits survenus à l'église de Musha

63. L'accusé reconnaît qu'entre le 8 et le 13 avril 1994, plus d'un millier de civils tutsis fuyant les attaques qu'ils essuyaient dans l'ensemble de la préfecture de Kigali-rural se sont refugiés à l'église de Musha, sise dans le secteur de Rutoma, (commune de Gikoro)[4925].

64. La Chambre relève qu'alors que l'acte d'accusation mentionne que Juvénal Rugambarara se trouvait parmi les personnes présentes pendant l'attaque contre l'église de Musha[4926], son nom ne figure pas dans l'accord de reconnaissance de culpabilité[4927]. Cela étant, elle pense que cela n'a aucune incidence sur la validité de l'accord de reconnaissance de culpabilité de l'accusé ni sur sa responsabilité pour la commission du crime.

65. L'accusé reconnait que :

a) Le 12 avril 1994 ou vers cette date, des militaires de l'armée rwandaise distribuaient des armes telles que des fusils et des grenades à des miliciens *Interahamwe* et à d'autres civils armés à l'église de Musha[4928] ;
b) Il en avait connaissance et du fait que ces armes seraient utilisées pour attaquer les civils tutsis qui avaient trouvé refuge à l'église de Musha[4929] ;
c) Le 13 avril 1994 ou vers cette date, une attaque était lancée sur les civils tutsis qui s'étaient réfugiés dans l'église de Musha. Les assaillants ont utilisé des armes à feu, des grenades, des machettes, des pangas et d'autres armes traditionnelles[4930] ;
d) Cette attaque a entrainé la mort de plus de mille civils tutsis[4931] ;
e) Pendant l'attaque, un milicien civil nommé Manda a incendié l'église, causant la mort de nombreux refugiés[4932] ,
f) L'accusé était présent durant l'attaque, en compagnie de Laurent Semanza, de militaires de l'armée rwandaise, de miliciens *Interahamwe*, de civils armés et d'agents de la police communale[4933] ;

[4922] *Ibid*., par. 44.
[4923] *Ibid*., par. 45.
[4924] Accord de reconnaissance de culpabilité, par. 5.
[4925] *Ibid*., par. 33 ; acte d'accusation, par. 17.
[4926] Acte d'accusation, par. 19.
[4927] Accord de reconnaissance de culpabilité, par. 35.
[4928] *Ibid*., par. 34.
[4929] *Id*.
[4930] Accord de reconnaissance de culpabilité, par. 35.
[4931] *Id*.
[4932] *Id*.

g) Sa présence à l'église de Musha pendant l'attaque était de nature à encourager les assaillants et à leur donner l'impression qu'il approuvait le massacre des civils tutsis qui s'y étaient rassemblés[4934].

66. Paul Bisengimana reconnaît qu'il avait les moyens de s'opposer au massacre de civils tutsis dans la commune de Gikoro, mais qu'il est resté indifférent à cette attaque[4935].

ii. Les faits survenus à l'église et à l'école protestantes de Ruhanga

67. L'accusé reconnaît qu'entre le 8 et le 10 avril 1994, fuyant les attaques qu'ils essuyaient dans l'ensemble de la préfecture[4936], de nombreux civils tutsis ont cherché refuge à l'église et à l'école protestantes de Ruhanga, cellule de Ruhanga, secteur de Gicaca, commune de Gikoro, en préfecture de Kigali-rural.

68. L'accusé reconnaît que :

a) Entre le 10 et le 15 avril 1994, le brigadier Rwabukumba, des éléments de la Garde présidentielle, des miliciens civils et des agents de la police communale ont lancé une attaque contre les civils tutsis qui s'étaient réfugiés au complexe de Ruhanga[4937].
b) Au cours de cette attaque, les assaillants, qui étaient munis d'armes à feu, de grenades, de machettes, de pangas et d'autres armes traditionnelles ont tué de nombreux réfugiés tutsis[4938].
c) Malgré sa qualité de bourgmestre et le fait qu'il savait que les réfugiés présents à l'église de Musha avaient été attaqués le 13 avril 1994, il n'a pris aucune mesure concrète pour protéger les Tutsis qui avaient trouvé refuge au complexe de Ruhanga entre le 10 et le 15 avril 1994[4939].

69. Paul Bisengimana reconnaît qu'il avait les moyens de s'opposer au massacre de civils tutsis dans la commune de Gikoro, mais qu'il est resté indifférent à ces attaques[4940].

C. Le droit applicable

70. La Chambre rappelle que l'extermination consiste en un acte ou un ensemble d'actes contribuant au meurtre d'un grand nombre de personnes[4941]. Il n'importe guère que la participation de l'accusé à l'acte soit détournée ou indirecte. C'est le nombre de victimes qui distingue le crime d'extermination de celui de meurtre[4942].

71. Pour établir l'intention criminelle s'agissant de l'extermination, le Procureur doit prouver que l'accusé avait l'intention de donner la mort ou avait fait preuve d'une négligence grave, peu lui important que la mort résulte ou non de ses actes ou omissions, et qu'il était conscient que ceux-ci s'inscrivaient dans le cadre d'une tuerie à grande échelle[4943]. Il faut montrer que l'accusé avait connaissance du vaste projet de meurtres collectifs visant une population civile pour des motifs

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[4933] Id.
[4934] Accord de reconnaissance de culpabilité, par. 36.
[4935] *Ibid*., par. 32.
[4936] *Ibid*., par. 40, acte d'accusation, par. 24.
[4937] Accord de reconnaissance de culpabilité, par. 41.
[4938] *Id*. ; acte d'accusation, par. 25.
[4939] Accord de reconnaissance de culpabilité, par. 42.
[4940] *Ibid*., par. 32.
[4941] Jugement *Kayishema et Ruzindana,* par. 144 à 147 ; jugement *Rutaganda,* par. 82 et 83 ; jugement *Musema,* par. 217 ;jugement *Kamuhanda,* par. 691 et 692 ; jugement *Ndindabahizi,* par. 479.
[4942] Jugement *Kajelijeli,* par. 893.
[4943] *Ibid*., par. 894 et 895 ; jugement *Kayishema et Ruzindana,* par. 144 et 146 ; jugement *Bagilishema,* par. 89 ; jugement *Semanza,* par. 341.

discriminatoires et qu'il voulait y participer[4944]. Il y a lieu pour la Chambre de se pencher sur la question de savoir si l'accusé, en tant que complice de l'extermination constitutive de crime contre l'humanité, avait connaissance de l'intention criminelle de l'auteur principal et savait que, par ses actes, il aiderait l'auteur principal à commettre son crime.

72. Par conséquent, pour être déclaré coupable d'extermination constitutive de crime contre l'humanité, un accusé doit (i) avoir participé à une tuerie généralisée de personnes ou à leur soumission à des conditions d'existence devant entrainer leur mort à grande echelle ; (ii) avoir eu l'intention de donner la mort ou avoir fait preuve d'une négligence grave, peu lui important que la mort resulte ou non de ses actes ou omissions ; et (iii) avoir été conscient que ses actes ou omissions s'inscrivaient dans le cadre d'une tuerie à grande échelle[4945] .

d. Conclusions

i. Les massacres perpétrés à l'église de Musha

73. Vu les faits reconnus par l'accusé et ses propres conclusions selon lesquelles l'attaque lancée contre des civils tutsis à l'église de Musha (commune de Gikoro) obéissait à des motifs discriminatoires, était généralisée et avait entrainé la mort de nombreuses victimes, la Chambre conclut que ladite attaque équivaut à une extermination.

74. La Chambre conclut que l'accusé a participé à l'attaque perpétrée contre l'église de Musha parce qu'il était sur les lieux et était conscient que sa présence encouragerait le comportement criminel des auteurs de l'attaque.

75. La Chambre est convaincue que l'accusé avait connaissance de l'intention criminelle des auteurs principaux ; il a en effet admis qu'il savait que des armes avaient été distribuées à des miliciens *Interahamwe* et à d'autres civils à l'église de Musha et que ces armes seraient utilisées pour attaquer la population tutsie qui y avait trouvé refuge.

76. Par conséquent, la Chambre est convaincue que, par sa présence à l'église de Musha le 13 avril 1994 ou vers cette date, Paul Bisengimana a aidé et encouragé à exterminer les civils tutsis qui s'y trouvaient.

ii. Les massacres perpétrés à l'église et à l'école protestantes de Ruhanga

77. Vu les faits reconnus par l'accusé et ses propres conclusions selon lesquelles l'attaque contre l'église et l'école protestantes de Ruhanga, commune de Gikoro, qui a eu lieu après celle de l'église de Musha qui a été lancée contre des civils tutsis pour des motifs discriminatoires, était généralisée et avait entrainé la mort de nombreuses personnes, la Chambre conclut que ladite attaque équivaut à une extermination.

78. Elle conclut que, bien que l'accusé ait pu ne pas être présent lors de l'attaque, il avait des raisons de savoir qu'une attaque serait lancée contre les civils tutsis rassemblés au complexe de Ruhanga du fait de l'attaque lancée plus tôt contre l'église de Musha. Elle conclut en outre que, malgré sa qualité de bourgmestre de la commune de Gikoro, l'accusé n'a pris aucune mesure concrète pour protéger les civils tutsis. Bien que l'accusé reconnaisse qu'il avait le devoir de protéger ces civils, la Chambre considère qu'il ne l'a pas fait.

[4944] Jugement *Kayishema et Ruzindana,* par. 144 et 145 ; jugement *Rutaganda,* par. 83 et 84 ; jugement *Musema,* par. 218 ; jugement *Bagilishema,* par. 94 ; jugement *Semanza,* par. 341 ; jugement *Kamuhanda,* par. 696 ; jugement *Kajelijeli,* par. 894.
[4945] Jugement *Kayishema et Ruzindana*, par. 144 ; jugement *Bagilishema,* par. 89.

79. La Chambre est convaincue, en raison de la position d'autorité de l'accusé, que le fait qu'il a omis d'empêcher l'attaque équivaut une négligence grave. Elle conclut que l'accusé devait savoir que son omission permettrait la commission des massacres.

80. A la lumière de ces circonstances, la Chambre est convaincue que l'accusé était au courant de l'intention criminelle des auteurs de l'attaque contre le complexe de Ruhanga.

81. Pour ces raisons, la Chambre estime que, du fait de son omission d'agir, l'accusé a aidé et encouragé autrui à exterminer les Tutsis rassemblés à l'église et à l'école protestantes de Ruhanga.

iii. Conclusions générales

82. La Chambre conclut que l'accusé est pénalement responsable en vertu de l'article 6 (1) du Statut pour avoir aidé et encouragé l'extermination de membres de la population tutsie à l'église de Musha, à l'église et à l'école protestantes de Ruhanga dans la commune de Gikoro en avril 1994. La Chambre déclare l'accusé coupable d'extermination constitutive de crime contre l'humanité en vertu de l'article 3 (b) du Statut et le condamne en conséquence.

4. Crimes contre l'humanité – Assassinat

a. L'acte d'accusation

83. Le troisième chef d'accusation est celui d'assassinat constitutif de crime contre l'humanité en vertu de l'article 3 (a) du Statut ; il est libellé comme suit :

> En avril 1994, dans la région de Bugesera, préfecture de Kigali-rural, République rwandaise, Paul Bisengimana, agissant seul, a tué ou fait tuer des personnes dans la commune de Gikoro et ses alentours, dans le cadre d'une attaque généralisée et systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale[4946].
>
> Paul Bisengimana a aidé et encouragé à planifier, préparer ou exécuter le meurtre de civils tutsis, par ses actes ou par le truchement des personnes qu'il a aidées, et ce, en toute connaissance de cause et en adhérant à leurs actes[4947].
>
> Parmi les civils tutsis tués en conséquence de la conduite de Paul Bisengimana figure un homme répondant au nom de Rusanganwa. Paul Bisengimana était effectivement présent durant l'attaque perpétrée à l'église de Musha dans le secteur de Rutoma, commune de Gikoro, le 13 avril 1994, date à laquelle Rusanganwa, qui s'était refugié dans ladite église, a été assassiné[4948].

b. L'accord de reconnaissance de culpabilité

84. L'accusé reconnait qu'il est coupable d'avoir aidé et encouragé la commission du crime d'assassinat constitutif de crime contre l'humanité[4949].

85. Il reconnait qu'il était présent lorsqu'un Tutsi nommé Rusanganwa, qui s'était refugié à l'église de Musha, a été assassiné pendant l'attaque lancée à cet endroit le 13 avril 1994[4950].

[4946] Acte d'accusation, par. 35.
[4947] *Ibid*., par. 38.
[4948] *Ibid*., par. 39.
[4949] Accord de reconnaissance de culpabilité, par. 5.
[4950] *Ibid*., par. 37.

86. Il reconnaît qu'il avait les moyens de faire échec au massacre de civils tutsis dans la commune de Gikoro, mais qu'il est resté indifférent à l'attaque[4951].

c. Le droit applicable

87. La Chambre rappelle que le meurtre est le fait de donner volontairement la mort à quelqu'un ou de porter volontairement une atteinte grave à son intégrité physique, tout en sachant que cette atteinte est de nature à entraîner la mort de la victime, ou en étant indifférent que la mort de la victime en résulte ou non[4952]. Le meurtre est punissable en tant que crime contre l'humanité lorsqu'il est commis dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile pour des raisons discriminatoires. La Chambre rappelle que c'est l'ampleur des massacres qui distingue l'extermination du meurtre en tant que crime contre l'humanité[4953].

88. En ce qui concerne l'élément moral de l'accusé en tant que complice d'assassinat constitutif de crime contre l'humanité, la Chambre doit chercher à savoir si l'accusé connaissait l'intention criminelle qui animait l'auteur principal de l'infraction et s'il savait que ses actes contribueraient à la commission du crime.

d. Conclusions

89. A titre préalable, la Chambre rappelle que la version française du Statut, en son article 3 (a), désigne l'acte blâmable sous le vocable d'« assassinat », qui est un meurtre prémédité tandis que la version anglaise du même article parle de « *murder* »[4954]. Elle rappelle en outre que, dans la version originale française de l'accord de reconnaissance de culpabilité, Rusanganwa avait été assassiné[4955], c'est-à-dire fait l'objet d'un meurtre avec préméditation. Ce fait n'est pas contesté. Elle relève toutefois qu'il n'est pas allégué que l'accusé a directement commis cet assassinat ou qu'il partageait l'intention de l'auteur principal de l'infraction, mais plutôt qu'il a concouru à la commission du crime. Cela étant, la Chambre doit chercher à savoir si l'intention criminelle de l'accusé était celle d'un complice lorsque l'assassinat de Rusanganwa était commis, autrement dit, s'il avait connaissance de l'intention criminelle qui animait l'auteur principal de l'infraction et, aussi, s'il savait que sa présence constituait un encouragement à la commission du crime.

90. La Chambre constate également que l'acte d'accusation[4956] semble indiquer que plusieurs accusations de meurtre sont portées contre l'accusé. Or, l'accord de reconnaissance de culpabilité fait seulement état de l'assassinat de Rusanganwa, commis lors de l'attaque à l'église de Musha[4957]. En conséquence, la Chambre n'a examiné que les faits invoqués à l'appui de cet assassinat, qui est allégué dans l'acte d'accusation et reconnu par l'accusé, et par lequel la victime est clairement identifiée.

91. La Chambre a déjà conclu que l'attaque à l'église de Musha était une attaque généralisée dirigée contre une population civile pour des raisons discriminatoires.

[4951] *Ibid*., par. 32.
[4952] Jugement *Akayesu,* par. 586 ; jugement *Ndindahahizi,* par. 487.
[4953] Jugement *Kajelijeli,* par. 893.
[4954] Jugement *Semanza,* par. 589 ; jugement *Musema,* par. 84 ; jugement *Rutaganda,* par. 80 ; jugement *Akayesu,* par. 585 ; jugement *Bagilishema,* par. 84 et 85 ; jugement *Kayishema et Ruzindana,* par. 140 ; jugement *Ntakirutimana,* par. 803, 804 et 808.
[4955] Il est écrit au paragraphe 37 de la version française de l'accord de reconnaissance de culpabilité, qui est l'original, que Rusanganwa a été « assassiné » pendant l'attaque.
[4956] Acte d'accusation, par.39.
[4957] Accord de reconnaissance de culpabilité, par. 37.

92. Il n'est pas contesté qu'un Tutsi, nommé Rusanganwa, a été tué avec préméditation. Sur la base des faits reconnus par l'accusé, la Chambre conclut que l'accusé était présent lorsque Rusanganwa a été assassiné pendant l'attaque contre l'église de Musha.

93. La Chambre est convaincue que Paul Bisengimana savait que le meurtre de Rusanganwa s'inscrivait dans le cadre d'une attaque généralisée dirigée contre des civils tutsis en raison de leur appartenance ethnique. Elle est également convaincue, au vu des circonstances de la cause, que Paul Bisengimana connaissait l'intention criminelle de l'auteur du meurtre de Rusanganwa. Elle rappelle le raisonnement qu'elle a suivi à l'appui de cette conclusion au paragraphe 75 du présent Jugement.

94. La Chambre retient que, du fait de sa présence sur les lieux lorsque le crime a été commis, l'accusé a participé au meurtre de Rusanganwa. L'accusé savait que sa présence encouragerait la conduite criminelle de l'auteur principal du crime et donnerait l'impression qu'il cautionnait le meurtre. De plus, il reconnaît que bien qu'il ait eu les moyens de s'opposer aux meurtres de civils tutsis, il a préféré rester indifférent face aux attaques.

95. La Chambre est convaincue que la responsabilité pénale individuelle de l'accusé en vertu de l'article 6 (1) du Statut est engagée parce qu'il a aidé et encouragé le meurtre d'un civil tutsi nommé Rusanganwa à l'église de Musha, commune de Gikoro, en avril 1994. En conséquence, elle déclare l'accusé coupable d'assassinat constitutif de crime contre l'humanité en vertu de l'article 3 (a) du Statut.

e. Cumul des déclarations de culpabilité

i. Le droit applicable

96. La Chambre rappelle que le critère général d'application du principe du cumul de déclarations de culpabilité a été réaffirmé dans l'arrêt *Krstić* :

> Il est de jurisprudence constante au Tribunal que plusieurs déclarations de culpabilité ne peuvent être prononcées sur la base de différentes dispositions du Statut, mais à raison du même comportement, que si chacune de ces dispositions comporte un élément nettement distinct qui fait défaut dans l'autre, un élément étant nettement distinct d'un autre s'il exige la preuve d'un fait que n'exige pas l'autre élément. Si ce critère n'est pas rempli, seule la déclaration de culpabilité fondée sur la disposition la plus spécifique sera retenue. En effet, l'infraction la plus spécifique englobe celle qui l'est moins, puisque la commission de la première implique forcément que la deuxième a également été commise[4958].

97. L'arrêt *Čelebići* précise que, si un ensemble de faits est régi par deux dispositions dont l'une comporte un élément supplémentaire nettement distinct, la Chambre se fondera uniquement sur cette dernière disposition pour declarer l'accusé coupable[4959].

98. Tout en prenant note du critère relatif au cumul de déclarations de culpabilité, la Chambre relève qu'il ne devrait pas être appliqué machinalement ou aveuglément. La Chambre d'appel du TPIY a recommandé la prudence dans l'application de ce critère afin d'éviter qu'il ne soit porté atteinte aux droits de l'accusé[4960].

ii. Conclusions

[4958] Arrêt *Krstić,* par. 218, cité également dans l'arrêt *Semanza,* par. 315 ; voir aussi arrêt *Ntakirutimana*, par. 542.
[4959] Arrêt Mucić et consorts, par. 413.
[4960] Arrêt *Kunarac,* par. 168 à 198.

99. La Chambre s'est penchée sur le fait que l'accord de reconnaissance de culpabilité était initialement fondé, sur l'acte d'accusation du 31 octobre 2005, qui reprochait à l'accusé sa participation directe à l'assassinat de Rusanganwa[4961]. D'après cet acte d'accusation, l'accusé a tranché le bras de Rusanganwa avec une machette et l'a laissé se vider de son sang. En revanche, l'acte d'accusation du 1er décembre 2005, sur lequel se fonde l'accord de reconnaissance de culpabilité, indique seulement que l'accusé était présent lors de l'attaque à l'église de Musha au cours de laquelle un Tutsi du nom de Rusanganwa a été tué[4962].

100. En l'espèce, l'assassinat de Rusanganwa et l'extermination des réfugiés à l'église de Musha avaient été planifiés et préparés par les auteurs principaux. La Chambre considère que le meurtre de Rusanganwa est inclus dans le crime d'extermination commis à l'église de Musha car Rusanganwa comptait parmi les civils tutsis dam le cadre de cette attaque généralisée et fondée sur des motifs discriminatoires.

101. La Chambre a conclu également que l'élément moral de l'aide et encouragement a complicité était établi car l'accusé connaissait l'intention criminelle des auteurs principaux de l'extermination et du meurtre ; il savait que ces crimes avaient été planifiés et que sa présence contribuerait à leur commission. A la réflexion, la Chambre considère que le même ensemble de faits prouve l'élément moral de l'aide et de l'encouragement, c'est-à-dire de la complicité de meurtre et d'extermination constitutifs de crimes contre l'humanité commis à l'église de Musha.

102. La Chambre relève que les accusations d'extermination et de meurtre à l'église de Musha sont étayées par le même ensemble de faits et que les infractions ont été commises avec le même mode de participation de la part de l'accusé. De ce point de vue là, donc, les crimes d'aide et d'encouragement à commettre le meurtre et l'extermination constitutifs de crimes contre l'humanité ne sont pas nettement distincts.

103. La Chambre considère qu'il faut voir dans le meurtre de Rusanganwa une infraction comprise dans le crime d'extermination commis à l'église de Musha. Deux déclarations de culpabilité à raison du concours idéal d'infractions ne se justifient donc pas dans ces circonstances car cela ne donnerait pas la meilleure représentation, ou du moins, la représentation plus complète de la conduite criminelle de l'accusé. La Chambre estime que l'accusé ne doit être déclaré coupable que d'extermination constitutive de crime contre l'humanité pour les infractions commises à l'église de Musha car, compte tenu de son ampleur, qui constitue un élément supplémentaire matériellement distinct, ce crime est plus précis que celui de meurtre.

104. La Chambre rappelle que, le 7 décembre 2005, l'accusé a été reconnu coupable de meurtre et d'extermination constitutifs de crimes contre l'humanité, après qu'elle eut accepté le plaidoyer de culpabilité de l'accusé.

105. A ce stade de la procédure, la Chambre décide que l'intérêt de la justice et l'équité de la procédure commandent que l'accusé ne soit declaré coupable que relativement au chef d'accusation d'extermination constitutive de crime contre l'humanité et non relativement au chef d'accusation de meurtre. En conséquence, elle ne condamnera l'accusé qu'à raison de sa déclaration de culpabilité concernant l'extermination.

IV. Questions relatives à la peine

A. TEXTES ET PRINCIPES APPLICABLES

[4961] Acte d'accusation, 31 octobre 2005, par. 22.
[4962] *Ibid*., par. 39.

106. La Chambre rappelle que le Tribunal a été créé pour contribuer au processus de réconciliation nationale, au rétablissement et au maintien de la paix ainsi que pour faire cesser les violations du droit international humanitaire au Rwanda et en reparer dûment les effets[4963]. Elle considère qu'un procès équitable et, en cas de condamnation, une peine juste contribuent à la réalisation de ces objectifs.

107. La Chambre condamnera Paul Bisengimana conformément aux dispositions des articles 22 et 23 du Statut et 100 et 101 du Règlement de procédure et de preuve. Elle fait observer que la seule peine que le Tribunal puisse infliger est la peine d'emprisonnement. En vertu de l'article 101 (A) du Règlement, la peine maximale est l'emprisonnement à vie.

108. Le Statut et le Règlement ne prévoient pas de peine spécifique pour tel ou tel crime relevant de la compétence du Tribunal.

109. Des lors, la détermination de la peine est laissée à l'appréciation de la Chambre. Dans l'exercice de ce pouvoir discrétionnaire, la Chambre tient compte des facteurs visés à l'article 23 (2) du Statut et à l'article 101 (B) du Règlement, notamment la gravité de l'infraction, l'existence de circonstances aggravantes ou atténuantes, la situation personnelle du condamné et la grille générale des peines d'emprisonnement appliquée par les tribunaux rwandais.

110. La Chambre est consciente de l'obligation qui lui est faite d'individualiser la peine[4964].

111. La Chambre rappelle que les circonstances aggravantes doivent être prouvées au-delà de tout doute raisonnable, alors que les circonstances atténuantes doivent l'être sur la base de l'hypothèse la plus probable[4965].

B. CIRCONSTANCES AGGRAVANTES

1. Arguments du Procureur sur la gravité de l'infraction et la position officielle de l'accusé

112. La gravité et le caractère odieux de l'assassinat et de l'extermination constitutifs de crimes contre l'humanité et leur proscription absolue confèrent un caractère proprement aggravant à leur commission. L'ampleur des crimes qui se sont soldés par le massacre de plusieurs milliers de civils au Rwanda en l'espace de 100 jours a choqué la conscience collective[4966] et constitue une circonstance aggravante[4967]. Les actes et omissions de Paul Bisengimana se sont soldés par le massacre de nombreux civils tutsis[4968].

113. En sa qualité de bourgmestre de la commune de Gikoro, Paul Bisengimana avait des responsabilités particulières à assumer : il avait le devoir et le pouvoir de protéger la population, de prévenir ou de punir les actes illégaux[4969]. Il avait l'obligation de faire montre d'un degré de moralité plus élevé que la moyenne[4970]. C'est une personne instruite, et à ce titre, il était en mesure de connaître et d'apprécier la dignité et la valeur de la vie humaine[4971]. Il était suffisamment instruit pour être

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[4963] Résolution 955 du Conseil de sécurité, 8 novembre 1994.
[4964] Arrêt *Mucić et consorts*, par. 717 à 719 ; jugement *Muhimana,* par. 594.
[4965] Arrêt *Kajelijeli,* par. 294 ; voir aussi la référence faite au paragraphe 19 de la Mémoire de la Défense préalable au prononcé de la sentence ; Mémoire du Procureur relatif à la sentence, par. 34, et compte rendu de l'audience du 19 janvier 2006, p. 6 et 7 ainsi que 42 et 43.
[4966] Mémoire du Procureur relatif à la sentence, par. 35 ; compte rendu de l'audience du 19 janvier 2006, p. 5 et 6.
[4967] Mémoire du Procureur relatif à la sentence, par. 35 ; compte rendu de l'audience du 19 janvier 2006, p. 6 et 7.
[4968] Mémoire du Procureur relatif à la sentence, par. 50 ; compte rendu de l'audience du 19 janvier 2006, p. 7 et 8.
[4969] Mémoire du Procureur relatif à la sentence, par. 36 et 40 ; compte rendu de l'audience du 19 janvier 2006, p. 6 et 7.
[4970] Mémoire du Procureur relatif à la sentence, par. 41 ; compte rendu de l'audience du 19 janvier 2006, p. 6 et 7.
[4971] Mémoire du Procureur relatif à la sentence, par. 42 ; compte rendu de l'audience du 19 janvier 2006, p. 6 et 7.

informé de la nécessité, de la valeur et de l'importance de la coexistence pacifique entre les communautés[4972].

114. L'implication des masses paysannes dans les massacres de civils tutsis a été facilitée, d'une part, par le crédit et la confiance mal placés que celles-ci accordaient à leurs dirigeants et, d'autre part, par la conviction qu'elles pouvaient tuer et piller les Tutsis sans être inquiétées[4973].

115. En dépit de tous ces facteurs, Paul Bisengimana n'a pris aucune mesure concrète pour protéger les réfugiés tutsis ; il s'est au contraire mis à l'écart pour assister au massacre[4974].

116. La Chambre relève que la Défense n'a fait aucune observation sur les circonstances aggravantes.

2. Conclusions

117. La Chambre rappelle que la gravité des crimes et l'ampleur de la participation de l'accusé à leur commission constituent des facteurs à prendre en considération dans la détermination des circonstances aggravantes. Les crimes contre l'humanité sont, en soi, des infractions graves en raison de leur caractère odieux qui choque la conscience de l'humanité[4975].

118. La Chambre rappelle que l'accusé est conscient que son crime consiste en des actes directs ou indirects ayant entraîné la torture physique ou mentale et causé la mort dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile en raison de son appartenance ethnique[4976].

119. La Chambre juge que le fait que l'accusé a aidé et encouragé à l'extermination et au meurtre constitutifs de crimes contre l'humanité constitue une violation grave du droit international humanitaire et une circonstance aggravante.

120, La Chambre conclut que le poste de bourgmestre de la commune de Gikoro qu'occupait l'accusé à l'époque des faits et son instruction sont des facteurs aggravants. Elle estime que l'accusé, en sa qualité de représentant du pouvoir exécutif au niveau de la commune, avait le devoir de protéger la population de ladite commune ; il n'a pris aucune mesure pour empêcher les massacres qui s'y sont produits. Bien au contraire, il a sciemment encouragé les tueurs à l'église de Musha par sa présence au moment de l'attaque qui s'est soldée par la mort de plus d'un millier de réfugiés tutsis. En outre, il n'a rien fait pour empêcher les massacres qui ont été perpétrés par la suite à l'église et à l'école protestantes de Ruhanga, et ont coûté la vie à de nombreux Tutsis. La Chambre estime que Paul Bisengimana était une personne instruite qui pouvait donc connaître et apprécier la dignité et la valeur de la vie humaine et était informé de la nécessité et de l'importance de la coexistence pacifique entre les communautés.

121. Toutefois, aucun élément de preuve ne vient étayer l'allégation du Procureur selon laquelle la participation des masses paysannes aux massacres a été facilitée, d'une part, par le crédit et la confiance mal placés que celles-ci accordaient à leurs dirigeants et, d'autre part, par la conviction qu'elles pouvaient tuer et piller les civils tutsis sans être inquiétées.

C. CIRCONSTANCES ATTÉNUANTES

[4972] Mémoire du Procureur relatif à la sentence, par. 43 ; compte rendu de l'audience du 19 janvier 2006, p. 7.
[4973] Mémoire du Procureur relatif à la sentence, par. 44 ; compte rendu de l'audience du 19 janvier 2006, p. 7 et 8.
[4974] Mémoire du Procureur relatif à la sentence, par. 48 et 49 ; compte rendu de l'audience du 19 janvier 2006, p. 7 et 8.
[4975] Jugement *Ruggiu*, par. 48.
[4976] Accord de reconnaissance de culpabilité, par. 14.

1. Arguments généraux des parties

122. Le Procureur soutient qu'il existe des « circonstances atténuantes convaincantes[4977] ». Il insiste sur le fait qu'un constat de circonstances atténuantes est pertinent pour l'évaluation de la peine mais n'ôte rien à la gravité du crime. En d'autres termes, il atténue la peine et non le crime[4978].

123. La Défense soutient que la Chambre a un large pouvoir d'appréciation s'agissant des circonstances atténuantes[4979] et rappelle que le TPIR et le TPIY ont admis dans leur jurisprudence de nombreuses circonstances atténuantes au bénéfice des accusés[4980].

124. La Défense a fait valoir huit circonstances atténuantes qui, selon elle, sont de nature à éclairer la Chambre dans la détermination d'une peine juste. Elle est pleinement consciente du fait que l'acceptation de circonstances atténuantes dans l'évaluation du *quantum* de la peine ne constitue en aucun cas une atténuation de la gravité des crimes commis ou du verdict de culpabilité qui sera rendu[4981].

2. Le droit applicable

125. La Chambre rappelle que les circonstances atténuantes peuvent ne pas avoir de rapport direct avec l'infraction[4982].

126. La Chambre note que la jurisprudence du TPIR et du TPIY a recensé plusieurs raisons pour lesquelles le plaidoyer de culpabilité peut avoir un effet d'atténuation : l'expression du remords[4983], le repentir[4984], la contribution à la réconciliation[4985], l'établissement de la vérité[4986], l'encouragement pour d'autres auteurs d'actes criminels avouer leurs forfaits[4987], l'économie d'une longue enquête et d'un procès et, partant, une économie de temps, d'énergie et des ressources[4988] et le fait que les témoins n'ont pas temoigné à l'audience[4989]. Le moment auquel le plaidoyer de culpabilité intervient entre aussi en ligne de compte[4990].

127. En ce qui concerne l'importance de la coopération que l'accusé a fournie au Procureur au sens de l'article 101 (B) (ii), la Chambre rappelle que la Défense a fait savoir que l'accusé n'avait pas coopéré avec le Procureur[4991]. Avant d'examiner la question des circonstances atténuantes, elle retient que cette absence de coopération de l'accusé avec le Bureau du Procureur[4992] ne constitue pas pour autant une circonstance aggravante[4993].

[4977] Mémoire du Procureur relatif à la sentence, par. 52 ; compte rendu de l'audience du 19 janvier 2006, p. 8 et 9.
[4978] Mémoire du Procureur relatif à la sentence, par. 52, citant le jugement *Kambanda*, par. 56 et 57 ; compte rendu de l'audience du 19 janvier 2006, p. 8 et 9.
[4979] Mémoire de la Défense préalable au prononcé de la sentence, par. 18, citant le jugement *Naletilić et consorts*, par. 742 ; compte rendu de l'audience du 19janvier 2006, p. 41 et 42.
[4980] Mémoire de la Défense préalable au prononcé de la sentence, par. 18.
[4981] *Ibid*., par. 20, citant le jugement *Ruggiu,* par. 80 ; compte rendu de l'audience du 19 janvier 2006, p. 42 et 43.
[4982] Jugement *Nikolić,* par. 14 ; jugement *Deronjić,* par. 155.
[4983] Jugement *Plašvić,* par. 73.
[4984] Jugement *Ruggiu,* par. 55.
[4985] Jugement *Plašvić,* par. 70.
[4986] Jugement *Nikolić,* par. 248.
[4987] Jugement *Erdemović,* (1998), par. 16 ; jugement *Ruggiu,* par. 55.
[4988] Jugement *Ruggiu,* par. 53.
[4989] Jugement *Erdemović,* (1998), par. 450.
[4990] Jugement Sikirica et consorts, par. 150.
[4991] Compte rendu de l'audience du 19 janvier 2006, p. 41 et 42.
[4992] Mémoire de la Défense préalable au prononcé de la sentence, par. 16 et 17.
[4993] Jugement *Plašvić,* par. 63 et 64.

3. Plaidoyer de culpabilité accompagné de regrets publics

a. Les arguments du Procureur

128. Le Procureur indique qu'un plaidoyer de culpabilité est généralement considéré, devant la plupart des juridictions nationales, dont celle du Rwanda, comme une circonstance atténuante[4994]. La reconnaissance de culpabilité de Paul Bisengimana contribuera à la bonne administration de la justice et au processus de réconciliation nationale au Rwanda. Elle épargnera également aux rescapés de cette attaque le calvaire de venir déposer devant le Tribunal[4995].

129. Le Procureur soutient que, plaidant coupable, l'accusé devrait faire figure d'exemple et en encourager d'autres à reconnaître leur responsabilité personnelle dans les massacres perpétrés au Rwanda en 1994[4996].

130. Le Procureur renvoie à l'accord de reconnaissance de culpabilité dans lequel Paul Bisengimana fait montre d'un certain degré de remords pour les crimes qui lui sont imputés, assume la pleine responsabilité de ses actes et omissions, convaincu que seule la manifestation de toute la vérité peut rétablir l'unité nationale et promouvoir la réconciliation au Rwanda[4997]. L'accusé a également fait part de son désir profond et sincère de dire toute la verité et a présenté ses sincères et profondes excuses à toutes les personnes qui ont été victimes, directement ou indirectement, des infractions qu'il a commises[4998].

131. Le Procureur ajoute que le plaidoyer de culpabilité est intervenu dans les délais et a permis au Tribunal d'économiser sensiblement ses ressources[4999] et que, eu égard à la stratégie d'achèvement du mandat du Tribunal, l'accusé mérite qu'il en soit tenu compte[5000].

b. Les arguments de la Défense

132. La Défense fait valoir que la jurisprudence considère le plaidoyer de culpabilité d'un accusé comme une circonstance atténuante dès lors qu'il est accompagné de regrets ou remords sincères, énoncés publiquement[5001]. Paul Bisengimana a déjà présenté ses plus sincères et profondes excuses aux victimes du génocide rwandais dans l'accord de reconnaissance de culpabilité. Il regrette aussi sincèrement de ne pas avoir eu le courage de s'opposer aux massacres et, par sa présence, de les avoir cautionnés. Il espère que ses regrets seront entendus par les Rwandais et par la communauté internationale, et qu'ils contribueront au processus de paix et de réconciliation nationale au Rwanda[5002]. La Défense a particulièrement mis l'accent sur le fait que l'accusé a reconnu que sa présence a pu donner l'impression qu'il approuvait le massacre à l'église de Musha et encourageait la mise à mort de Rusanganwa. De plus, l'accusé a reconnu n'avoir pris aucune mesure pour protéger les personnes

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[4994] Mémoiré du Procureur rélatif à la sentence, par. 53, citant le jugement *Kambamda* ; compte rendu de l'audience du 9 janvier 2006, p. 8 et 9.
[4995] Mémoire du Procureur relatif à la sentence, par. 53, citant le jugement *Todorović,* par. 80 ; compte rendu de l'audience du 19 janvier 2006, p. 8 et 9.
[4996] Mémoire du Procureur relatif à la sentence, par. 58, citant le jugement *Kambamda* ; par. 53 et le jugement *Erdemović* (1998), p. 16 ; compte rendu de l'audience du 19 janvier 2006, p. 9 et 10.
[4997] Mémoire du Procureur relatif à la sentence, par. 54 ; compte rendu de l'audience du 19 janvier 2006, p. 8 et 9.
[4998] Mémoire du Procureur relatif à la sentence, par. 55 ; compte rendu de l'audience du 19 janvier 2006, p. 8 et 9.
[4999] Mémoire du Procureur relatif à la sentence, par. 57, citant le jugement *Kambanda*, par. 54 ; compte rendu de l'audience du 19 janvier 2006, p. 8 à 10.
[5000] Mémoire du Procureur relatif à la sentence, par. 57 ; compte rendu de l'audience du 19 janvier 2006, p. 8 et 9.
[5001] Mémoire de la Défense préalable au prononcé de la sentence, par. 21 ; compte rendu de l'audience du 19 janvier 2006, p. 42 et 43.
[5002] Mémoire de la Défense préalable au prononcéde la sentence, par. 27 et 28 ; compte rendu de l'audience du 19 janvier 2006. p. 52 à 54.

refugiées à l'école et à l'église protestantes de Ruhanga, malgré sa qualité de bourgmestre et le fait qu'il était au courant d'une attaque antérieure[5003].

133. La Défense ajoute que les sentiments de l'accusé doivent être appréciés à la lumière de ses déclarations et de son comportement[5004].

134. La Défense précise que le plaidoyer de culpabilité devrait en principe donner lieu à une diminution de la peine à laquelle l'accusé aurait été condamné s'il n'avait pas plaidé coupable[5005].

135. S'il est vrai qu'un plaidoyer de culpabilité est toujours important pour établir la vérité, il n'est vraiment utile que s'il intervient avant le commencement du procès, moment où il permettra au Tribunal de réaliser de précieuses économies de temps et de ressources[5006]. En l'espèce, Paul Bisengimana a decidé de plaider coupable avant le début de son procès, avant même qu'une date ne soit fixée par le Greffe pour l'ouverture du procès. Ce faisant, il a permis au Tribunal et à la communauté internationale de faire des économies substantielles, tant du point de vue des ressources humaines et financières que du temps[5007].

c. Conclusions

136. La Chambre rappelle que, dans l'accord de reconnaissance de culpabilité, Paul Bisengimana déclare qu'en plaidant coupable, il exprime son désir profond et sincère de dire toute la vérité et de contribuer à la recherche de la vérité en révélant les connaissances personnelles et les informations qu'il possède[5008]. Elle rappelle aussi que l'accusé nourrit l'espoir que son exemple en incitera d'autres à contribuer à la recherche de la vérité[5009].

137. La Chambre relève qu'à l'audience préalable au prononcé de la sentence, l'accusé a reconnu avoir failli à son devoir qui était de protéger les vies humaines et de n'avoir pas su faire preuve du courage que ses concitoyens attendaient de leur bourgmestre. Il a demandé pardon aux familles des victimes des massacres de sa commune et a exprimé publiquement ses remords pour ne pas avoir été en mesure de sauver ces innocents alors que sa mission première était d'assurer leur sécurité[5010].

138. La Chambre constate que, dans l'accord de reconnaissance de culpabilité comme lors de l'audience préalable au prononcé de la sentence, l'accusé a publiquement exprimé ses regrets et ses remords pour les crimes qu'il a commis.

139. La Chambre estime qu'une reconnaissance de culpabilité peut constituer une preuve d'honnêteté de la part de l'auteur. Elle fait sienne l'opinion exprimée dans les jugements *Erdemović* et *Ruggiu* selon laquelle il est de bonne politique de prendre en considération les plaidoyers de culpabilité afin d'encourager d'autres auteurs d'actes criminels à avouer leurs forfaits[5011]. En outre, elle est d'avis que la reconnaissance de culpabilité de l'accusé peut contribuer au processus de réconciliation nationale au Rwanda.

[5003] Compte rendu de l'audience du 19 janvier 2006, p. 10 ; Paul Bisengimana, compte rendu de l'audience du 19 janvier 2006, p. 53 à 55.
[5004] Mémoire de la Défense préalable au prononcé de la sentence, par. 25 et 26, citant le jugement *Serushago*, par. 41.
[5005] Mémoire de la Défense préalable au prononcé de la sentence, par. 22, citant le jugement *Todorović*, par. 80.
[5006] Mémoire de la Défense préalable au prononcé de la sentence, par. 23, citant le jugement *Todorović*, par. 81 ; jugement *Rutaganira*, par. 151.
[5007] Mémoire de la Défense préalable au prononcé de la sentence, par. 24 ; compte rendu de l'audience du 19 janvier 2006, p. 44 à 46.
[5008] Accord de reconnaissance de culpabilité, par. 7.
[5009] *Ibid*., par. 11.
[5010] Compte rendu de l'audience du 19 janvier 2006, p. 53 à 55.
[5011] Jugement *Erdemović* (1998), par. 11 ; jugement *Ruggiu,* par. 55.

140. La Chambre estime que le changement de plaidoyer de Paul Bisengimana et sa reconnaissance de culpabilité constituent une circonstance atténuante. La reconnaissance est assortie de regrets publics et fait preuve de son désir d'assumer la responsabilité de ses actes[5012]. Par ailleurs, lorsqu'elle est faite en temps voulu, la reconnaissance de culpabilité[5013] facilite l'administration de la justice et permet d'économiser les ressources du Tribunal.

4. Situation personnelle et familiale

a. Les arguments de la Défense

141. La Défense fait valoir que le fait d'être marié et d'avoir des enfants est généralement considéré comme une circonstance atténuante[5014] et qu'il faudrait également prendre en considération l'histoire personnelle de l'accusé, du point de vue tant social que professionnel et familial[5015]. La Défense rappelle que Paul Bisengimana est marié et père de 10 enfants, dont les deux plus jeunes, qui ont quatre et six ans[5016], vivent en France avec leur mère[5017], l'épouse de l'accusé ; ils ont récemment obtenu le statut de refugié[5018], ce qui va permettre à leur mère de reprendre son activité d'infirmière. Cette situation personnelle et familiale laisse entrevoir un espoir réel de réinsertion de l'accusé à sa sortie de prison[5019].

142. Le Procureur n'a présenté aucun argument sur ce point.

b. Conclusions

143. La Chambre estime que le fait que l'accusé est marié et qu'il a des enfants peut être considéré comme circonstance atténuante[5020]. Elle convient que l'histoire personnelle de l'accusé dans sa dimension tant sociale que professionnelle et familiale doit également être prise en consideration[5021].

144. Les arguments de la Défense et la déclaration de l'accusé lors de sa deuxième comparution, la situation personnelle et familiale de l'accusé, qui est marié et a des enfants, conduisent la Chambre à croire à ses chances de réinsertion ; elle considère donc que sa situation constitue une circonstance atténuante.

5. La personnalité de l'accusé

a. Les arguments du Procureur

[5012] Jugement *Ruggiu,* par. 54.
[5013] *Ibid*., par. 53.
[5014] Mémoire de la Défense préalable au prononcé de la sentence, par. 29, citant l'arrêt *Kunarac et consorts,* par. 362 ; jugement *Vasiljević,* par. 300 ; jugement *Serushugo,* par. 39 ; jugement *Rutuganira,* par. 120 et 121.
[5015] Mémoire de la Défense préalable au prononcé de la sentence, par. 30, citant l'arrêt *Blaškić,* par. 779.
[5016] Mémoire de la Défense préalable au prononcé de la sentence, par. 31. La Chambre relève que la fille de l'accusé, Claudine Uwera Bisengimana, a declaré que les deux plus jeunes enfants de l'accusé étaient âgés de 9 et 4 ans, voir compte rendu de l'audience du 19 janvier 2006, Claudine Uwera Bisengimana, p. 29 et 30.
[5017] Mémoire de la Défense préalable au prononcé de la sentence, par. 32 ; compte rendu de l'audience du 19 janvier 2006, Claudine Uwera Bisengimana, p. 29 et 30 ; compte rendu de l'audience du 19 janvier 2006, p. 46 et 47.
[5018] Mémoire de la Défense préalable au prononcé de la sentence, par. 32 ; compte rendu de l'audience du 19 janvier 2006, Claudine Uwera Bisengimana, p. 29 et 30.
[5019] Mémoire de la Défense préalable au prononcé de la sentence, par. 32 et 33.
[5020] Arrêt *Kunarac et consorts,* par. 362 ; jugement *Vasiljević,* par. 300 ; jugement *Serushugo,* par. 39 ; jugement *Rutuganira,* par. 120 et 121.
[5021] Jugsment *Blaškić,* par. 779.

145. Le Procureur relève, qu'à sa connaissance, Paul Bisengimana était une personne de bonne moralité, à qui on ne connaissait pas de comportements extrêmistes avant 1994[5022].

b. Les arguments de la Défense

146. La Défense fait valoir qu'il y a lieu d'examiner les traits de personnalité d'un accusé dans la perspective d'évaluer ses capacités de réinsertion[5023] et qu'ils devraient être pris en consideration dans la détermination de la peine[5024].

147. La Défense fait valoir que Paul Bisengimana était une personne de bonne moralité avant 1994. C'était un bourgmestre respecté de ses administrés. Il a apporté prosperité et développement à la commune de Gikoro tout au long de son mandat et a oeuvré sans relâche à l'amélioration des conditions de vie de la population[5025]. L'accusé n'a jamais fait preuve de discrimination ethnique contre la population tutsie, tant sur le plan personnel que sur le plan professionnel, que ce soit avant ou pendant les faits survenus en 1994[5026]. L'accusé avait un sens aigu des responsabilités[5027].

148. La Défense fait ainsi valoir que les qualités humaines évidentes de Paul Bisengimana témoignent de ses capacités de réinsertion[5028].

c. Conclusions

149. La Chambre considère que l'accusé était une personne instruite qui assumait de hautes responsabilités dans la commune de Gikoro au moment des faits incriminés. Elle rappelle que les témoins Gervais Condo et RKV ont dit que Paul Bisengimana était un bourgmestre apprécié, qu'il avait apporté prospérité et développement à la commune de Gikoro tout au long de son mandat et qu'il travaillait sans relâche à l'amélioration des conditions de vie de la population[5029]. Ces témoins ont également parlé des projets de développernent réalisé dans la commune de Gikoro par l'accusé[5030]. En outre, d'après les témoins Gervais Condo et Claudine Uwera Bisengimana, Paul Bisengimana avait un sens aigu des responsabilités, du fait de sa condition de veuf, de père et de bourgmestre[5031].

150. La Chambre juge fiables les déclarations des témoins selon lesquelles, avant d'être impliqué dans les crimes commis dans la commune de Gikoro en avril 1994, l'accusé était une personne de bonne moralité et estime que cela constitue une circonstance atténuante.

6. Assistance apportée à certaines victimes

a. Les arguments de la Défense

[5022] Mémoire du Procureur relatif à la sentence, par. 56, citant le jugement *Banović*, par. 75 et 76 compte rendu de l'audience du 19 janvier 2006, p. 8 et 9.
[5023] Mémoire de la Défense préalable au prononcé de la sentence, par. 34, citant le jugement *Blaškić*, par. 780 ; jugement *Ruggiu*, par. 68.
[5024] Mémoire de la Défense préalable au prononcé de la sentence, par. 34, citant l'arrêt *Mucić et consorts* (2001), par. 788 ; jugement *Serushago*, par. 18 ; jugement *Ruggiu*, par. 68 ; jugement *Rutaganda*, par. 127.
[5025] Compte rendu de l'audience du 19 janvier 2006, Gervais Condo, p. 15 et 16 ; compte rendu de l'audience du 19 janvier 2006, temoin RKV, p. 25 et 26 ; Paul Bisengimana, compte rendu de l'audience du 19 janvier 2006, p. 46 et 47, 53 et 54.
[5026] Mémoire de la Défense préalable au prononcé de la sentence, par. 36.
[5027] *Ibid*., par. 37.
[5028] *Ibid*., par. 38.
[5029] Compte rendu de l'audience du 19 janvier 2006, Gervais Condo, p. 14 à 16 ; compte rendu de l'audience du 19 janvier 2006, témoin RKV, p. 25 et 26.
[5030] Compte rendu de l'audience du 19 janvier 2006, Gervais Condo, p. 15 et 16 ; compte rendu de l'audience du 19 janvier 2006, temoin RKV, p. 25 et 26.
[5031] Compte rendu de l'audience du 19 janvier 2006, Gervais Condo, p. 20 ; compte rendu de l'audience du 19 janvier 2006, Claudine Uwera Bisengimana, p. 30 et 31.

151. La Défense affirme que le fait, pour un accusé, d'avoir apporté son aide à des victimes a été considéré comme une circonstance atténuante[5032], une telle assistance étant une indication que l'accusé sera en mesure de se réinserer dans la société[5033].

152. La Défense fait valoir qu'immédiatement après la mort du Président Habyarimana, une douzaine de civils tutsis ont cherché protection auprès de Paul Bisengimana. D'après la Défense, celui-ci leur a offert refuge et leur a ainsi sauvé la vie[5034].

153. Le Procureur n'a presenté aucun argument sur ce point

b. Conclusions

154. La Chambre rappelle que Claudine Uwera Bisengimana, la deuxième fille de l'accusé[5035], est le seul témoin à avoir déclaré qu'en 1994, une douzaine environ de civils tutsis s'étaient réfugiés à son domicile[5036]. Elle se rappelait, notamment, de Laurent et ses quatre enfants, son épouse, son cousin et sa soeur ainsi que de Mukarubayiza, une dame de Duha, et ses trois enfants[5037]. Elle a déclaré que les réfugiés étaient restés jusqu'à ce que le FPR prenne le contrôle de la localité, et qu'ils s'étaient alors enfuis en compagnie de sa famille[5038]. Le témoin avait 14 ans au moment des faits[5039].

155. Claudine Uwera Bisengimana a dit que des « tueurs » avaient menacé sa famille, qu'ils accusaient de complicité parce qu'elle cachait des Tutsis et que ces menaces étaient adressées à Paul Bisengimana, son père. Toutefois, Claudine Uwera Bisengimana ne se rappelait aucun incident précis à cet égard[5040].

156. Interrogée par la Chambre, Claudine Uwera Bisengimana a déclaré que la femme et les enfants de Laurent étaient toujours en vie. En revanche, Laurent, sa soeur et leur cousin avaient été tués. Elle ne savait pas avec certitude si Marie Mukarubayiza et ses enfants étaient toujours en vie. Elle a indiqué que certains réfugiés avaient survécu tandis que d'autres avaient été tués alors qu'ils se rendaient à Kabuga[5041], mais elle ne savait pas dans quelles circonstance[5042].

157. Claudine Uwera Bisengimana a expliqué que sa famille, les réfugiés et elle-même avaient quitté tous ensemble la maison. Son père l'avait ensuite emmenée avec le reste de la famille jusqu'à un établissement scolaire à Bicumbi. Il était reparti récupérer les autres personnes mais le FPR était à leurs trousses et il avait dû emmener sa famille à Kabuga, de sorte que les réfugiés étaient restés en arrière. Lorsque son père avait voulu repartir pour les récupérer, il pleuvait et il lui avait été impossible d'aller les chercher. Claudine a ajouté que les membres de sa famille étaient restés à Kabuga, qu'ils avaient appris par la suite que ces personnes avaient été tuées, mais qu'elle ignorait qui les avait tuées[5043].

[5032] Mémoire de la Défense préalable au prononcé de la sentence, par. 39, citant le jugement *Sikirica et consorts*, par. 195 et 229 ; jugernent *Serushago*, par. 38 ; jugement *Ruggiu*, par. 73 et 74 ; jugement *Rutuganira*, par. 155 ; jugement *Blaškić*, par. 781.
[5033] Mémoire de la Défense préalable au prononcé de la sentence, par. 39.
[5034] *Ibid*., par. 40.
[5035] Compte rendu de l'audience du 19 janvier 2006, Claudine Uwera Bisengimana, p. 29 et 30.
[5036] *Ibid*., p. 31 à 33.
[5037] *Ibid*., p. 30 et 31.
[5038] *Ibid*., p. 31 et 32.
[5039] *Ibid*., p. 30 et 31.
[5040] *Ibid*., p. 31 et 32.
[5041] *Ibid*., p. 32 à 34.
[5042] Id.
[5043] Compte rendu de l'audience du 19 janvier 2006, Claudine Uwera Bisengimana, p. 33 et 34.

158. La Chambre relève qu'aucun autre témoin n'a dit que l'accusé avait aidé des réfugiés tutsis et que l'accusé non plus n'en a pas parlé. Le Procureur n'a pas contesté cette assertion.

159. Après avoir soigneusement examiné la déposition de Claudine Uwera Bisengimana, la Chambre considère qu'il y a de fortes chances que certains civils tutsis se soient réfugiés temporairement au domicile de Paul Bisengimana en 1994. Toutefois, sur la base de la même déposition, elle estime également établi que Paul Bisengimana s'est enfui avec sa famille, en abandonnant les réfugiés, dont certains ont été tués. Ayant examiné cette déposition dans son intégralité, la Chambre ne juge pas établi, au vu des circonstances, que l'accusé ait protégé des réfugiés tutsis et leur ait, ce faisant, sauvé la vie, comme l'a fait valoir la Défense. En conséquence, la Chambre rejette cette prétendue circonstance atténuante.

7. Absence de passé criminel et bonne conduite en détention

a. Les arguments de la Défense

160. La Défense fait valoir que l'absence de passé criminel de l'accusé[5044] et sa bonne conduite en détention[5045] peuvent constituer des circonstances atténuantes.

161. La Défense soutient que l'accusé n'a pas de passé criminel mais admet qu'elle n'a pas pu obtenir un extrait de son casier judiciaire auprès des autorités rwandaises[5046], cette démarche s'avérant extrêmement difficile.

162. La Défense soutient aussi que la conduite de Paul Bisengimana en détention a été exemplaire[5047].

163. Le Procureur n'a présenté aucun argument sur ce point.

b. Conclusions

164. La Chambre rappelle que, le 3 février 2006, elle a accepté que soit versé au dossier le certificat de bonne conduite signé par le commandant du centre de détention des Nations Unies[5048]. Ce certificat atteste que, durant la période écoulée entre son arrivée au centre, le 11 mars 2002, et la date de délivrance du certificat, le 22 décembre 2005, l'accusé n'a jamais fait l'objet d'une quelconque mesure disciplinaire et a toujours eu une conduite irréprochable.

165. La Chambre a pris en considération les arguments de la Défense et le fait que l'accusé avait été bourgmestre de la commune de Gikoro de mai 1981 au 19 avril 1994. Elle estime qu'il est fort probable que l'accusé ait eu un casier judiciaire vierge. La Chambre considère que cette conclusion constitue une circonstance atténuante[5049].

[5044] Mémoire de la Défense préalable au prononcé de la sentence, par. 41, citant le jugement *Simić,* par. 108 ; jugement *Nikolić,* par. 265 ; jugement *Ruggiu,* par. 59 et 60 ; jugement *Rutaganira,* par. 129 et 130.
[5045] Mémoire de la Défense préalable au prononcé de la sentence, par. 41, citant le jugement *Simić,* par. 112 ; jugement *Rutaganira,* par. 131 ; jugement *Krnojelac,* par. 520 ; jugement *Krstić,* par. 7 15
[5046] Mémoire de la Défense préalable au prononcé de la sentence, par. 42 ; compte rendu de l'audience du 19 janvier 2006, p. 47
[5047] Mémoire de la Défense préalable au prononcé de la sentence, par. 43 ; conlpte rendu de l'audience du 19 janvier 2006, p. 47.
[5048] Decision on the Motion for the Admission of a Written Statement in Lieu of Oral Testimony in Accordance with Rule 92 bis (A) und (B) of the Rules of Procedure and Evidence, 3 février 2006
[5049] Jugernent *Ruggiu,* par. 59 et 60.

8. Age avancé et mauvais état de santé

a. Les arguments de la Défense

166. La Défense fait valoir que le Tribunal de céans et le TPIY[5050] accordent une grande importance à l'âge des accusés et invoque en particulier le jugement *Rutaganira*[5051].

167. Les juges devraient tenir compte de l'âge de l'accusé pour deux raisons. Premièrement, la même peine est plus dure à supporter pour une personne âgée que pour une personne jeune, à cause de la déterioration physique liée à l'âge. Deuxièmement, comme l'a fait remarquer la Cour d'appel de la Nouvelle-Galles du Sud (Australie), saisie de l'affaire *Holyoak,* un criminel âgé, une fois libéré, peut ne plus avoir devant lui que peu d'années à vivre[5052].

168. La Défense fait valoir que Paul Bisengimana est âgé de 57 ans[5053].

169. La Défense rappelle que le Tribunal de céans[5054] et le TPIY[5055] ont admis que le mauvais état de santé constituait un facteur entrant en ligne de compte dans la détermination de la peine.

170. Selon la Défense, Paul Bisengimana souffre de diabète et d'hépatite B depuis plusieurs années déjà[5056]. Ces deux maladies lui ont causé de graves désagréments physiologiques qui ont inévitablement été exacerbés par l'âge et la détention.

171. La Défense rappelle également qu'en 1994, Paul Bisengimana souffrait d'une crise hépatique aiguë due à l'hépatite B[5057]. Selon la Défense, la Chambre devrait tenir compte de la fragilité de son état de santé durant les faits et lui appliquer une peine équitable[5058].

172. Le Procureur n'a pas présenté d'arguments à ce sujet.

b. Conclusions

173. La Chambre a décidé d'examiner ensemble l'âge et le prétendu mauvais état de santé de l'accusé[5059]. Elle a pris acte du rapport médical confidentiel du docteur Épée admis en preuve lors de l'audience préalable à la détermination de la peine tenue le 19 janvier 2006 et indiquant que l'accusé se fait actuellement traiter pour plusieurs maladies[5060].

[5050] Mémoire de la Défense préalable au prononcé de la sentence, par. 44, citant les jugement *Banović,* par. 75 et 76 et *Rutaganira,* par. 136.
[5051] Mémoire de la Défense préalable au prononcé de la sentence, par. 44, citant le jugement *Rutaganira,* par. 136.
[5052] Mémoire de la Défense préalable au prononcé de la sentence, par. 45, citant le jugement *Plašvić*, par. 105.
[5053] Mémoire de la Défense préalable au prononcé de la sentence, par. 46 ; compte rendu de l'audience du 19 janvier 2006, p. 46 et 47.
[5054] Mémoire de la Défense préalable au prononcé de la sentence, par. 48, citant le jugement *Rutaganira*, par. 136.
[5055] Mémoire de la Défense préalable au prononcé de la sentence, par. 47, citant le jugement *Simić*, par. 98.
[5056] Mémoire de la Défense préalable au prononcé de la sentence, par. 49 ; compte rendu de l'audience du 19 janvier 2006, témoin RKV, p. 26 ; compte rendu de l'audience du 19 janvier 2006, Claudine Uwera Bisengimana, p. 31 et 32 ; compte rendu de l'audience du 19 janvier 2006, p. 46 et 47..
[5057] Mémoire de la Défense préalable au prononcé de la sentence, par. 50 ; compte rendu de l'audience du 19 janvier 2006, Gervais Condo, p. 28 à 20 ; compte rendu de l'audience du 19 janvier 2006, Claudine Uwera Bisengimana, p. 31 et 32 ; compte rendu de l'audience du 19 janvier 2006, Paul Bisengimana, p. 53 et 54.
[5058] Mémoire de la Défense préalable au prononcé de la sentence, par. 50.
[5059] Jugement *Rutaganira*, par. 136.
[5060] Le rapport médical de Paul Bisengimana a été admis en vertu de l'article 92 *bis* du Règlement après que le docteur Épée eut confirmé qu'elle en était l'auteur, voir compte rendu de l'audience du 19 janvier 2006, p. 51 à 34.

174. La Chambre juge infondé l'argument de la Défense selon lequel l'état de santé de l'accusé prétendument fragile à l'époque des faits devrait être pris en considération dans la détemination d'une peine de prison équitable. Elle a entendu les trois témoins à décharge sur ce point, mais relève que ceux-ci ne sont pas des experts médicaux. De plus, même s'il était établi que l'accusé souffrait du foie à l'époque des faits, rien ne prouve que ce mal aurait eu un effet sur le rôle qu'il a joué dans les massacres.

175. La Chambre estime que l'âge de l'accusé ajouté à son état de santé actuel, tel qu'établi par le rapport médical, constitue une circonstance atténuante.

9. Défaut de participation personnelle dans la commission des infractions

a. Les arguments de la Défense

176. Pour la Défense, la participation indirecte peut être considérée comme une circonstance atténuante. Un acte d'assistance à un crime est souvent considéré comme étant moins grave que la commission effective du crime et peut donner lieu à une peine plus légère[5061]. Bien qu'il ait été admis par le Tribunal dans l'affaire *Ruggiu*[5062], ce principe n'a pas été accepté dans l'affaire *Rutaganira* parce que l'absence de participation personnelle était déjà reflétée dans le mode de responsabilité, à savoir l'omission[5063]. La Défense soutient que c'est pour cette raison que Paul Bisengimana ne fait valoir cette circonstance atténuante qu'en ce qui concerne le site de l'église de Musha. Pour la Défense, Paul Bisengimana a seulement été présent à un moment donné lors de l'attaque des Tutsis réfugiés à l'église de Musha et lors de l'assassinat d'un réfugié nommé Rusanganwa. De plus, sa passivité à la vue de ces crimes a servi d'encouragement aux principaux auteurs des crimes[5064].

177. Le Procureur n'a pas présenté d'arguments sur ce point.

b. Conclusions

178. La Chambre est consciente de la nécessité de prendre en considération les circonstances particulières de l'instance, notamment la forme et le degré de participation de l'accusé à la commission des crimes[5065]. Elle rappelle que Paul Bisengimana n'a personnellement commis aucun acte violent pendant les massacres

179. Toutefois, la Chambre n'est pas convaincue par l'argument de la Défense selon lequel « Paul Bisengimana n'a fait qu'être présent un moment donné lors de l'attaque des Tutsis réfugiés à l'église de Musha ». Elle rappelle que l'accusé savait conscient que les assaillants allaient lancer une attaque contre les personnes qui s'étaient réfugiées à l'église de Musha à l'aide des armes qui avaient été distribuées, qu'il avait les moyens de s'opposer à ces tueries mais a choisi de ne rien faire. De plus, la Chambre rappelle que l'accusé était présent lorsque l'attaque a été lancée et que plus d'un millier de personnes ont été tuées à l'église de Musha, dont Rusanganwa, et qu'il savait que sa présence aurait pour effet d'encourager les auteurs à commettre des actes criminels. Par conséquent, rappelant que l'accusé était une autorité qui avait l'obligation de protéger les réfugiés, la Chambre ne considère pas

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[5061] Mémoire de la Défense préalable au prononcé de la sentence, par. 51, citant le jugement *Krstić*, par. 714.
[5062] Mémoire de la Défense préalable au prononcé de la sentence, par. 52, citant le jugement *Ruggiu*, par. 78 ; compte rendu de l'audience du 19 janvier 2006, p. 44 à 46.
[5063] Mémoire de la Défense préalable au prononcé de la sentence, par. 52, citant le jugement *Rutaganira*, par. 137 et 138 ; compte rendu de l'audience du 19 janvier 2006, p. 44 à 46.
[5064] Mémoire de la Défense préalable au prononcé de la sentence, par. 53 et 54 ; compte rendu de l'audience du 19 janvier 2006, Paul Bisengimana, p. 44 à 46, 53 à 55.
[5065] Arrêt *Mucić*, par. 731, citant l'arrêt *Kupreskić*, par. 852, cité dans le jugement *Aleksovski*, par. 182.

comme circonstance atténuante la forme de sa participation aux massacres perpétrés à l'église de Musha.

D. CONCLUSIONS SUR LES CIRCONSTANCES AGGRAVANTES ET ATTÉNUANTES

180. La Chambre conclut que la gravité des crimes et la position officielle de l'accusé constituent des circonstances aggravantes, mais que les facteurs ci-après peuvent être considérés comme des circonstances atténuantes : l'accusé a plaidé coupable et publiquement exprimé des remords, sa situation familiale, sa bonne moralité avant les faits, l'absence d'antécédents judiciaires, sa bonne conduite pendant sa détention, son âge et sa santé fragile.

181. Toutefois, ayant examiné la gravité du crime et la position officielle de l'accusé, la Chambre conclut qu'il convient de modérer l'effet atténuant de ces facteurs.

182. La Chambre considère qu'en l'espèce, la qualité de bourgmestre de Paul Bisengimana constitue une circonstance extrêmement aggravante et que l'accusé était une personne instruite qui a dirigé la commune de Gikoro assez longtemps pour connaître amplement ses devoirs et ses responsabilités. Elle rappelle que, bien qu'il ait su que des civils tutsis avaient trouvé refuge à l'église de Musha et au complexe de Ruhanga et que des armes avaient été distribuées pour être utilisées lors des attaques contre ces réfugiés, Paul Bisengimana n'a rien fait pour arrêter les massacres, et ce malgré les moyens dont il disposait pour s'y opposer.

183. La Chambre est consciente qu'il a été dit dans le jugement *Semanza* qu'une peine de prison plus sévère pouvait être imposée à « celui qui ordonne l'extermination plus qu'à celui qui se contente de l'aider et de l'encourager »[5066]. Elle rappelle toutefois qu'en l'occurrence, elle n'est pas d'avis que la forme de participation de l'accusé constitue une circonstance atténuante[5067]. S'agissant des massacres perpétrés à l'église de Musha, la Chambre ne considère pas que l'accusé a commis une omission. Il avait le devoir de protéger la population et savait que sa présence lors du lancement de l'attaque aurait pour effet d'encourager les assaillants en leur donnant l'impression qu'il approuvait leurs actes criminels. Elle considère que la présence de l'accusé est une forme grave de participation, même s'il n'est pas allégué ou établi qu'il était coauteur ou qu'il a directement commis des actes criminels pendant les massacres. Elle rappelle que plus d'un millier de civils tutsis ont trouvé la mort lors des massacres perpétrés à l'église de Musha et au complexe de Ruhanga.

E. PEINE RECOMMANDÉE PAR LES PARTIES

184. L'accord de reconnaissance de culpabilité signé par les parties recommande à la Chambre de première instance de condamner l'accusé à une peine d'emprisonnement d'une durée comprise entre 12 et 14 ans, diminuée du temps qu'il a déjà passé en détention provisoire[5068]. Les parties disent savoir que la fourchette des peines qu'elles recommandent ne fait pas obligation à la Chambre[5069].

1. Le Procureur

185. Le Procureur rappelle que le Tribunal a été créé par le Conseil de sécurité pour juger et punir les auteurs des atrocités commises au Rwanda, dans le but de mettre un terme à l'impunité et de promouvoir la reconstruction nationale, le rétablissement de la paix et la réconciliation[5070].

[5066] Arrêt *Semanza,* par. 388.
[5067] Jugement, par. 178 et 179.
[5068] Accord de reconnaissance de culpabilité, par. 48.
[5069] *Ibid*., par, 50.
[5070] Compte rendu de l'audience du 19 janvier 2006, p. 3 et 4.

186. Dans son mémoire relatif à la sentence, et lors de l'audience préalable au prononcé de la sentence, le Procureur a recommandé à la Chambre de condamner l'accusé à une peine d'emprisonnement d'une durée minimale de 14 ans, déduction faite du temps qu'il a déjà passé en detention provisoire[5071].

187. Le Procureur indique que conformément à l'accord de reconnaissance de culpabilité, il est disposé à appuyer toute demande déposée par l'accusé tendant à ce qu'il purge sa peine dans une prison en Europe[5072] .

2. La Defense

188. La Défense demande à la Chambre de condamner Paul Bisengimana à une peine de prison maximale de 12 ans, déduction faite du temps qu'il a déjà passé en détention provisoire[5073].

189. La Défense souligne qu'au moment d'imposer une peine d'emprisonnement à Paul Bisengimana, la question que l'on devrait se poser « c'est de savoir si les uns ou les autres nous aurions été capables de nous lever au moment opportun pour dire : « cessez ces massacres », y compris d'ailleurs au prix de votre vie[5074] ».

190. La Défense indique que Paul Bisengimana demande à la Chambre de désigner la France, ou résident sa femme et ses deux plus jeunes enfants, comme lieu d'exécution de sa peine[5075]. Dans l'alternative, il demande que soit designé l'un des pays européens qui ont indiqué leur volonté d'accueillir les condamnés du Tribunal[5076]. La Défense souligne que ceci permettrait à l'accusé de recevoir les soins de santé dont il a « véritablement besoin »[5077].

191. Enfin, la Défense rappelle à la Chambre qu'en vertu de l'article 26 du Statut, les peines prononcées par le Tribunal sont exécutées conformément aux lois en vigueur de l'Etat concerné, sous la supervision dudit Tribunal[5078].

F. CONCLUSIONS

1. Grille générale des peines d'emprisonnement appliquée par les tribunaux du Rwanda

192. La Chambre rappelle l'article 23 du Statut et l'article 101 du Règlement qui indiquent que le Tribunal tient compte de la grille générale des peines d'emprisonnement appliquée par les tribunaux du Rwanda.

193. La Chambre relève que, s'agissant de crimes graves tels que l'assassinat, la peine maximale prévue par le Code penal rwandais est l'emprisonnement à vie ou la condamnation à mort[5079]. L'article 89 dudit code precise que le complice peut subir la même peine que l'auteur principal du crime.

[5071] Mémoire du Procureur relatif à la sentence, par. 60 ; compte rendu de l'audience du 19 janvier 2006, p. 9 et 10.
[5072] Id.
[5073] Mémoire de la Défense préalable au prononcé de la sentence, par. 56 à 58 ; compte rendu de l'audience du 19 janvier 2006, p. 49 à 51.
[5074] Compte rendu de l'audience du 19 janvier 2006, p. 49 à 51.
[5075] Mémoire de la Défense préalable au prononcé de la sentence, par. 59 ; compte rendu de l'audience du 19 janvier 2006, p. 48 et 49.
[5076] Mémoire de la Défense préalable au prononcé de la sentence, par. 59.
[5077] Compte rendu de l'audience du 19 janvier 2006, p. 48 et 49.
[5078] Mémoire de la Défense préalable au prononcé de la sentence, par. 60.
[5079] Code pénal rwandais, Décret-loi n°21/77 du 18 août 1977, modifié par le Décret-loi n°23/81 du 13 octobre 1981, articles 311 à 317.

194. La Chambre considère que la loi organique du Rwanda, créant « les juridictions gacaca »[5080] et la loi organique[5081] modifiant et complètant ladite loi sont pertinentes en l'espèce, en ce qu'elles traitent des questions de procédure en cas de plaider coupable de crimes contre l'humanité. Une personne agissant en qualité d'autorité municipale[5082], et qui a encouragé d'autres personnes à commettre des crimes contre l'humanité, peut, après avoir plaidé coupable et sous certaines conditions[5083], être condamnée à une peine d'emprisonnement allant de 25 ans à la perpétuité[5084].

195. La Chambre est également consciente que l'article 83 du Code penal rwandais prévoit qu'en cas de circonstances atténuantes, les peines sont modifiées ou réduites comme suit : la peine de mort est remplacée par une peine d'emprisonnement d'au moins cinq ans ; la peine d'emprisonnement à perpétuité est remplacée par une peine d'emprisonnement d'au moins deux ans ; la peine d'emprisonnement de cinq à vingt ans ou supérieure à vingt ans peut être commuée en une peine d'emprisonnement d'un an[5085].

2. Déduction du temps passé en détention provisoire

196. Selon l'article 101 (D) du Règlement,

> « la durée de la période pendant laquelle la personne reconnue coupable a été placée en détention provisoire à vue en attendant d'être remise au Tribunal ou en attendant d'être jugée par une Chambre de première instance ou par la Chambre d'appel est, le cas échéant, déduite de la durée totale de sa peine ».

197. La Chambre considère la date du 4 décembre 2001 comme le début de la détention provisoire de l'accusé[5086]. Elle reconnaît à celui-ci le droit de voir déduire de la durée totale de sa peine le temps qu'il a passé en détention provisoire depuis cette date, y compris le temps supplémentaire qu'il pourrait passer en détention en attendant la décision d'appel.

198. La Chambre ne perd pas de vue la nécessité d'infliger les mêmes peines pour les mêmes crimes, mais elle reste également consciente du raisonnement tenu dans l'arrêt *Kupreskić* selon lequel « la Chambre de première instance n'est pas tenue de comparer expressément le cas d'un accusé à celui d'un autre »[5087]. Elle est également consciente de l'obligation qui lui est faite de s'assurer que la peine est adaptée à la situation personnelle du condamné[5088].

3. Conclusion

199. Ayant examiné les pratiques de détermination des peines du Tribunal de céans et du TPIY, la Chambre relève que les personnes reconnues coupables, en tant qu'auteurs principaux de crimes contre l'humanité tels que l'assassinat et l'extermination, ont été condamnées à des peines

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[5080] Loi organique portant creation des « juridictions gacaca » et organisation des poursuites des infractions constitutives du crime de génocide ou de crimes contre l'humanité, commises entre le 1er octobre 1990 et le 31 décembre 1994, n°40/2000 du 26/1/2001, Journal officiel de la République du Rwanda, 40ème année, n°6, 15 mars 2001 (« Loi organique du 26 janvier 2001 »).

[5081] Loi organique modifiant et complètant la loi organique n°40/2000 du 26 janvier 2001 portant création des « juridictions gacaca » et organisation des poursuites des infractions constitutives du crime de génocide ou de crimes contre l'humanité, commises entre le 1er octobre 1990 et le 31 décembre 1994. Journal officiel de la République du Rwanda, 40ème annee, n°14, 15 juillet 2001 (« Loi organique modifiant et complètant la Loi organique du 26 janvier 2001 »).

[5082] Article 51 de la Loi organique du 26 janvier 2001 et article 1er de la Loi organique modifiant et complètant la Loi organique du 26 janvier 2001.

[5083] Article 56 de la Loi organique du 26 janvier 2001.

[5084] Article 68 de la Loi organique du 26 janvier 2001.

[5085] Code pénal rwandais, Décret-loi n°21/77, 18 août 1977.

[5086] Lettre du Procureur Général près la Cour d'appel de Bamako datée du 14 janvier 2002, déposée le 15 janvier 2002, indiquant que Paul Bisengimana est détenu à Bamako (Mali) depuis le 4 decembre 2001.

[5087] Arrêt *Kupreškić*, par. 443.

[5088] Arrêt *Mucić,* par. 717 à 719 ; jugement *Muhimana*, par. 594.

d'emprisonnement allant de 10 ans à l'emprisonnement à vie[5089]. Les personnes reconnues coupables de formes secondaires de participation ont généralement été condamnées à des peines moins lourdes[5090]. La peine devrait refléter l'ensemble de la conduite criminelle reprochée à l'accusé[5091].

200. Pour les raisons susmentionnées[5092], la Chambre ne prononcera pas de peine pour le chef 3 (a) savoir l'assassinat constitutif de crime contre l'humanité au sens de l'article 3 (a) du Statut.

201. La Chambre réitère qu'une reconnaissance de culpabilité peut constituer une preuve d'honnêteté de la part de l'auteur des faits et que l'on devrait accorder un certain crédit à ceux qui ont avoué leurs crimes pour encourager les autres à faire de même. De plus, elle est d'avis que le plaidoyer coupable peut aider la réconciliation nationale au Rwanda[5093].

202. Toutefois, bien qu'elle n'ait pas condamné Paul Bisengimana pour le chef d'assassinat constitutif de crime contre l'humanité, la Chambre estime qu'étant donné le statut officiel de l'accusé ainsi que le nombre de personnes tuées en sa présence – plus d'un millier – à l'église de Musha et la tuerie du complexe de Ruhanga dont il avait connaissance. Ce seul chef d'extermination justifie une peine plus lourde que celles situées dans la fourchette proposée par les parties.

V. Verdict

203. En vertu du Statut et du Règlement, de la grille générale des peines d'emprisonnement appliquée par les tribunaux du Rwanda, sur la base des arguments et des éléments de preuve présentés par les parties au cours de l'audience de détermination des peines et après évaluation des circonstances aggravantes et des circonstances atténuantes, la Chambre prononce à l'encontre de Paul Bisengimana une peine d'emprisonnement de 15 ans pour le chef 4, extermination constitutive de crime contre l'humanité, en vertu de l'article 3 (b) du Statut.

204. La Chambre conclut que Paul Bisengimana a droit à une déduction de peine de la durée de sa détention provisoire, à compter du 4 décembre 2002 jusqu'à la date du prononcé du présent jugement.

205. En vertu de l'article 102 (A) du Règlement, la peine d'emprisonnement prend effet à compter de la date du prononcé du présent jugement.

206. Selon l'article 103 du Règlement, Paul Bisengimana restera en détention en attendant qu'une décision soit prise sur le lieu de son emprisonnement, conformément à l'article 26 du Statut et à l'article 103 (A) du Règlement. La Chambre a pris acte des arguments des parties concernant l'Etat dans lequel la peine de prison sera exécutée, mais elle rappelle que le Président du Tribunal désignera cet Etat après consultation de la Chambre. Le Gouvernement rwandais et l'Etat désigné en seront informés officiellement par le Greffier.

207. Selon l'article 102 (A) du Règlement, dès le dépôt d'un acte d'appel, il est sursis à l'exécution de la sentence jusqu'au prononcé de la décision rendue sur l'appel, le condamné restant néanmoins en detention.

[5089] Jugement *Muhimana,* par. 618 ; jugement *Ntagerura et consorts,* par. 822 et 825 ; jugement *Ntakirutimana,* par. 922 et 924

[5090] Laurent Semanza a été condamné à une peine d'emprisonnement de huit ans pour incitation au meurtre de six personnes, acte qualifié de crime contre l'humanité (jugement *Semanza,* par. 5881), et Vincent Rutaganira à une peine d'emprisonnement de six ans pour complicité par omission dans l'extermination constitutive de crime contre l'humanité (jugement *Rutaganira,* par. 40) ; Elizaphan Ntakirutimana a été condamné à une peine d'emprisonnement de dix ans pour aide et encouragement au génocide (jugement *Ntakirutimana,* par. 790 et 921), jugement confirmé par la Chambre d'appel (arrêt *Ntakirutimana,* par. 570.)

[5091] Arrêt *Mucić,* par. 771.

[5092] Jugement, par. 99 à 105.

[5093] *Ibid*., par. 139.

Fait en anglais à Arusha, le 13 avril 2006.

[Signé]: Arlette Ramaroson ; William H. Sekule ; Solomy B. Bossa

e

VI. Annexes

A. PROCÉDURE

208. Le 10 juillet 2000, le Procureur a déposé contre l'accusé un acte d'accusation daté du 1er juillet 2000, qui a été confirmé par le juge Pavel Dolenc le 17 juillet 2000[5094].

209. L'accusé était poursuivi à raison des 12 chefs d'accusation suivants : génocide ; complicité dans le génocide ; entente en vue de commettre le génocide ; incitation directe et publique à commettre le génocide; assassinat constitutif de crime contre l'humanité ; extermination constitutive de crime contre l'humanité ; torture constitutive de crime contre l'humanité ; viol constitutif de crime contre l'humanité ; autres actes inhumains constitutifs de crimes contre humanité ; et violations de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II, tels que visés aux alinéas a, e et f de l'article 4 du Statut.

210. Le 8 août 2001, sur requête du Procureur, le juge Pavel Dolenc a délivré un mandat d'arrêt l'encontre de l'accusé, conformément aux dispositions des articles 54, 57 et 64 du Règlement de procédure et de preuve. Le mandat d'arrêt, qui était assorti d'un ordre de transfèrement et de détention de l'accusé au centre de détention de l'ONU et d'un ordre de recherche et de saisie, a été adressé à tous les Etats[5095].

211. Le 4 décembre 2001, l'accusé a été arrêté au Mali et transféré au centre de détention de l'ONU le 11 mars 2002.

212. Le 18 mars 2002, l'accusé a fait sa première comparution devant le juge Lloyd G. Williams et a plaidé non coupable des 12 chefs d'accusation figurant dans l'acte d'accusation du 1er jiuillet 2000[5096].

213. Le 17 juin 2005, le Procureur a déposé une requête en modification de l'acte d'accusation du 1er juillet 2000[5097]. Le 23 juin 2005, il a déposé un rectificatif dudit acte d'accusation[5098].

214. Le 19 août 2005, le Procureur a déposé une requête visant à retirer sa requête en modification de l'acte d'accusation du 1er juillet 2000 et le rectificatif de celui-ci[5099].

[5094] Confirmation de l'acte d'accusation et ordonnance prescrivant la non divulgation de l'acte d'accusation et des mesures de protection en faveur de témoins et de victimes, 17 juillet 2000.
[5095] Mandat d'arrêt, ordre de transfèrement et de détention et ordre de recherche et de saisie. 9 août 2001.
[5096] Compte rendu de l'audience du 18 mars 2002, p. 29 à 31.
[5097] Requête du Procureur demandant la modification de l'acte d'accusation, en application des articles 73, 50 et 51 du Règlement de procédure et de preuve, déposée le 17 juin 2005.
[5098] Corrigendum to the Prosecutor's Request for Leave to Amend an Indictment Pursuant to Rules 73, 50 and 51 of the Rules of Procedure and Evidence, déposé le 23 juin 2005.
[5099] Prosecutor's Request to Withdraw Prosecutor's Request for Leave to Amend the Indictment and Corrigendum Thereof, déposé le 19 août 2005.

215. Le 24 août 2005, la juge Arlette Ramaroson a rejeté la requête du Procureur aux fins de retrait de sa requête en modification de l'acte d'accusation du 1er juillet 2000 et du rectificatif de celui-ci au motif qu'elle était sans objet[5100].

216. Le 21 septembre 2005, le Procureur a déposé une nouvelle requête en modification de l'acte d'accusation du 1er juillet 2000[5101].

217. Le 19 octobre 2005, le Procureur et la Défense ont déposé une requête conjointe visant à l'examen d'un accord entre Paul Bisengimana et le Bureau du Procureur aux fins d'un plaidoyer de culpabilité[5102].

218. Le 27 octobre 2005, la Chambre a fait droit à la demande d'autorisation du Procureur de modifier l'acte d'accusation du 1er juillet 2000[5103].

219. Le 31 octobre 2005, le Procureur a deposé un acte d'accusation modifié inculpant l'accusé des cinq chefs d'accusation suivants : génocide ; complicité dans le génocide; assassinat, extermination et viol constitutifs de crimes contre humanité.

220. Le 17 novembre 2005, lors de la comparution suivante, l'accusé a plaidé coupable d'assassinat et d'extermination constitutifs de crime contre l'humanité[5104] conformément à l'article 6 (1) du Statut[5105]. Il a plaidé non coupable de génocide[5106] ; de complicité dans le génocidé[5107] ; d'assassinat constitutif de crime contre l'humanité conformément à l'article 6 (3) du Statut[5108] ; d'extermination constitutive de crime contre l'humanité conformément à l'article 6 (3) du Statut[5109] ; et de viol constitutif de crime contre l'humanité[5110].

221. Sur la base de l'accord de reconnaissance de culpabilité conclu entre les parties, qui a été déposé le 19 octobre 2005[5111], le Procureur a demandé oralement à la Chambre de ne pas retenir les chefs d'accusation pour lesquels l'accusé avait plaidé non coupable et d'inscrire à son compte un verdict de non culpabilité en ce qui concerne ces chefs d'accusation conformément aux dispositions des articles 73, 54 et 51 du Règlement[5112]. La Chambre a refusé de se prononcer sur cette demande à ce stade de la procédure.

222. La Chambre a descellé l'accord de reconnaissance de culpabilité susmentionné lors d'une audience publique conformément à l'article 62 *bis*. Elle a indiqué les disparités qui existent entre les faits étayant les chefs d'accusation pour lesquels l'accusé avait plaidé coupable et ceux figurant dans l'accord de reconnaissance de culpabilité[5113]. Le Procureur a fait valoir que, comme l'accusé avait

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[5100] Decision on the Prosecutor's Request to Withdraw Prosecutor's Request for Leave to Amend the Indictment and Corrigendum Thereof, rendue le 24 août 2005.
[5101] Requête du Procureur demandant l'autorisation de modifier un acte d'accusation conformément aux articles 73, 50 et 51 du Règlement de procédure et de preuve, déposée le 21 septembre 2005.
[5102] Requête conjointe visant à l'examen d'un accord entre Paul Bisengimana et le Bureau du Procureur aux fins d'un plaidoyer de culpabilité, déposée le 19 octobre 2005.
[5103] Décision relative à la Requête du Procureur demandant l'autorisation de modifier l'acte d'accusation, 27 octobre 2005.
[5104] Compte rcndu de l'audience du 17 novembre 2005, p. 14 à 17.
[5105] Id.
[5106] Compte rendu de l'audience du 17 novembre 2005, p. 13 et 14.
[5107] Id.
[5108] Compte rendu de l'audience du 17 novembre 2005, p. 16 et 17.
[5109] *Ibid*., p. 17 à 19.
[5110] *Ibid*., p. 16 et 17.
[5111] Requête conjointe visant à l'examen d'un accord entre Paul Bisengimana et le Bureau du Procureur aux fins d'un plaidoyer de culpabilité, déposée le 19 octobre 2005, en même temps que l'accord de reconnaissance de culpabilité conclu entre M. Paul Bisengimana et le Bureau du Procureur.
[5112] Compte rendu de l'audience du 17 novembre 2005, p. 17 à 19.
[5113] *Ibid*., p. 21 et 22.

plaidé coupable des chefs 3 et 4 conformément à l'article 6 (1) du Statut, il allait modifier en conséquence les paragraphes 8, 19, 20, 21, 22, 28, 38, 39 et 42 de l'acte d'accusation modifié pour corriger les disparités susmentionnées et qu'il déposerait une version revisée de l'acte d'accusation modifié par la suite. La Défense a indiqué qu'elle ne considérait comme valable que le contenu de l'accord de reconnaissance de culpabilié et qu'elle appuierait donc le Procureur dans son intention de déposer une version révisée de l'acte d'accusation modifié[5114].

223. La Chambre a rejeté oralement la requête conjointe aux fins d'un accord de reconnaissance de culpabilité entre Paul Bisengimana et le Bureau du Procureur au motif qu'il n'était pas sans équivoque. Conformément à l'alinea iii du paragraphe (A) de l'article 62, la Chambre a inscrit, au nom de l'accusé, un plaidoyer de non culpabilité en ce qui concerne les chefs d'accusation 3 et 4 de l'acte d'accusation modifié et a dûment pris acte du plaidoyer de non culpabilité pour tous les autres chefs d'accusation[5115]. La Chambre a pris note de l'engagement du Procureur de réviser l'acte d'accusation modifié afin de le conformer aux faits dont les parties sont convenues[5116].

224. Le 28 novembre 2005, le Procureur a deposé en version anglaise un second acte d'accusation modifié date du 23 novembre 2005.

225. Le 1er décembre 2005, le Procureur et la Défense ont deposé aux fins d'examen par la Chambre une nouvelle requête conjointe relative à un accord de reconnaissance de culpabilité conclu entre Paul Bisengimana et le Bureau du Procureur datée du 30 novembre 2005, à laquelle était joint un accord de reconnaissance de culpabilité entre l'accusé et le Procureur, signé par l'accusé et son conseil le 4 octobre 2005 et par le Procureur le 17 octobre 2005. Le même jour, le Procureur a deposé les versions anglaise et française du nouvel acte d'accusation modifié, daté du 23 novembre 2005.

226. Suite à une demande de renseignements de la Chambre au sujet d'une partie manquante de la version française du compte rendu de l'audience de Bisengimana du 17 novembre 2005, une version révisée dudit compte rendu a été déposée le 16 decembre 2005[5117].

227. Le 7 décembre 2005, lors d'une conférence de mise en état, la Défense a présenté deux requêtes orales : la première tendait à ce que le responsable du centre de détention lui délivre une attestation concernant la détention de l'accusé ; la seconde était que le docteur Epée délivre à la Défense une attestation sur l'état de santé de l'accusé[5118].

228. Le 7 décembre 2005, lors de sa seconde comparution, l'accusé a plaidé coupable des chefs d'accusation suivants : assassinat constitutif de crime contre l'humanité en vertu de l'article 6 (1) du Statut[5119] ; et extermination constitutive de crime contre l'humanité en vertu de l'article 6 (1) du Statut[5120]. Il a plaidé non coupable des chefs d'accusation suivants : génocide en vertu des alinéas 1 et 3

[5114] *Ibid*., p. 29 et 30.
[5115] *Ibid*., p. 31 et 32.
[5116] Id.
[5117] Le 7 décemhre 2005, sur requête de la Défense, une conférence de mise en état a été tenue à huis clos en présence de l'accusé. Le conseil de la Défense a fait observer qu'il ressortait de la version française du compte rendu de l'audience du 17 novembre 2005 que la Chambre n'avait pas demandé à l'accusé de plaider relativement au chef d'accusation 5 de l'acte d'accusation modifié. La Chambre a fait savoir à l'audience publique qu'il y a eu certainement une erreur dans la version française du compte rendu d'audience car l'accusé avait effectivement plaidé par rapport à ce chef d'accusation, comme il ressort de la version anglaise du compte rendu d'audience.
[5118] Compte reudu de l'audience du 7 décembre 2005, p. 3 (conférence de mise en état).
[5119] *Ibid*., p. 13 et 14.
[5120] *Ibid*., p. 14 et 15.

de l'article 6 du statut[5121] ; complicité dans le génocide en vertu de l'article 6 (1) du statut[5122] ; et viol constitutif de crime contre l'humanité en vertu des alinéas 1 et 3 de l'article 6 du statut[5123].

229. Sur la base de l'accord de reconnaissance de culpabilité conclu entre les parties[5124], le Procureur a demandé oralement à la Chambre de retirer et de ne pas retenir les chefs d'accusation pour lesquels l'accusé avait plaidé non coupable et de l'acquitter des ces chefs, conformément aux articles 51, 54 et 73 du Règlement[5125].

230. Conformément à l'article 62 *bis,* la Chambre a demandé que l'accord de reconnaissance de culpabilité soit descellé et divulgué au public[5126]. La Défense a demandé à la Chambre de ne divulguer que les chapitres 3, 4 et 5 de l'accord car, a-t-elle fait valoir, il n'était pas nécessaire de rendre publics les autres chapitres[5127]. La Chambre a rejeté oralement cette requête, estimant que la Défense n'avait pas donné de justification suffisante quant à la raison pour laquelle seules certaines parties de l'accord de reconnaissance de culpabilité devraient être divulguées[5128].

231. La Chambre a accédé à la requête conjointe tendant à ce qu'elle examine l'accord de reconnaissance de culpabilité conclu entre Paul Bisengimana et le Bureau du Procureur[5129]. Elle a declaré que les conditions posées par l'article 62 (B) étaient réunies et, en conséquence, a déclaré l'accusé coupable d'avoir aidé et encouragé la commission des crimes d'assassinat (chef 3) et d'extermination (chef 4) constitutifs de crimes contre l'humanité en vertu de l'article 6 (1) du Statut[5130]. Elle a accédé à la requête du Procureur aux fins de retrait et d'exclusion des chefs d'accusation pour lesquels l'accusé avait plaidé non coupable (génocide, complicité dans le génocide, et viol constitutif de crime contre l'humanité)[5131]. En revanche, elle a rejeté la demande d'acquittement parce que le Procureur n'avait pas motivé sa requête sur ce point[5132]. En ce qui concerne la demande de délivrance d'attestations faite par la Défense relativement à la detention et à l'état de santé de l'accusé, la Chambre a enjoint à la Défense de saisir le Greffe de ces questions[5133]. Enfin, elle a ordonné que l'accusé soit détenu dans des conditions garantissant sa sécurité[5134].

232. Au cours de la même audience, la Défense a fait savoir qu'elle entendait citer des témoins de moralité. Ainsi, le 16 décembre 2005, elle a déposé une requête en mesures de protection en faveur de ses témoins de moralité[5135]. Le 20 décembre 2005, la Chambre y a fait droit en partie.

233. La Défense a deposé son mémoire préalable au prononcé de la sentence en version française le 20 décembre 2005 ; le Procureur a déposé le sien en version anglaise le 16 janvier 2006. L'audience préalable au prononcé de la sentence s'est tenue le 19 janvier 2006. La Chambre a entendu le

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[5121] *Ibid*., p. 13 et 14.
[5122] Id.
[5123] Compte rendu de l'audience du 7 décembre 2005, p. 14 et 15.
[5124] Requête conjointe visant à l'examen d'un accord entre Paul Bisengimana et le Bureau du Procureur aux fins d'un plaidoyer de culpabilité a été déposée le 1er décembre 2005, en même temps que l'accord de reconnaissance de culpabilité conclu entre M. Paul Bisengimana et le Bureau du Procureur, daté du 30 novembre 2005.
[5125] Compte rendu de l'audience du 7 décembre 2005, p. 14 et 15. Il s'agit des chefs d'accusation suivants : chef d'accusation 1, génocide en vertu des articles 6 (1) et 6 (3) du Statut ; chef 2, complicité dans le génocide en vertu de l'article 6 (1) du Statut et chef 5, viol constitutif de crime contre l'humanité en vertu des articles 6 (1) et 6 (3) du Statut.
[5126] *Ibid*., p. 17 à 19.
[5127] Id.
[5128] Compte rendu de l'audience du 7 décembre 2005, p. 22 et 23.
[5129] *Ibid*., p. 20 à 22.
[5130] Id.
[5131] Compte rendu de l'audience du 7 décembre 2005, p. 22 et 23.
[5132] Id.
[5133] Id.
[5134] Compte rendu de l'audience du 7 décembre 2005, p. 23 et 24.
[5135] La Requête en extrême urgence de la Défense aux fins de prescription de mesures de protection des témoins de moralité, déposée le 16 décembre 2005.

Procureur, la Défense, trois témoins de moralité à décharge, ainsi que l'accusé. Le rapport médical concernant l'accusé a été admis conformément à l'article 92 *bis* après que le docteur Epée eut déclaré sous serment en être l'auteur[5136]. L'attestation de bonne conduite établie par le commandant du centre de détention de l'ONU a été admise conformément à l'article 92 *bis* le 3 février 2006[5137].

[5136] Compte rendu de laudience du 19 janvier 2006, p. 51 et 52.
[5137] Decision on the Defence Motion for the Admission of a Written Statement in Lieu of Oral Testimony in Accordance with Rule 92 bis (A) and (B) of the Rules of Procedure and Evidence, 3 fevrier 2006.

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Rectificatif
Jugement portant condamnation
20 avril 2006 (ICTR-2000-60-T)

(Original : Français)

Chambre de première instance II

Juges : Arlette Ramaroson, Présidente de Chambre ; William H. Sekule ; Solomy B. Bossa

Paul Bisengimana – Rectificatif, erreur de date

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIEGEANT en la Chambre de première instance II, composée des juges Arlette Ramaroson, Président de Chambre, William H. Sekule et Solomy B. Bossa (la « Chambre »),

PRENANT ACTE d'une erreur de date figurant au paragraphe 204 du jugement du 13 avril 2006 en l'affaire *Le Procureur c. Paul Bisengimana,*

LA CHAMBRE,

CORRIGE l'erreur en question et décide que le paragraphe 204 se lira comme suit :

> « La Chambre conclut que Paul Bisengimana a droit à une déduction de peine de la durée de sa détention provisoire, à compter du 4 décembre 2001 jusqu'à la date du prononcé du présent jugement ».

Fait à Arusha le 20 avril 2006.

[Signé] : Arlette Ramaroson ; William H. Sekule ; Solomy B. Bossa

The Prosecutor v. Augustin BIZIMUNGU, Protais MPIRANYA, Augustin NDINDILIYIMANA, François-Xavier NZUWONEMEYE and Innocent SAGAHUTU

Case N° ICTR-2000-56

Case History: Augustin Bizimungu

- Name: BIZIMUNGU
- First Name: Augustin
- Date of Birth: 1952
- Sex: male
- Nationality: Rwandan
- Former Official Function: Chief of Staff of the Rwandan Army
- Date of Indictment's Confirmation: 23 January 2000
- Counts: genocide, complicity in the genocide, conspiracy to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date and Place of Arrest: 2 August 2002, in Angola
- Date of Transfer: 14 August 2002
- Date of Initial Appearance: 21 August 2002
- Date Trial Began: 20 September 2004

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Case History: Augustin Ndindiliymana

- Name: NDINDILIYMANA
- First Name: Augustin
- Date of Birth: 1943

• Sex: male

• Nationality: Rwandan

• Former Official Function: Chief of Staff of the *gendarmerie nationale*

• Date of Indictment's Confirmation: 28 January 2000

• Counts: genocide, complicity in the genocide, conspiracy to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

• Date and Place of Arrest: 29 January 2000, in Belgium

• Date of Transfer: 22 April 2000

• Date of Initial Appearance: 27 April 2000

• Pleading: not guilty

• Date Trial Began: 20 September 2004

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Case History: François-Xavier Nzuwonemeye

• Name: NZUWONEMEYE

• First Name: François-Xavier

• Date of Birth: 30 August 1955

• Sex: male

• Nationality: Rwandan

• Former Official Function: Commander of 42nd Battalion of *Reconnaissance* of the Rwandan Army

• Date of Indictment's Confirmation: 28 January 2000

• Counts: genocide, complicity in the genocide, conspiracy to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

• Date and Place of Arrest: 15 February 2000, in France

• Date of Transfer: 23 May 2000

• Date of Initial Appearance: 25 May 2000

• Pleading: not guilty

• Date Trial Began: 20 September 2004

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Case History: Innocent Sagahutu

• Name: SAGAHUTU

• First Name: Innocent

• Date of Birth: unknown

• Sex: male

• Nationality: Rwandan

• Former Official Function: Second-in-command of the *Reconnaissance* Battalion within the Rwandan Army

• Date of Indictment's Confirmation: 28 January 2000

• Counts: genocide, complicity in the genocide, conspiracy to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

• Date and Place of Arrest: 15 February 2000, in Denmark

• Date of Transfer: 24 November 2000

• Date of Initial Appearance: 28 November 2000

• Pleading: not guilty

• Date Trial Began: 20 September 2004

Decision on Nzuwonemeye's Motion requestiong the Cooperation from the Government of The Netherlands Pursuant to Article 28 of the Statute 13 February 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

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

François-Xavier Nzuwonemeye – Request of cooperation, Interview of a former soldier of the UNAMIR : limits of the interview defined by the United Nations Assistant Secretary General for Legal Affairs, The Netherlands : policy not to accede to non-obligatory requests related to the work of the Ad hoc Tribunals – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 54 ; Statute, art. 28

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana, 25 May 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request to the Kingdom of The Netherlands for Cooperation and Assistance, 7 February 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute, 31 October 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana et al., Decision on Nzuwonemeye's Ex Parte and Confidential Motion to Obtain the Cooperation of the Kingdom of Belgium, 9 November 2005 (ICTR-2000-56)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Radislav Krstić, Decision on Application for subpoenas, 1 July 2003 (IT-98-33)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEISED OF Nzuwonemeye's "Motion for Request of Cooperation from the Government of the Netherlands Pursuant to Article 28 of the Statute" (the "Motion"), filed on 25 January 2006;

NOTING that the Prosecution has not filed a response;

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Article 28 of the Statute and Rule 54 of the Rules;

HEREBY DECIDES the Motion on the basis of the written submissions filed by the Defence pursuant to Rule 73 (A) of the Rules.

Submissions of the Defence

1. The Defence for Nzuwonemeye requests the Chamber to issue an order for cooperation and assistance of the Government of the Netherlands to facilitate an interview with Major Robert Alexander Van Putten.[1] The Defence team wishes to interview Major van Putten about various issues related to his role as a UNAMIR soldier in Rwanda in 1994, including (a) his perception of the events in Rwanda in 1994; (b) his perception of the military situation in Rwanda and the role of the UNAMIR; (c) the meetings he attended on 6 and 7 April 1994 with the Rwandan senior military officers; (d) the death of the 10 Belgian UNAMIR soldiers on 7 April 1994 and (e) the murder of Agathe Uwilingiyimana, former Prime Minister of Rwanda[2].

2. The Defence submits that it has received a letter from the United Nations Assistant Secretary General for Legal Affairs indicating that the United Nations has no objection to the meeting and interview, provided that the questions asked do not "concern (i) information that was provided in confidence to the United Nations by a third person or State or (ii) what happened during closed meetings or informal consultations of the Security Council or (iii) information the disclosure of which would place anyone's life in danger".[3]

3. The Defence submits that on 28 November 2005, it wrote to the Minister of Defence of the Netherlands requesting that members of the Defence team be provided with the contact details of Major Robert Alexander Van Putten, and for authorization to meet with the proposed witness[4]. On 19 December 2005, the Minister sent a reply denying the Defence request and indicating, among other things, that due to resource constraints, it is the policy of the Government of the Netherlands not to accede to non-obligatory requests related to the work of the *Ad hoc* Tribunals. The Minister, however, indicated that the Government of the Netherlands will comply with an order of the Trial Chamber to provide Major Van Putten as a witness.[5]

4. The Defence submits that it is not in a position to determine whether or not Major Van Putten will be called as a witness without first meeting and interviewing him. Finally, the Defence submits that, in accordance with the relevant case law of both *Ad-hoc* Tribunals, when the Defence is not fully aware of the nature and relevance of the testimony of a prospective witness, it is in the interests of justice to allow the Defence to meet the witness and assess his testimony.[6]

Deliberations

5. The Chamber recalls that Article 28 of the Statute imposes an obligation on States to "cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law". Article 28 (2) provides a non-exhaustive list of the types of cooperation or assistance which the Tribunal may seek from States. According to the jurisprudence of the Tribunal, the Chamber's power under Article 28 may include any request or order the purpose of which is to assist the Tribunal in its mandate.[7] In addition, the Chamber recalls Rule 54 which enables it to issue any orders it deems necessary for the investigation, preparation or conduct of the trial. Acting under Article 28 and Rule 54, Trial Chamber I1 has recently issued an order for State cooperation in the instant case.[8]

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[1] Motion, para. 1.
[2] Motion, para. 3.
[3] Annex I to Motion.
[4] Motion, par. 4; Annex 2.
[5] Motion, par. 5 ; Annex 3.
[6] Motion, para. 6, 7.
[7] *Prosecutor v. Bagosora* et al., Case N°ICTR-98-41-T, Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance, 7 February 2005 (TC I), para. 4 [hereinafter '*Bagosora* 7 February 2005 Decision'].
[8] *Prosecutor v. Ndindiliyimana* et al., Case N°ICTR-00-56-T, Decision on Nzuwonemeye's *Ex Parte* and Confidential Motion to Obtain the Cooperation of the Kingdom of Belgium, 9 November 2005 (TC II) [hereinafter '*Ndindiliyimana* 9 November 2005 Decision'].

6. The Chamber further recalls the jurisprudence of the Tribunal to the effect that the party seeking an order under Article 28 must, to the extent possible, specify the nature and purpose of the assistance sought from the requested State, as well as its relevance to the trial. It must also demonstrate that efforts have been made to obtain such assistance, and that these efforts have been unsuccessful.[9]

7. The Chamber notes that Paragraph 3 of the Motion specify the nature of the information sought, as well as its relevance to the trial. Annex 2 to the Motion demonstrates that the Defence has made reasonable efforts to obtain the assistance of the Government of the Netherlands by requesting authorization to meet with the former UNAMIR officer in question. The Chamber further notes that the Defence efforts have been unsuccessful because of the policy of the Government of the Netherlands not to comply with non-obligatory requests related to the work of *Ad-hoc* Tribunals. The Chamber therefore concludes that the criteria for granting an order requesting cooperation under Article 28 have been met.

8. Furthermore, the Chamber agrees with the *Ad-hoc* Tribunals' jurisprudence that when the Defence is not fully aware of the nature and relevance of the testimony of a prospective witness, it is in the interests of justice to allow the Defence to meet the witness and assess his testimony.[10]

9. However, in issuing the order for cooperation, the Chamber is mindfull of the fact that the United Nations Assistant Secretary General for Legal Affairs censer ted to the proposed meetings based on a number of conditions.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion;

RESPECTFULLY REQUESTS the Government of the Netherlands to give its full cooperation to allow the Defence team for Nzuwonemeye to meet and interview Major Robert Alexander Van Putten in the Netherlands, at a place convenient to all parties ;

ORDERS that during the meeting, the Defence shall not ask any questions relating to (i) information that was provided in confidence to the United Nations by a third person or State; (ii) what happened during closed meetings or informal consultations of the Security Council; and (iii) information the disclosure of which would place anyone's life in danger;

DIRECTS the Registry to transmit this Decision to the relevant authorities of the Government of the Netherlands; to collaborate with the Defence for Nzuwonemeye in the implementation of this request; and to report back to the Chamber.

Arusha, 13 February 2006

[Signed] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

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[9] *Prosecutor v. Bagosora* et al., Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana, 25 May 2004 (TC I), para. 6, cited with approval in *Ndindiliyimana 9 November 2005 Decision,* para. 10. See also *Prosecutor v. Bagosora* et al., Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute, 31 October 2005 (TC I), para. 2; *Bagosora* 23 June 2004 Decision, para. 4; *Bagosora* 7 February 2005 Decision, para. 5.

[10] *Prosecutor v. Bagosora* et al., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004 (TC I), para. 4. See also *Prosecutor v. Krstić,* Case N°IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 (ICTY Appeals Chamber), para. 8.

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Decision on Nzuwonemeye's Motion requesting the Cooperation from the Government of Ghana Pursuant to Article 28 of the Statute 13 February 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

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

François-Xavier Nzuwonemeye – Request of cooperation, Interview of a former soldier of the UNAMIR : limits of the interview defined by the United Nations Assistant Secretary General for Legal Affairs, Ghana, Interests of the Justice to allow the Defence to meet a witness in order to appreciate the relevance of his/her testimony – Motion granted

International Instruments cited :

Rules of Procedure and Evidence, rule 54 ; Statute, art. 28

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana, 25 May 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request to the Kingdom of The Netherlands for Cooperation and Assistance, 7 February 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute, 31 October 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana et al., Decision on Nzuwonemeye's Ex Parte and Confidential Motion to Obtain the Cooperation of the Kingdom of Belgium, 9 November 2005 (ICTR-2000-56)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Radislav Krstić, Decision on Application for subpoenas, 1 July 2003 (IT-98-33)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEISED OF Nzuwonemeye's "Motion for Request of Cooperation from the Government of Ghana and the Government of Togo Pursuant to Article 28 of the Statute" (the "Motion") filed on 25 January 2006;

NOTING that the Prosecution has not filed a response;

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Article 28 of the Statute and Rule 54 of the Rules;

HEREBY DECIDES the Motion on the basis of the written submissions filed by the Defence pursuant to Rule 73 (A) of the Rules.

Submissions of the Defence

1. The Defence for Nzuwonemeye requests the Chamber to issue an order for cooperation and assistance of the Government of Ghana in order to facilitate an interview with Sergeant Aboagye, Brigadier General Henry Kuame Ayidiho, Captain Amoako, Captain Kwesi Doe and Captain Samdow Zambulugu.[1] The Defence team wishes to interview the individuals concerned about various issues related to their role as IJNAMIR soldiers in Rwanda in 1994, including (a) their perception of the events in Rwanda in 1994 ; (b) their perception of the military situation in Rwanda and the role of the UNAMIR ; (c) the meetings they attended on 6 and 7 April 1994 with the Rwandan senior military officers ; (d) the death of the 10 Belgian UNAMIR soldiers on 7 April 1994 and (e) the murder of Agathe Uwilingiyimana, former Prime Minister of Rwanda[2].

2. The Defence submits that it has received a letter from the United Nations Assistant Secretary General for Legal Affairs indicating that the United Nations has no objection to the meeting and interview, provided that the questions asked do not "concern (i) information that was provided in confidence to the United Nations by a third person or State or (ii) what happened during closed meetings or informal consultations of the Security Council or (iii) information the disclosure of which would place anyone's life in danger"[3].

3. The Defence submits that on 29 November 2005, it wrote to Ghana's Minister of Defence for authorization to meet and provide the team with the contact details of the former UNAMIR soldiers named above.[4] The Defence avers that it has not yet received a response, even though it sent a reminder to the Minister on 19 December 2005, The Defence therefore fears that its request will be denied.[5]

4. Finally, the Defence submits that the Prosecution case will y be completed this year, and the Defence therefore does not have much time left to conduct its investigations. Consequently, it is urgent for the Defence team to have access to these witnesses, interview them and assess the relevance of their testimony. The Defence submits that an order from the Tribunal would help speed-up the proceedings.[6]

Deliberations

5. The Chamber recalls that Article 28 of the Statute imposes an obligation on States to "cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law." Article 28 (2) provides a non-exhaustive list of the types of cooperation or assistance which the Tribunal may seek from States. According to the jurisprudence of the Tribunal, the Chamber's power under Article 28 may include any request or order the purpose of which is to assist the Tribunal in its mandate,[7] In addition, the Chamber recalls Rule 54 of the Rule which enables it to issue any orders it deems necessary for the investigation, preparation or conduct of the trial. Acting under Article 28 and Rule 54, Trial Chamber II has recently issued an order for State cooperation in the instant case.[8]

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[1] Motion, par. 1.
[2] Motion, par. 3.
[3] Annex 1 to the Motion.
[4] Motion, par. 4, Annex 2.
[5] Motion, par. 7.
[6] Motion, par. 8.
[7] *Prosecutor v. Bagosora* et al., Case N°ICTR-98-41-T, Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance, 7 February 2005 (TC I), para. 4 [hereinafter 'Bagosora 7 February 2005 Decision'].
[8] *Prosecutor v. Ndindiliyimana* et al., Case N°ICTR-00-56-T, Decision on Nzuwonemeye's *Ex Parte* and Confidential Motion to Obtain the Cooperation of the Kingdom of Belgium, 9 November 2005 (TC II) [hereinafter 'Ndindiliyimana 9 November 2005 Decision'].

6. The Chamber further recalls the jurisprudence of the Tribunal to the effect that the party seeking an order under Article 28 must, to the extent possible, specify the nature and purpose of the assistance sought from the requested State, as well as its relevance to the trial. It must also demonstrate that efforts have been made to obtain such assistance, and that these efforts have been unsuccessful.[9]

7. The Chamber notes that paragraph 3 of the Motion specify the nature of the information sought, as well as its relevance to the trial. Annex 2 to the Motion demonstrates that the Defence has made reasonable efforts to obtain the assistance of the Government of Ghana by requesting authorization to meet with the former UNAMIR soldiers in question. The Chamber further notes that the Defence efforts have been unsuccessful. Despite a reminder sent to Ghana's Minister of Defence, the Defence team has still not received an answer. The Chamber therefore concludes that the criteria for granting an order requesting cooperation under Article 28 have been met.

8. Furthermore, the Chamber agrees with the *Ad hoc* Tribunals' jurisprudence that when the Defence is not fully aware of the nature and relevance of the testimony of a prospective witness, it is in the interests of justice to allow the Defence to meet the witness and assess his testimony.[10]

9. However, in issuing the order for cooperation, the Chamber is mindful of the fact that the United Nations Assistant Secretary General for Legal Affairs consented to the proposed meetings based on a number of conditions.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion;

RESPECTFULLY REQUESTS the Government of Ghana to give its full cooperation to allow the Defence team for Nzuwonemeye to meet with and interview Sergeant Aboagye, Brigadier General Henry Kuame Ayidiho, Captain Amoako, Captain Kwesi Doe and Captain Samdow Zambulugu, at a place convenient to all the parties;

ORDERS that during the meetings, the Defence shall not ask any questions relating to (i) information that was provided in confidence to the United Nations by a third person or State; (ii) what happened during closed meetings or informal consultations of the Security Council; and (iii) information the disclosure of which would place anyone's life in danger;

DIRECTS the Registry to transmit this Decision to the relevant authorities of the Government of Ghana; to collaborate with the Defence for Nzuwonemeye in the implementation of this request; and to report back to the Chamber.

Arusha, 13 February 2006.

[Signed] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

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[9] *Prosecutor v. Bagosora* et al., Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana, 25 May 2004 (TC I), para. 6, cited with approval in *Ndindiliyimana* 9 November 2005 Decision, para. 10. See also *Prosecutor v. Bagosora* et al., Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute, 31 October 2005 (TC I), para. 2; *Bagosora* 23 June 2004 Decision, para. 4; *Bagosora* 7 February 2005 Decision, para. 5.

[10] *Prosecutor v. Bagosora* et al., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004 (TC I), para. 4. See also *Prosecutor v. Krstić,* Case N°IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 (ICTY Appeals Chamber), para. 8.

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Decision on Nzuwonemeye's Motion requesting the Cooperation from the Government of Togo Pursuant to Article 28 of the Statute 13 February 2006 ICTR-2000-56-T)

(Original : English)

Trial Chamber II

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

François-Xavier Nzuwonemeye – Request of cooperation, Interview of a former soldier of the UNAMIR : limits of the interview defined by the United Nations Assistant Secretary General for Legal Affairs, Togo, Interests of the Justice to allow the Defence to meet a witness in order to appreciate the relevance of his/her testimony – Motion granted

International Instruments cited :

Rules of Procedure and Evidence, rule 54 ; Statute, art. 28

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana, 25 May 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request to the Kingdom of The Netherlands for Cooperation and Assistance, 7 February 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute, 31 October 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana et al., Decision on Nzuwonemeye's Ex Parte and Confidential Motion to Obtain the Cooperation of the Kingdom of Belgium, 9 November 2005 (ICTR-2000-56)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Radislav Krstić, Decision on Application for subpoenas, 1 July 2003 (IT-98-33)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEISED OF Nzuwonemeye's "Motion for Request of Cooperation from the Government of Ghana and the Government of Togo Pursuant to Article 28 of the Statute" (the "Motion") filed on 25 January 2006;

NOTING that the Prosecution has not filed a response;

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Article 28 of the Statute and Rule 54 of the Rules;

HEREBY DECIDES the Motion on the basis of the written submissions filed by the Defence pursuant to Rule 73 (A) of the Rules.

Submissions of the Defence

1. The Defence for Nzuwonemeye requests the Chamber to issue an order for cooperation and assistance of the Government of Togo in order to facilitate an interview with Captain Apedo.[1] The Defence team wishes to interview Captain Apedo about various issues related to his role as a UNAMIR soldier in Rwanda in 1994, including (a) his perception of the events in Rwanda in 1994; (b) his perception of the military situation in Rwanda and the role of the UNAMIR; (c) the meetings he attended on 6 and 7 April 1994 with the Rwandan senior military officers; (d) the death of the 10 Belgian UNAMIR soldiers on 7 April 1994 and (e) the murder of Agathe Uwilingiyimana, former Prime Minister of Rwanda.[2]

2. The Defence submits that it has received a letter from the United Nations Assistant Secretary General for Legal Affairs indicating that the United Nations has no objection to the meeting and interview, provided that the questions asked do not "concern (i) information that was provided in confidence to the United Nations by a third person or State or (ii) what happened during closed meetings or informal consultations of the Security Council or (iii) information the disclosure of which would place anyone's life in danger"[3].

3. The Defence submits that on 29 November 2005, it wrote to Togo's Minister of Defence for authorization to meet and provide the team with the contact details of the former UNAMIR soldier named above.[4] The Defence avers that it has not yet received a response, even though it sent a reminder to the Minister on 19 December 2005. The Defence therefore fears that its request will be denied.[5]

4. Finally, the Defence submits that the Prosecution case will likely be completed this year, and the Defence therefore does not have much time left to conduct its investigations. Consequently, it is urgent for the Defence team to have access to this witness, interview him and assess the relevance of his testimony. The Defence submits that an order from the Tribunal would help speed-up the proceedings.[6]

Deliberations

5. The Chamber recalls that Article 28 of the Statute imposes an obligation on States to "cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law." Article 28 (2) provides a non-exhaustive list of the types of cooperation or assistance which the Tribunal may seek from States. According to the jurisprudence of the Tribunal, the Chamber's power under Article 28 may include any request or order the purpose of which is to assist the Tribunal in its mandate.[7] In addition, the Chamber Rule 54 of the Rule which enables it to issue any orders it deems necessary for the investigation, preparation or conduct of the trial. Acting under Article 28 and Rule 54, Trial Chamber I1 has recently issued an order for State cooperation in the instant case.[8]

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[1] Motion, para. 1.
[2] Motion, para. 3.
[3] Annex 1 to the Motion.
[4] Motion, para. 4, Annex 2.
[5] Motion, para. 7.
[6] Motion, para. 8.
[7] *Prosecutor v. Bagosora* et al., Case N°ICTR-98-41-T, Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance, 7 February 2005 (TC I), para. 4 [hereinafter '*Bagosora* 7 February 2005 Decision'].
[8] *Prosecutor v. Ndindiliyimana* et al., Case N°ICTR-00-56-T, Decision on Nzuwonemeye's *Ex Parte* and Confidential Motion to Obtain the Cooperation of the Kingdom of Belgium, 9 November 2005 (TC II) [hereinafter '*Ndindiliyimana* 9 November 2005 Decision'].

6. The Chamber further recalls the jurisprudence of the Tribunal to the effect that the party seeking an order under Article 28 must, to the extent possible, specifies the nature and purpose of the assistance sought from the requested State, as well as its relevance to the trial. It must also demonstrate that efforts have been made to obtain such assistance, and that these efforts have been unsuccessful.

7. The Chamber notes that paragraph 3 of the Motion specify the nature of the information sought, as well as its relevance to the trial. Annex 2 to the Motion demonstrates that the Defence has made reasonable efforts to obtain the assistance of the Government of Togo by requesting authorization to meet with the former UNAMIR soldier in question. The Chamber further notes that the Defence efforts have been unsuccessful.[9] Despite a reminder sent to Togo's Minister of Defence, the Defence team has still not received an answer. The Chamber therefore concludes that the criteria for granting an order requesting cooperation under Article 28 have been met.

8. Furthermore, the Chamber agrees with the *Ad-hoc* Tribunals' jurisprudence that when the Defence is not fully aware of the nature and relevance of the testimony of a prospective witness, it is in the interests of justice to allow the Defence to meet the witness and assess his testimony.[10]

9. However, in issuing the order for cooperation, the Chamber 3 mindful of the fact that the United Nations Assistant Secretary General for Legal Affairs consented to the proposed meetings based on a number of conditions.

FOR THE ABOVE REASONS, TWE CHAMBER

GRANTS the Motion;

RESPECTFULLY REQUESTS the Government of Togo to give its full cooperation to allow the Defence team for Nzuwonemeye to meet with and interview Captain Apedo, at a place convenient to all the parties;

ORDERS that during the meeting, the Defence shall not ask any questions relating to (i) information that was provided in confidence to the United Nations by a third person or State; (ii) what happened during closed meetings or informal consultations of the Security Council; and (iii) information the disclosure of which would place anyone's life in danger;

DIRECTS the Registry to transmit this Decision to the relevant authorities of the Government of Togo; to collaborate with the Defence for Nzuwonemeye in the implementation of this request; and to report back to the Chamber.

Arusha, 13 February 2006.

[Signed] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

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[9] *Prosecutor v. Bagosora* et al., Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana, 25 May 2004 (TC I), para. 6, cited with approval in *Ndindiliyimana* 9 November 2005 Decision, para. 10. See also *Prosecutor v. Bagosora* et al., Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute, 31 October 2005 (TC I), para. 2; *Bagosora* 23 June 2004 Decision, para. 4; *Bagosora* 7 February 2005 Decision, para. 5.

[10] *Prosecutor v. Bagosora* et al., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004 (TC I), para. 4. See also *Prosecutor v. Krstić,* Case N°IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 (ICTY Appeals Chamber), para. 8.

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Decision on Bizimungu's Motion for Certification to Appeal the Chamber's Oral Decision of 2 February 2006 Admitting Part of Witness GFA's Confessional Statement into Evidence
27 February 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

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

Augustin Bizimungu – Decisions under Rule 73 (A) are in principle "without interlocutory appeal", Admitting documents with an unknown and possibly incriminating content into evidence may affect the fairness of the proceedings and the outcome of the trial, No irreparable prejudice caused by the Chamber's Oral Decision – Motion dismissed

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A), 73 (B), 89 (C) and 98

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on Sagahutu's Request for Certification to Appeal, 9 June 2005 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on Bizimungu's Request for Certification to Appeal the Oral Decision Dated 8 June 2005, 30 June 2005 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on Ndindiliyimana's Request for Certification to Appeal the Chamber's Decision Dated 21 September 2005, 26 October 2005 (ICTR-2000-56)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEISED OF Bizimungu's « Requête de la Défense du Général Bizimungu aux fins d'obtenir l'autorisation de la Chambre de première instance II d'interjeter appel contre sa décision orale du 2 février 2006 d'admettre la pièce ID-19 (Article 73 (B) du Règlement de procédure et preuve) »[1] filed on 8 February 2006 (the "Motion");

HAVING RECEIVED AND CONSIDERED the
(i) «Observations du Procureur sur la Requête de la Défense d'Augustin Bizimungu aux fins d'obtenir l'autorisation de la Chambre de première instance II d'interjeter appel contre sa décision orale du 2 février 2006»,[2] filed on 9 February 2006 (the "Response");

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[1] "Motion of the Defence for General Bizimungu Requesting Certification to Appeal the Chamber's Oral Decision of 2 February 2006 to Admit Exhibit ID-19 into Evidence (Pursuant to Rule 73 (B) of the Rules of Procedure and Evidence)" (Unofficial Translation).
[2] "The Prosecution's Observations Regarding the Motion of the Defence for General Bizimungu Requesting Certification to Appeal the Chamber's Oral Decision of 2 February 2006 to Admit Exhibit ID-19 into Evidence" (Unofficial Translation).

RECALLING the Chamber's Oral Decision rendered on 2 February 2006 (the "Impugned Decision");

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 73 (B) of the Rules;

HEREBY DECIDES the Motion on the basis of the written submissions filed by the Parties pursuant to Rule 73 (A) of the Rules.

Submissions of the Parties

The Defence

1. The Defence requests for certification to appeal the Impugned Decision pursuant to Rule 73 (B).

2. The Defence submits that the Impugned Decision raises a question that significantly affects the fairness and the outcome of the proceedings.

3. The Defence submits that ID-19 introduces a new element to the proceedings with no relevance whatsoever. The Defence further submits that there is no legal ground to admit a document into evidence only on the basis that it has been shown to a witness during his testimony.

4. The Defence submits that it opposed the admissibility of the said document during the proceedings on 2 February, arguing that (a) the document was never translated into one of the two working languages of the Tribunal, (b) the Defence for Bizimungu is not aware of the document's content and (c) the document was not part of either the examination-in-chief or the cross-examination.

5. The Defence argues that it is therefore difficult to assess whether or not ID-19 contains any incriminating elements and whether or not the document is linked to any of the subjects touched upon by the witness' testimony.

6. The Defence submits that admitting into evidence a document to which a witness made reference during his testimony deprives the Accused of his fundamental right to a full defence, causing "irreparable prejudice."[3]

7. Finally, the Defence submits that the resolution of this issue by the Appeals Chamber would advance the proceedings and have an impact on the arguments taking place before the Chamber. Furthermore, a decision by the Appeals Chamber would contribute to judicial economy, since it would not be necessary for the Trial Chamber to entertain any further arguments concerning the admissibility of similar documents.

The Prosecution

8. The Prosecution submits that admitting into evidence a document emanating from the witness and to which both the Prosecution and the Defence made reference does not affect the fairness or the progress or the outcome of the proceedings.

9. The Prosecution submits that pursuant to Rules 89 (C) and 98 of the Rules, the Trial Chamber has discretion on this issue and that the Chamber has not abused its discretion in the instant case.

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[3] Motion, para. 10.

10. The Prosecution therefore prays the Chamber to deny the Defence request for certification.

Deliberations

11. The Chamber recalls its previous Decisions in which it discussed the criteria for certification under Rule 73 (B).[4] In particular, the Chamber notes the principle that decisions under Rule 73 (A) are "without interlocutory appeal" and that certification to appeal is an exception that the Chamber may grant, if the two criteria under Rule 73 (B) are satisfied.

12. The first part of the test is satisfied "if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial". The Chamber agrees with the Defence that admitting documents with an unknown and possibly incriminating content into evidence may affect the fairness of the proceedings and the outcome of the trial. The Chamber, however, recalls that the document in question, a list of names drawn up by Witness GFA as part of one of his confessional statements made to the Rwandan authorities, was admitted into evidence on 2 February 2006 strictly for *identification purposes*.[5] Furthermore, the Chamber notes that the document was part of the material disclosed by the Prosecution, and that the Defence admitted during Witness GFA's testimony that it was in possession of the document.[6] Finally, the Chamber notes that reference was made to that document during cross-examination by the Defence on at least one occasion.[7] In light of the above, the Chamber finds the Defence submission that "irreparable prejudice" was caused by the Chamber's Oral Decision of 2 February 2006 to be grossly inaccurate and without merit. The Defence has therefore failed to meet the first criterion for certification.

13. Having determined that the first part of the two-pronged test under Rule 73 (B) has not been satisfied, the Chamber need not consider the second part.

Arusha, 27 February 2006.

[Signed] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

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[4] *The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu*, ICTR-00-56-T, "Decision on Sagahutu's Request for Certification to Appeal" (TC), 9 June 2005, para. 16. 17; "Decision on Bizimungu's Request for Certification to Appeal the Oral Decision Dated 8 June 2005" (TC), 30 June 2005; "Decision on Ndindiliyimana's Request for Certification to Appeal the Chamber's Decision Dated 21 September 2005" (TC), 26 October 2005, para. 7.

[5] T 2 February 2006, p. 51, 52 (French version). By admitting a document as ID evidence, the Chamber acknowledges the existence of the document, but not its content.

[6] T 31 January 2006, p. 86, 87 (French version).

[7] T 31 January 2006, p. 87 (French version).

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Decision on Bizimungu's Motion for Certification of Appeal Against the Decision of 2 December 2005 on the Admissibility of the testimony of Witness AOF 13 March 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

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

Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu – Certification of Appeal, Admissibility of the testimony of Witness that has not be heard yet – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 73 (B)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEIZED OF Augustin Bizimungu's « Requête de la Défense afin de certifier l'appel de la décision rendue le 2 décembre 2005 sur l'admissibilité du témoignage du Témoin AOF (article 73 (B) Règlement de procédure et de preuve) »,[1] filed on 7 December 2005 ("the Motion");

NOTING THAT the Prosecution has not filed a response;

RECALLING its "Decision on Bizimungu's Motion in Opposition to the Admissibility of the Testimony of Witness AOF" filed on 2 December 2005 (the Impugned Decision);

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 73 (B) of the Rules;

HEREBY DECIDES the Motion on the basis of the written brief filed by the Defence for Bizimungu pursuant to Rule 73 (A) of the Rules.

Submissions of the Defence

1. The Defence for Augustin Bizimungu requests the Chamber to grant certification of appeal against the Decision of 2 December 2005 on the admissibility of Prosecution Witness AOF's proposed testimony.

2. The Defence submits that the Decision in question substantially affects the fairness of the proceedings and the outcome of the trial, and that the Chamber should not have declared the proposed testimony of Witness AOF admissible.

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[1] "Defence Motion for Certification of Appeal against the Decision of 2 December 2005 on the Admissibility of the Testimony of Witness AOF (pursuant to Rule 73 (B) of the Rules of Procedure and Evidence)." (Unofficial Translation)

3. The Defence further submits that although in the Decision of 2 December 2005 the Chamber recognised that AOF's proposed testimony relates to new facts not alleged in the Indictment, the Chamber still rejected the Defence arguments, relying instead on the Appeals Chamber's 2004 decision in the *Ntakirutimana* case holding that the Prosecution may cure defects in the Indictment through subsequent communications. According to the Defence, this reasoning runs counter to the position enunciated by the Appeals Chamber in the cases of *Ntagerura et al* and *Nahimana et al*.

4. The Defence asserts that if the Prosecution had had sufficient evidence to charge Bizimungu with the acts alleged by AOF, those allegations would have been included in the Indictment, as were those indicated at paragraph 29 of the Indictment. The Defence further asserts that the Prosecution is attempting to cure defects in the Indictment by using a scheme of deliberate conduct to make up for the inadequacies in its choice of charges to include in the Indictment.

5. The Defence refers to an oral decision by the *Ntagerura* Trial Chamber stating that the Prosecution cannot be allowed to present evidence of crimes that are not charged in the Indictment. According to the Defence, that reasoning should be applied *mutatis mutandis* to the instant case and only the charges appearing at paragraph 29 of the Indictment should be retained. The Defence also refers to concurring decisions by the Trial and Appeals Chambers in the matter of *The Prosecutor v. Tharcisse Muvunyi* according to which statements referring to already existing charges are admissible, but those creating new charges are not.

Deliberations

6. The Chamber recalls Rule 73 (B) of the Rules under which a Trial Chamber may grant certification for an interlocutory appeal if (1) the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (2) in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

7. The Chamber further recalls that its Decision of 2 December 2005 was divided into two parts, reflecting the two primary arguments advanced by the Defence. In the first part, after considering the Defence proposition that Witness AOF's proposed testimony contained allegations that did not appear in the Indictment, the Chamber concluded that those allegations were not new charges but merely new material facts underpinning already-existing charges. In the second part, the Chamber agreed with the Defence that an Accused person cannot be convicted on the basis of allegations falling outside the Tribunal's temporal jurisdiction, but observed that such allegations could nonetheless be admitted into evidence, among other reasons, for the purpose of proving a pattern of conduct that extended into the period of the Tribunal's temporal jurisdiction.

8. The Chamber notes that the Defence has repeatedly challenged the proposed testimony of Prosecution witnesses on the grounds that the allegations about which such witnesses would testify were not contained in the Indictment. In each case, the Chamber has stated that the admissibility of the evidence would be determined during the course of the witness's testimony while the weight to be attached thereto would be decided at the conclusion of the proceedings.

9. Similarly, in the instant situation, the Chamber is of the view that the Defence Motion for certification is premature, as Prosecution Witness AOF is yet to testify. The Chamber notes that it was only on Monday, 27 February 2006 that the Prosecution filed a notice indicating the points of the Indictment to which Witness AOF will testify.[2] At this point in the proceedings, it is not known whether the witness will attempt to introduce testimony about any allegations not contained in the

[2] The Prosecution asserts in the notice that Witness AOF will testify to the allegations contained in the following paragraphs of the Indictment: 2, 3, 17, 21, 22, 23, 24, 25, 27, 59, 61, 68, 69 and 70.

Indictment. It would therefore not be proper for the Chamber to render a ruling on the admissibility of the witness's testimony without having heard it first.

10. Furthermore, in the Chamber's view, the issues involved here have not yet risen to such a level that they would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Consequently, the Chamber concludes that the Defence has failed to satisfy the first condition for the certification of an interlocutory appeal. Having made such a determination, the Chamber need not consider the second criterion for certification.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion for certification of appeal.

Arusha, 13 March 2006.

[Signed] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

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Decision on Nzuwonemeye's Motion to Exclude Parts of Witness AOG's Testimony 30 March 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

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

Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu – Exclusion of testimony related to missing facts of the Indictment, Defect of the Indictment : material facts underpinning the charges have to be pleaded in the Indictment, Cure by cured by giving the Defence clear, timely, and consistent notice of the facts, Conditions to be met for the admission of evidence relating to events that happened prior to the temporal jurisdiction of the Tribunal, Facts relevant to the background and the context – Evidence admitted

International Instruments cited :

Rules of Procedure and Evidence, rules 47 (C), 72, 73, 89 (C) and 95; Statute, art. 20 (4)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Proposed Testimony of Witness DBY, 18 September 2003 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and ICTR-96-17) ; Trial Chamber, The Prosecutor v. Protais Zigiranyirazo, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief, 30 September 2005 (ICTR-2001-73)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEIZED OF François-Xavier Nzuwonemeye's "Urgent Motion to Exclude Parts of Witness AOG's Testimony" filed on 21 February 2006 (the "Motion");

HAVING RECEIVED AND CONSIDERED

i. The "Réponse du Procureur à la requête du conseil de François-Xavier Nzuwonemeye, en date du 21 février 2006, poursuivant l'exclusion d'une partie du témoignage de AOG"[1] filed on 23 February 2006, ("the Response");
ii. The "Defence Reply to the Prosecutor's Response to the Urgent Motion to Exclude Parts of Witness AOG's Testimony" filed on 1 March 2006, ("the Reply");

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules") in particular rules 72, 89 (C) and 95 of the Rules;

HEREBY DECIDES the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73 of the Rules.

Submissions

Relief Sought by the Defence

1. The Defence requests the Chamber to declare irrelevant and therefore inadmissible parts of the testimony given by Prosecution Witness AOG on 20 February 2006, relating to (1) the alleged relationship between the MRND and CDR parties, (2) the events at Nyamirambo Stadium, and (3) the speech delivered by Leon Mugesera in 1992.

Supporting Arguments

2. The Defence argues that the objectionable parts of Witness AOG's testimony concern material facts that are not pleaded in the Indictment and that

> "cannot reasonably be linked to any form of participation such as joint criminal enterprise or a formal charge in the Indictment such as conspiracy in relation to the Accused François-Xavier Nzuwonemeye."[2]

3. The Defence first submits that, pursuant to Rule 47 (C) of the Rules, material facts underpinning the charges in the Indictment must be pleaded with sufficient specificity. In support of this argument, the Defence recalls the Appeals Chamber's statement in *The Prosecutor v. Niyitegeka*, that the

> "obligation on the part of the Prosecution [is] to state the Material Facts underpinning the Charges in the Indictment, but not the evidence by which such Material Facts are to be proven".[3]

The Defence further refers to a decision in the case of *The Prosecutor v. Pauline Nyiramasuhuko*, where the Appeals Chamber stated that

> "for an indictment to be pleaded with sufficient particularity, it must set out the material facts of the Prosecution case with enough detail to inform the defendant clearly of the charges against him or her so that he or she may prepare his or her defence."[4]

4. The Defence submits that neither the Indictment nor the Pre-Trial Brief contain any reference to CDR, Nyamirambo, or Leon Mugesera.[5] The Defence also points out that the Mugesera speech was

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[1] "Prosecutor's Response to François-Xavier Nzuwonemeye's Motion of 21 February 2006, seeking the exclusion of part of AOG's testimony." (Unofficial translation).
[2] Motion, para. 2.
[3] *The Prosecutor v. Niyitegeka*, Case No.96-14-A, Appeals Judgment, 9 July 2004, para. 193.
[4] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's request for Reconsideration, 27 September 2004, paras. 11-12.

specifically pleaded in the Indictment against *Casimir Bizimungu et al*.[6] The Defence then argues that the jurisprudence on allowing the Prosecution to lead evidence not included in the Indictment can be summarized by the following statement from a decision of the Trial Chamber in the case of *The Prosecutor v. Protais Zigiranyirazo*:

> "the process of curing an indictment does take place only when the material fact was already in the Indictment in a certain manner, not when it was not included at all."[7]

5. The Defence further submits that the Prosecution did not adequately meet the requirement of stating the material facts underpinning the charges in the Indictment relating to conspiracy. According to the Defence, "paragraph 24 of the English version of the Indictment, in its vagueness does not come near the requirements of sufficiency in pleading" and cannot be used as a basis for leading the evidence that the Prosecution seeks to introduce.[8]

6. The Defence then suggests that the "Prosecutor relies heavily on the joint criminal enterprise theory to lead evidence from Witness AOG on important material facts, which are not pleaded in the Indictment",[9] and argues that the Prosecution cannot do this because the joint criminal enterprise theory is itself not properly pleaded in the Indictment. Citing *The Prosecutor v. Simic*,[10] the Defence emphasizes that in order to rely on the joint criminal enterprise theory, the Prosecution must specify the following in Indictment: the nature or purpose of the joint criminal enterprise; the time at which or the period over which the enterprise is said to have existed; the identity of those engaged in the enterprise, in so far as their identity is known, but at least by reference to their category as a group; and the nature of the participation by the accused in that enterprise. The Defence submits that joint criminal enterprise is not specifically referred to in this Indictment, and that none of the criteria listed above are set forth in it.[11]

6. The Defence further submits that the mention of the theory of joint criminal enterprise liability in the Pre-Trial Brief is not sufficient to cure its absence from the Indictment.

The Prosecution's Response

7. In response to the Motion, the Prosecution first submits that paragraphs 22-25 of the Indictment refer to the emergence of a doctrine of exclusion that developed in the institutions of Rwanda, beginning in October 1990.[12] The Prosecution emphasizes the necessity of understanding the context surrounding the genocide, citing as support the decision of this Chamber on 15 July 2004, in which the Chamber refused to strike paragraphs 25, 26, 27 and 28 of the Indictment because "these particular paragraphs may be of great significance in establishing that there was a criminal enterprise for a conspiracy to commit genocide".[13]

8. According to the Prosecution, an Indictment should not be a catalogue of historical facts; it should outline the main tenets of the doctrine underlying the genocide, and allow the Pre-Trial Brief, the disclosure of evidence, and the testimony of witnesses to fill in the details.

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[5] Motion, para. 10.
[6] The Prosecutor v. Casimir Bizimungu et al., Indictment, 12 may 1999, para. 5.8.
[7] *The Prosecutor v. Protais Zigiranyirazo*, Case N°ICTR-2001-73-PT, ""Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief", 30 September 2005, para. 13.
[8] Motion, para. 14.
[9] Motion, para. 17.
[10] *The Prosecutor v. Simic*, Case N°IT-95-9-T, Judgment, 17 September 2003, para.145.
[11] Motion, para. 20.
[12] Response, para. 3.
[13] *The Prosecutor v. Augustin Bizimungu*, Case N°ICTR-00-56-I, Decision on Augstin Bizimungu's Preliminary Motion, 15 July 2004, paras. 26-27.

9. The Prosecution points out that the Mugesera Speech was delivered to the Defence in Volume VI of its disclosure of supporting materials, sent by registered mail to the Registrar on 17 March 2004. The report of the International Commission of Inquiry set up by various human rights organizations in 1993, which analyzed the Mugesera speech, was disclosed at the same time. The Prosecution further remarks that Mugesera's indoctrinating works are specifically referred to in paragraph 13 of the Pre-Trial Brief.

10. The Prosecution then submits that paragraphs 23-25 of the Indictment do not always relate to the personal conduct of the Accused; their purpose is to explain a policy and outline a doctrine whose goal was to federate extremist Hutus. Citing the *Nitiyegeka* and *Blaskic* judgments in general as support, the Prosecution argues that the degree of specificity required in these circumstances is not the same as when the personal conduct of the Accused is in issue.[14]

11. Quoting from the *Nahimana* Judgment, the Prosecution submits that "conspiracy to commit genocide can be inferred from coordinated action by individuals who have a common purpose and are acting within a unified framework",[15] and suggests that the Accused Nzuwonemeye, by virtue of the conduct referred to in paragraphs 34, 38 and 39 of the Indictment, participated in the rupture of the constitutional order that laid the groundwork for the genocide.[16]

12. The Prosecution asserts that the Defence made a request similar to the present one during the hearing of 20 February 2006, and that this request was denied by the Chamber. Given this, the Prosecution argues that the admissibility of a second motion on this issue is debatable at best.[17]

13. The Prosecution further argues that by virtue of Rule 72, as well as the decision taken by Judge Arlette Ramaroson on the occasion of the new initial appearance convened on 30 April 2004, the Defence was obliged to raise any defects in the form of the Indictment within one month of receiving the translation it requested. According to the Prosecution, this deadline having passed, the Defence may not raise this objection during the course of the trial.

14. Finally, the Prosecution submits that according to Rule 98 *bis*, if the Defence considers that the charges against the Accused Nzuwonemeye are insufficient or that the crime of conspiracy has not been established, it must wait until the close of the Prosecution's case to make these arguments.

The Defence Reply

15. In reply to the Prosecution's Response, the Defence argues that the objections being raised in relation to the testimony of Witness AOG go to the substance and not the form of the Indictment, and that the thirty day deadline imposed by Rule 72 therefore does not apply in this instance.[18]

16. With respect to the specificity of the Indictment in relation to the conspiracy charge, the Defence argues that mere disclosure of a potential exhibit is insufficient to enable the defence to prepare its case, citing as support a decision in *The Prosecutor v. Radoslav Broanin and Momir Talic*, in which a Trial Chamber of the ICTY held that "notice that such evidence will be led in relation to a particular offence charged is *not* sufficiently given by the mere service of witness statements by the prosecution pursuant to the disclosure requirements imposed by Rule 66 (A)."[19]

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[14] Response, paras. 8-9.
[15] *The Prosecutor v. Ferdinand Nahimana et al.*, Case N°ICTR-99-52-T, Judgment and Sentence, 3 December 2003, para. 1047.
[16] Response, para. 10-11.
[17] Response, para. 14.
[18] Reply, paras. 3-5.
[19] *The Prosecutor v. Radoslav Brdanin and Momir Talić*, Case N°IT-99-36-PT, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend", 26 June 2001, para. 62.

17. The Defence further notes that the Prosecution voluntarily removed an explicit reference to the Mugesera speech from paragraph 4.11 of the second Indictment dated 17 October 2002.[20]

18. Finally, the Defence remarks that the Prosecution does not address the issue of joint criminal enterprise in its Response, and reiterates that this theory was not pleaded in the Indictment.[21]

HAVING DELIBERATED

19. The Chamber recalls the provisions of Article 20 (4) of the Statute, which sets out minimum guarantees for the Accused, including the right to be informed promptly and in detail of the nature and cause of the charge against him; Rule 47 (C) of the Rules, which stipulates that the indictment must set forth a concise statement of the facts of the case and of the crime with which the suspect is charged; and Rule 89 (C) which allows the Chamber to admit any relevant evidence which it deems to have probative value.

20. The Chamber considers that the gist of the Defence argument has two limbs to it: first, the Defence argues that the alleged relationship between the MRND and CDR parties, the arrest and detention of five thousand people at Nyamirambo stadium in 1990, and a speech given by Léon Mugesera in 1992, are material facts that have not been pleaded in the Indictment or the Pre-trial brief and therefore witness AOG's evidence relating to those facts is irrelevant and inadmissible. Second, the Defence argues that the Prosecution relies on the theory of joint criminal enterprise to lead evidence on important material facts not pleaded in the Indictment, and that this is impermissible because the theory of joint criminal enterprise has itself not been properly pleaded in the Indictment.

21. The Chamber notes that the Indictment does not explicitly refer to the relationship between the MRND and the CDR party, the arrests at Nyamirambo stadium, or the 1992 speech of Léon Mugesera. The Chamber considers that material facts underpinning the charges have to be pleaded in the Indictment. If they are not, the Indictment is defective. However, the defect can be cured by giving the Defence clear, timely, and consistent notice of the said facts through other communications from the office of the Prosecutor such as the pre-trial brief, the Prosecutor's opening statement, or witness statements.[22] Notice of material facts must be received in such circumstances that the Defence cannot claim to have been taken by surprise if the Prosecutor seeks to lead evidence relating to the facts in question.[23]

22. On the other hand, if the evidence sought to be tendered does not, in the Chamber's view, constitute a material fact, the Chamber must be satisfied that it is otherwise relevant so as to justify admission. In this respect, the Chamber is mindful of the jurisprudence of the Tribunal to the effect that evidence relating to events that happened prior to the temporal jurisdiction of the Tribunal can be admitted if (i) it is relevant to an offence continuing into the mandate year; (ii) the evidence provides context or background to the crime charged; or (iii) the evidence constitutes 'similar fact evidence' that demonstrates a consistent pattern of conduct.[24]

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[20] Reply, para. 9.
[21] Reply, para.10.
[22] *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana,* Cases N°ICTR-96-10-A and ICTR-96-17-A, 13 December 2004, para. 25, 27.
[23] *Ibid*., at para 27. The Appeals Chamber noted that whether 'facts' are 'material' depends on the nature of the case. It also indicated that 'mere service of witness statements by the [p]rosecution pursuant to the disclosure requirements' of the rules does not suffice to inform the Defence of material facts that the prosecution intends to prove at trial.
[24] *The Prosecutor v. Bagosora et al*., Case N°ICTR-98-41-T, "Decision on Admissibility of Proposed Witness DBY", 18 September 2003, paras 4-14.

23. With respect to the relationship between the MRND and CDR parties, and the arrest and detention of people at the Nyamirambo stadium in 1990, the Chamber notes that neither of these events is specifically pleaded in the Indictment. They evidently took place before 1994, thus falling outside the temporal jurisdiction of the Tribunal. The Prosecutor, however, argues that they are relevant to the context that engendered the genocide and are therefore admissible on that ground.

24. The Chamber recalls a recent Decision in the *Zigiranyirazo* case, where the Trial Chamber held that evidence relating to the MRND and the establishment of *Interahamwe*, the Arusha *Accords*, the 'Hutu Power' movement and the Bugesera campaign were

> "facts [that] are only relevant to the background and the context of the specific allegations brought against the Accused."

The Chamber notes that the facts in the *Zigiranyirazo case* were not pleaded in the Indictment, but were mentioned in the pre-trial brief.[25]

25. The Chamber has considered witness AOG's testimony relating to the CDR Party and the arrest and detention of people at the Nyamirambo stadium, and is satisfied that this testimony is relevant to the background of some of the allegations laid against the Accused. Specifically, the evidence is relevant to the background and historical context of paragraphs 22 through 25 of the Indictment, which describe the conspiracy to commit genocide charged in Count 1, and paragraphs 26 through 37, which describe the acts that were executed in preparation for the genocide.

26. With respect to the Léon Mugesera speech, the Chamber again notes that this is not specifically pleaded in the current Indictment. The Chamber notes, however, that paragraph 13 of the Pre-Trial Brief dated 1 September 2004, mentions 'articles' authored by Mugesera, and his role in the incitement of hatred against the Tutsis. The Chamber further notes that the text of the Mugesera speech was disclosed to the Defence on 17 March 2004 as part of the supporting materials. In the circumstances, the Chamber considers that neither the mention, nor the content of Mugesera's speech by witness AOG in his testimony on 20 February 2006 could have taken the Defence by surprise. The Chamber is satisfied that the Defence received clear, timely and consistent notice of the Prosecution's intention to rely on the speech as relevant supporting material with respect to the strategy of "incitement to hatred" and to the "definition of the enemy" described in paragraph 25 of the Indictment. Consequently, the Prosecution's failure to specifically mention the speech in the Indictment does not render witness AOG's testimony on this issue inadmissible.

27. Having decided that the evidence of witness AOG on the relationship between the MRND and CDR parties, the arrest and detention of people at Nyamirambo stadium, and the speech of Léon Mugesera is admissible on the grounds discussed above, the Chamber sees no need, at this stage of the proceedings, to determine the question whether joint criminal enterprise has been adequately pleaded in the Indictment.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion in its entirety.

Arusha, 30 March 2006.

[Signed] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

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[25] *The Prosecutor v. Protais Zigiranyirazo,* case N°ICTR-2001-73-PT, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief, 30 September 2005, paras 16-18.

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Decision on the Prosecutor's Ex-Parte Motion for the Transfer of Witnesses Detained or Placed under Court Supervision Pursuant to Rules 54 and 90 bis of the Rules of Procedure and Evidence
13 April 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

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

Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu – Transfer of detained witnesses, Cooperation of Rwanda requested

International Instrument cited :

Rules of Procedure and Evidence, rule 90 bis (B)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding (the "Chamber");

BEING SEISED OF the "Prosecutor's *Ex-Parte* Motion for the Transfer of Witnesses Detained or Placed Under Court Supervision Pursuant to Rules 54 and 90 *bis* of the Rules of Procedure and Evidence", filed on 12 April 2006 (the "Motion");

NOTING the Prosecutor's letter of 8 March 2006 to the Rwandan Ministry of Justice seeking confirmation that the conditions for transfer of detained witnesses under the Rules are met;

TAKING INTO CONSIDERATION the letter of 11 April 2006 from the Rwandan Ministry of Justice to the Tribunal's Prosecutor, in which it is confirmed that Witnesses DO, ANF, XXQ and GFQ are available during the period they are required to be present at the Tribunal as Prosecution witnesses;

TAKING INTO CONSIDERATION that the trial against the four accused will resume on 2 May 2006;

TAKING INTO ACCOUNT the provisions in Rule 90 *bis* (B) which require that a transfer order for a detained witness shall be issued only after prior verification that:

(i) The presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;

(ii) Transfer of the witness does not extend the period of his detention as foreseen by the requested State.

SATISFIED that these conditions have been met in the present case;

HEREBY ORDERS that Witnesses DO, ANF, XXQ and GFQ shall be transferred temporarily to the Tribunal's Detention Facilities in Arusha for a period not exceeding three (3) months with effect from 20 April 2006, in order to testify in the trial against the four accused;

INSTRUCTS the Registry to:

- transmit this order to the Government of Rwanda and the Government of Tanzania;

- ensure the proper conduct of the transfer, including the supervision of the witnesses in the Detention Unit of the Tribunal;
- remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the length of the temporary detention, and, as promptly as possible, inform the Judges of any such change.

REQUESTS the Government of Rwanda and the Government of Tanzania to cooperate with the Registry in the implementation of this Order;

Arusha, 13 April 2006.

[Signed] : Asoka de Silva

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Decision on Nzuwonemeye's Motion Requesting Cooperation from the Government of Belgium Pursuant to Article 28 of the Statute 7 June 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

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

François-Xavier Nzuwonemeye – Cooperation of the States, Belgium, Party seeking cooperation must to the extent possible specify the nature and purpose of the assistance sought, Demonstration of prior unsuccessful efforts, UNAMIR Soldiers, Consent of the United Nations Assistant Secretary General for Legal Affairs to the proposed meetings – Motion granted

International Instruments cited :

Rules of Procedure and Evidence, rules 54 and 73 (A) ; Statute, art. 28 and 28 (2)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana, 25 May 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request to the Kingdom of The Netherlands for Cooperation and Assistance, 7 February 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute, 31 October 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana et al., Decision on Nzuwonemeye's Ex Parte and Confidential Motion to Obtain the Cooperation of the Kingdom of Belgium, 9 November 2005 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. François-Xavier Nzuwonemeye, Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of the Netherlands Pursuant to Article 28 of the Statute, 13 February 2006 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana, Decision on Nzuwonomeye's Motion Requesting Cooperation From the Government of Ghana Pursuant to Article 28 of the Statute, 13 February 2006 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. François-Xavier Nzuwonemeye, Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of Togo Pursuant to Article 28 of the Statute, 13 February 2006 (ICTR-2000-56)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Radislav Krstić, Decision on Application for subpoenas, 1 July 2003 (IT-98-33)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEISED OF Nzuwonemeye's "Motion for Request of Cooperation from the Government of Belgium Pursuant to Article 28 of the Statute" filed on 18 May 2006 (the "Motion");

NOTING that the Prosecution has not filed a response;

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Article 28 of the Statute and Rule 54 of the Rules;

HEREBY DECIDES the Motion on the basis of the written submissions filed by the Defence pursuant to Rule 73 (A) of the Rules.

Submissions of the Defence

1. The Defence for Nzuwonemeye requests the Chamber to issue an order for cooperation and assistance of the Government of Belgium in order to facilitate an interview with Major Maggen and Colonel Joseph Dewez.[1] The Defence wishes to interview the individuals concerned about various issues related to their role as UNAMIR (United Nations Assistance Mission for Rwanda) soldiers in Rwanda in 1994, including (a) their perception of the events in Rwanda in 1994; (b) their perception of the military situation in Rwanda and the role of the UNAMIR; (c) the meetings they attended on 6 and 7 April 1994 with the Rwandan senior military officers; (d) the death of the 10 Belgian UNAMIR soldiers on 7 April 1994; and (e) the murder of Agathe Uwilingiyimana, former Prime Minister of Rwanda.[2]

2. The Defence submits that it has received a letter from the United Nations Assistant Secretary General for Legal Affairs indicating that the United Nations has no objection to the meeting and interview, provided that the questions asked do not concern "(i) information that was provided in confidence to the United Nations by a third person or State or (ii) what happened during closed meetings or informal consultations of the Security Council or (iii) information the disclosure of which would place anyone's life in danger."[3]

3. The Defence submits that on 28 November 2005, it wrote to Belgium's Minister of Defence to provide the team with the contact details of the former UNAMIR soldiers named above and for authorization to meet with them.[4] On 4 January 2006 the Defence received a letter from the Minister of Defence of Belgium forwarding the request to the Ministry of Justice.[5] On 10 February 2006, the Defence received a letter from the Ministry of Justice denying its request to interview Major Maggen and Colonel Dewez, on the ground that the Ministry considers Article 28 of the Statute to only apply to requests made to a State by the Prosecutor or by the Tribunal, and therefore the Defence request

[1] Motion, para. 8.
[2] Motion, para. 3
[3] Motion, para 2, Annex 1 to the Motion;
[4] Motion, para. 4, Annex 2.
[5] Motion, para 5.

could not be granted.[6] The Ministry, however, indicated that this request would be granted, upon an Order of the Tribunal.[7]

4. Finally, the Defence submits that it is not fully aware of the nature and relevance of the testimony of these prospective witnesses and therefore it is in the interests of justice to allow the Defence to meet Major Maggen and Colonel Dewez to assess their potential testimonies.[8]

Deliberations

5. The Chamber recalls that Article 28 of the Statute imposes an obligation on States to

> "cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law."

Article 28 (2) provides a non-exhaustive list of the types of cooperation or assistance which the Tribunal may seek from States. According to the jurisprudence of the Tribunal, the Chamber's power under Article 28 may include any request or order the purpose of which is to assist the Tribunal in its mandate.[9] In addition, the Chamber recalls Rule 54 of the Rules which enables it to issue any orders it deems necessary for the investigation, preparation or conduct of the trial at the request of either party or *proprio motu*. Acting under Article 28 and Rule 54, the Chamber has recently issued four orders for State cooperation in the instant case.[10]

6. The Chamber further recalls the jurisprudence of the Tribunal to the effect that the party seeking an order under Article 28 must, to the extent possible, specify the nature and purpose of the assistance sought from the requested State, as well as its relevance to the trial. It must also demonstrate that efforts have been made to obtain such assistance, and that these efforts have been unsuccessful.[11]

7. The Chamber notes that the Motion[12] specifies the nature of the information sought, as well as its relevance to the trial. Annex 2 to the Motion demonstrates that the Defence has made reasonable efforts to obtain the assistance of the Government of Belgium by requesting authorization to meet with the former UNAMIR soldiers in question. The Chamber further notes that Annex 3 to the Motion demonstrates that the Defence efforts have been unsuccessful. The Chamber therefore concludes that the criteria for granting an order requesting cooperation under Article 28 have been met. Additionally, the Belgian authorities have indicated their willingness to comply with such a request, provided that it is in the form of an order issued by this Tribunal.

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[6] Motion, para. 6, Annex 3.
[7] Motion, para 6, Annex 3.
[8] Motion, para.7.
[9] *Prosecutor v. Bagosora et al.*, Case N°ICTR-98-41-T, "Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance", 7 February 2005 (TC I), para. 4 [hereinafter '*Bagosora* 7 February 2005 Decision'].
[10] *Prosecutor v. Ndindiliyimana et al.*, Case N°ICTR-00-56-T, "Decision on Nzuwonemeye's *Ex Parte* and Confidential Motion to Obtain the Cooperation of the Kingdom of Belgium", 9 November 2005 (TC II) [hereinafter '*Ndindiliyimana* 9 November 2005 Decision']; *Prosecutor v. Ndindiliyimana et al.*, Case N°ICTR-00-56-T, "Decision on Nzuwonemeye's Motion Requesting the Cooperation from the Government of the Netherlands pursuant to Article 28 of the Statute", 13 February 2006 (TC II); *Prosecutor v. Ndindiliyimana et al.*, Case N°ICTR-00-56-T, "Decision on Nzuwonemeye's Motion Requesting the Cooperation from the Government of Ghana pursuant to Article 28 of the Statute", 13 February 2006 (TC II); *Prosecutor v. Ndindiliyimana et al.*, Case N°ICTR-00-56-T, Decision on Nzuwonemeye's "Motion Requesting the Cooperation from the Government of Togo pursuant to Article 28 of the Statute", 13 February 2006 (TC II); [hereinafter '*Ndindiliyimana* 13 February 2006 Decisions'].
[11] *Prosecutor v. Bagosora* et al., "Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana", 25 May 2004 (TC I), para. 6, cited with approval in *Ndindiliyimana* 9 November 2005 Decision, para. 10; cited with approval in *Ndindiliyimana* 13 February 2006 Decisions, para. 6. See also *Prosecutor v. Bagosora et al.*, "Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute", 31 October 2005 (TC I), para. 2; *Bagosora* 23 June 2004 Decision, para. 4; *Bagosora* 7 February 2005 Decision, para. 5.
[12] Motion, para. 3.

8. Furthermore, the Chamber agrees with the *ad-hoc* Tribunals' jurisprudence that when the Defence is not fully aware of the nature and relevance of the testimony of a prospective witness, it is in the interests of justice to allow the Defence to meet the witness and assess his testimony.[13]

9. However, in issuing the order for cooperation, the Chamber is mindful of the fact that the United Nations Assistant Secretary General for Legal Affairs consented to the proposed meetings based on a number of conditions.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion;

RESPECTFULLY REQUESTS the Government of the Kingdom of Belgium to give its full cooperation to allow the Defence team for Nzuwonemeye to meet with and interview Major Maggen and Colonel Dewez, at a place convenient to all the Parties;

ORDERS that during the meetings, the Defence shall not ask any questions relating to:

(i) information that was provided in confidence to the United Nations by a third person or State;
(ii) what happened during closed meetings or informal consultations of the Security Council; and
(iii) information the disclosure of which would place anyone's life in danger;

DIRECTS the Registry to transmit this Order to the relevant authorities of the Government of the Kingdom of Belgium; to collaborate with the Defence for Nzuwonemeye in the implementation of this request; and to report back to the Chamber.

Arusha, 7 June 2006.

[Signed] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

[13] *Prosecutor v. Bagosora et al.,* Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004 (TC I), para. 4. See also *Prosecutor v. Krstić*, Case N°IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 (ICTY Appeals Chamber), para. 8. Motion para. 7.

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Decision on Ndindiliyimana's Extremely Urgent Motion to Prohibit the Prosecution from Leading Evidence on Important Material Facts not Pleaded in the Indictment Through Witness ANF
15 June 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

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

Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu – Exclusion of testimony related to missing facts of the Indictment, Obligation of the Prosecution to state the material facts underpinning the charges in the Indictment but not the evidence, Requisite degree of specificity to be made on case-by-case basis, Pleading of superior responsibility, Cure of the defects by providing the Accused with timely, clear and consistent information underpinning the charges against him or her, Proposed testimony in possession of the Prosecution for three years, Defect in the Indictment had been cured by subsequent disclosure – Motion dismissed

International Instruments cited :

Rules of Procedure and Evidence, rule 47 (C) and 73 (A) ; Statute, art. 20 (4) (a)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Eliezer Niyitegeka, Judgement, 9 July 2004 (ICTR-96-14) ; Trial Chamber, The Prosecutor v. Emmanuel Ndindabahizi, Judgement, 15 July 2004 (ICTR-2001-71) ; Appeals Chamber, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and ICTR-96-17)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Zoran Kupreškić, Judgement, 23 October 2001 (IT-95-16) ; Appeals Chamber, The Prosecutor v. Mladen Naletilić and Vinko Martinović, Judgement, 3 May 2006 (IT-98-34)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEISED OF the « Requête en extrême urgence d'Augustin Ndindiliyimana aux fins d'interdire au procureur d'introduire en preuve à travers le témoin ANF des faits matériels essentiels non repris dans l'acte d'accusation »[1] filed on 16 May 2006 (the "Motion");

HAVING RECEIVED AND CONSIDERED the

(i) « Réponse du Procureur à la Requête en extrême urgence d'Augustin Ndindiliyimana aux fins d'interdire l'introduction en preuve, à travers le témoin ANF, des faits matériels non repris dans l'acte d'accusation »,[2] filed on 18 May 2006 (the "Response");

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[1] "Augustin Ndindiliyimana's extremely urgent Motion to Prohibit the Prosecution From Leading Evidence on Important Material Facts not Pleaded in the Indictment through Witness ANF" (Unofficial Translation).

(ii) « Réponse de la Défense d'Augustin Bizimungu au soutien de la Requête en extrême urgence d'Augustin Ndindiliyimana datée du 16 mai 2006 »,[3] filed on 19 May 2006 (the "Bizimungu Response in support");

(iii) « Réplique à la 'Réponse du Procureur à la Requête en extrême urgence d'Augustin Ndindiliyimana aux fins d'interdire l'introduction en preuve, à travers le témoin ANF, des faits matériels non repris dans l'acte d'accusation' »,[4] filed on 23 May 2006 (the "Reply").

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Article 20 (4) (a) of the Statute and Rule 47 (C) of the Rules;

HEREBY DECIDES the Motion on the basis of the written submissions filed by the Parties pursuant to Rule 73 (A) of the Rules.

Submissions of the Parties

The Defence Motion

1. The Defence requests the Chamber to prohibit the Prosecutor from leading evidence through Witness ANF, on some important material facts that are not pleaded in the Amended Indictment of 23 August 2004.

2. The Defence submits that Prosecution Witness ANF's statement deals almost exclusively with important events alleged to have occurred in Ntyazo *commune* and in the town of Nyanza, in which some *gendarmes* might have been involved whereas in the entire Indictment, there is no direct or indirect reference to the events at Ntyazo and Nyanza or to the alleged involvement of *gendarmes* in these events. The Defence refers in particular to the following alleged events:

a. On 18 April 1994, the *gendarmes* at Nyanza attacked a vehicle full of Tutsis and killed them at a distance of about 3 kilometres from the Ntyazo Communal Office.
b. Biguma told his fellow *gendarmes* at his friends' office to start killing.
c. At the Ntyazo trade centre, *gendarmes* incited the population and some Burundian refugees to kill Tutsis.
d. Chief Warrant Officer Biguma and his men pursued Nyagasasa, the *Bourgmestre* of Ntyazo, hunted him down, and killed him in Nyanza, together with numerous Tutsis including Pierre Nyakarashi.
e. Sergeant Kabera killed Tutsis in Ndago *cellule*, Bugali *secteur*.
f. The massive attack and extermination of refugees on Karama hill with the participation of *gendarmes*.
g. The attack by *gendarmes* on refugees in Kaguma *secteur*.
h. The murders of Rwabuhihi and Nzayinambaho

3. The Defence submits that the Chamber should resolve this matter beforehand and definitively, and thus save itself from the trouble of having to deal with this question during the witness's testimony, which could slow down the proceedings considerably.

4. The Defence refers to Article 20 (4) (a) of the Statute and, relying in particular on the "Cyangugu" Judgement[5] and the *Blaskic*[6] Appeals Chamber Judgement, submits that the Prosecution is

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[2] "The Prosecution's Response to Augustin Ndindiliyimana's extremely urgent Motion to Prohibit the Introduction of Evidence on Material Facts not Pleaded in the Indictment through Witness ANF" (Unofficial Translation).
[3] "The Response of Augustin Bizimungu's Defence in Support of Augustin Ndindiliyimana's extremely urgent Motion dated 16 May 2006" (Unofficial Translation).
[4] "The Reply to '[t]he Prosecution's Response to Augustin Ndindiliyimana's extremely urgent Motion to Prohibit the Introduction of Evidence on Material Facts not Pleaded in the Indictment through Witness ANF'" (Unofficial Translation).
[5] The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe, Case N°ICTR-99-46-T, Judgement (TC), 25 February 2004.

under the obligation to plead the material facts underpinning the charges against the accused in the Indictment itself regardless of the form of responsibility.

5. The Defence submits that the process of curing a defective Indictment takes place only in exceptional and very limited circumstances when the material fact was already in the Indictment in a certain manner, not when it was not included at all.

6. The Defence submits that ANF's statement is dated 4-6 June 2001 and the most recent Amended Indictment is dated 24 (*sic*) August 2004. On 30 April 2004, the Accused pleaded not guilty to the charges in the Indictment amended by the Prosecutor. By that time, the Prosecutor had had ANF's statement in his possession for almost three years. The Defence therefore argues that the Prosecution could have included in the Indictment the material facts contained in ANF's statement with the aim of making it conform to the letter and the spirit of the Statute and of the jurisprudence developed by the Tribunal and the ICTY.

7. The Defence submits that the Prosecutor deliberately failed to do so and therefore cannot at this stage, lead evidence on these material facts without first filing a motion to amend the Indictment.

8. Finally, the Defence submits that the material facts contained in the Indictment impose a limitation and the Prosecutor should not be authorised to introduce new facts.

The Prosecution Response

9. The Prosecution requests the Chamber to dismiss the Motion as baseless.

10. The Prosecution acknowledges that the facts related by Prosecution Witness ANF are not mentioned in Counts 2 to 8 of the Indictment, but does not agree that they are absent from Count 1 (conspiracy to commit genocide).

11. The Prosecution submits that after a close reading of paragraphs 5, 18, 22, 25 and 53 of the Indictment, it can be said that the facts to which Witness ANF will testify are not new with respect to the Accused person's responsibility in 1994 and with respect to the acts or omissions attributed to him in the above-mentioned paragraphs. On the contrary, the Prosecution argues that the facts clearly illustrate the criminal conspiracy pleaded at Paragraph 22 of the Indictment as well as the refusal of the Accused, who was Chief of Staff of the National *Gendarmerie*, to assume the responsibilities incumbent upon him by protecting the civilian population.

12. The Prosecution further submits that the Accused has had the opportunity and the means to adequately prepare his defence through subsequent disclosures made to him regarding Witness ANF. These disclosures have been numerous, detailed, and more than reasonably timely, in order to allow for an appropriate defence.

13. The Prosecution points out that the redacted statements of Prosecution Witness ANF were transmitted to the Defence on 16 March 2004 and the Pre-Trial Brief on 17 June 2004. The Prosecution further points to paragraphs 89, 90, 92, 97, 98 of the Pre-Trial Brief, the factual summary of Prosecution Witness ANF's statement at page 108 of Annexure IV to the Pre-Trial Brief and the Opening Statement and submits that the Accused was notified of these facts about three to seven months before the start of the trial and was therefore able to adequately prepare his defence.

14. Finally, the Prosecution submits that it was through his own research effort that the Senior Trial Attorney learnt in March 2004 about certain statements concerning *Gendarmerie* Captains

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[6] *The Prosecutor v. Tihomir Blaskic*, Case N°IT-95-14, Judgement (AC), 29 July 2004.

Bilikunzira and Sebuhura and the Senior Trial Attorney immediately disclosed those witness statements to the Defence on 16 March 2004. According to the Prosecution, the trial date had already been set and it would not have been possible for the Chamber to accept another amendment to the Indictment.

Bizimungu's Response in Support of the Motion

15. The Defence for Bizimungu submits that it is in the interests of justice that the questions raised by the Defence for Ndindiliyimana should be examined by the Chamber.

16. The Defence for Bizimungu further submits that the question of material facts not pleaded in the Indictment is a fundamental aspect of the Accused's right to a full defence and a fair trial.

17. The Defence for Bizimungu argues that it has always submitted that the Indictment is the only accusatory instrument under the Statute and the Rules and that evidence may be adduced only in regard to the allegations contained in the Indictment.

18. The Defence for Bizimungu submits that it would be unfair for the Prosecution to introduce material facts that constitute new charges not pleaded in the Indictment.

19. Finally, the Defence for Bizimungu submits that the required specificity for the pleading of charges applies also to the pleading of material facts underpinning the charge of superior responsibility.

The Defence Reply

20. In its reply, the Defence for Ndindiliyimana prays the Chamber to reject the Prosecution's explanation as to why the material facts of Witness ANF's expected testimony were not included in the Indictment, submitting that the Office of the Prosecutor is one entity and that the Military II Prosecution team has always had various persons involved in the management of the case. The Defence submits that the Office of the Prosecutor had Prosecution Witness ANF's statement in its possession for several years and it deliberately abstained from pleading the material facts in the Indictment.

21. Defence for Ndindiliyimana also prays the Chamber to reject the Prosecution's argument that by the time Prosecution Witness ANF's statement was 'discovered', a trial date had already been set and it would not have been possible for the Chamber to accept another amendment to the Indictment, submitting that it is not up to the Parties to anticipate the decision of the Chamber.

22. The Defence for Ndindiliyimana asks the Chamber to take note of the Prosecution's admission that the facts related by Prosecution Witness ANF are not mentioned in Counts 2 to 8 of the Indictment and submits that the Prosecution therefore does not intend to prove Counts 2 to 8 through Prosecution Witness ANF.

23. The Defence for Ndindiliyimana further submits that, contrary to the Prosecution's assertion, paragraphs 5, 18, 22, 25 and 53 in support of Count 1 do not contain the facts which Witness ANF is expected to testify about.

24. Finally, the Defence for Ndindiliyimana wishes to reiterate its position that it has to defend itself only against the Indictment to which the Accused has pleaded not guilty and that it has prepared its defence only with respect to the material facts included in that document and on which the Prosecution has based its case.

Deliberations

25. The Chamber recalls Article 20 (4) (a) of the Statute which guarantees an accused the 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".

In addition, Rule 47 (C) of the Rules provides that

> "[t]he indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged".

In the jurisprudence of the Tribunal and the ICTY, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the Indictment, but not the evidence by which such material facts are to be proved at trial.[7] The determination of whether a particular fact is material and whether that fact has been pleaded with the requisite degree of specificity must be made on case-by-case basis.[8] The Appeals Chamber in *Ntakirutimana* reasoned that in cases where the Prosecution alleges personal physical commission of specific criminal acts, such as murder of a named individual, the indictment should set forth such material facts as "the identity of the victim, the time and place of the events and the means by which the acts were committed." On the other hand, such detail need not be pleaded where the sheer scale of the alleged crimes makes it impracticable to require the same degree of specificity in such matters.[9]

26. With regard to the pleading of superior responsibility, the Chamber recalls that the Indictment has to set forth (a) (i) that the accused is the superior of (ii) subordinates sufficiently identified, (iii) over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and (iv) for whose acts he is alleged to be responsible; (b) the conduct of the accused by which he may be found to (i) have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates, and (ii) the related conduct of those others for whom he is alleged to be responsible; and (c) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[10] Failure to plead these material facts renders the Indictment defective.[11]

27. The Chamber however recalls that defects in the Indictment may be cured where the Prosecution provides the Accused with timely, clear and consistent information underpinning the charges against him or her.[12] The Appeals Chamber has expressly found that certain defects in an Indictment may be cured through the Prosecution's Pre-trial Brief, during disclosure of evidence or through proceedings at trial.[13] Whether a defect in the Indictment has been cured by subsequent disclosure involves, *inter alia*, consideration of the period of notice given to the Accused and the importance of the information to the ability of the Accused to prepare his or her defence.[14] Mention of a material fact in a witness statement does not necessarily constitute adequate notice: the Prosecution must convey that the material allegation is part of the case against the Accused.[15] The essential

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[7] *The Prosecutor v. Kupreskic et al.*, Case N°IT-95-16-A, Judgement (AC), 23 October 2001, paras. 88-90; see also *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases N°ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004, para. 24.
[8] *Kupreskic*, Judgement (AC), paras. 89-90; *Ntakirutimana*, Judgement (AC), para. 25.
[9] *Kupreskic*, Judgement (AC), para. 89, *Ntakirutimana*, Judgement (AC), para. 25.
[10] *Blaskic*, Judgement (AC), 29 July 2004, para. 218.
[11] *Kupreskic*, Judgement (AC), para. 112.
[12] *Kupreskic*, Judgement (AC), para. 114; See also *The Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Case N°IT-98-34-A, Judgement (AC), 3 May 2006, para. 26.
[13] *Ntakirutimana*, Judgement (AC), para. 27.
[14] *The Prosecutor v. Niyitegeka*, Case N°ICTR-96-14-T, Judgement (AC), 9 July 2004, para. 197; *Ntakirutimana*, Judgement (AC), paras. 82-84; *The Prosecutor v. Emmanuel Ndindabahizi*, Case N°ICTR-2001-71-I, Judgement (TC), 15 July 2004, para. 29.
[15] *Ntakirutimana*, Judgement (AC), para. 27 ("mere service of witness statements by the [P]rosecution pursuant to the disclosure requirements of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial"); *Niyitegeka*, Judgement (AC), para. 197.

question is whether the Defence has had reasonable notice of, and a reasonable opportunity to investigate and confront the Prosecution case.[16]

28. In the instant case, the Chamber notes that Prosecution Witness ANF's proposed testimony does not involve the *direct* participation of the Accused in the alleged events in Butare *préfecture* in 1994 but refers to his superior responsibility as set forth in paragraphs 61, 78, 109 and 118 and, to a certain extent, in Paragraph 53 of the Amended Indictment of 23 August 2004. The Chamber notes, however, that the events contained in Prosecution Witness ANF's statement are not specifically pleaded in the Indictment.

29. Although the scale of the alleged events mentioned in Witness ANF's proposed testimony makes it impractical to plead the facts with the same specificity required for acts involving the direct participation of an accused person, the Chamber considers it entirely possible for the Prosecution to have included the alleged events in the Indictment in at least a summarised form. The Chamber recalls that the Prosecution had been in possession of Witness ANF's statement for almost three years by the time the Indictment was amended. The Chamber is of the opinion that the Prosecution's argument that a member of its team "discovered" ANF's statement only in 2004 cannot serve as an excuse for the failure to plead the events in the Indictment. The Chamber finds the Indictment defective on this point.

30. With regard to the question whether the defect has been cured by subsequent disclosure, the Chamber recalls the summary of Prosecution Witness ANF's proposed testimony[17]:

> Witness will testify that following the death of President Habyarimana, *gendarmes* including their commanders Adjutant Biguma and 1st Sgt. Twagirayezu incited the local authorities and Hutu civilians to kill all Tutsis in Butare Prefecture and assisted them in killing the Tutsis and moderate Hutus including the bourgmestre of Ntyazo commune, Nyagasaza, the families of the President of the Community Court in Ntyazo, Rwabuhihi Jean Pierre and his brother Nzayinambaho, at various locations in Ntyazo commune especially at the Karama Hill in Karuyumba Cellule. Witness will also say that the attackers looted Tutsi's property.

31. The Chamber notes that, according to Annex IV of the Pre-Trial Brief, the summary is relevant to Count 2 and 3 (Genocide and Complicity in Genocide) and Count 4 and 5 (Murder and Extermination as Crimes against Humanity).[18] Furthermore the Chamber notes that paragraphs 92 and 97 of the Pre-Trial Brief specifically mention the alleged massacre of Tutsis on Karama hill "by a Gendarmerie detachment led by Sergeant Twagirayezu." Finally, the Chamber notes that the list of points of the Indictment to which Prosecution Witness ANF will testify includes, *inter alia*, paragraphs 53, 61, 78 and 109.[19]

32. The Chamber observes that the Pre-Trial Brief and its annexes were filed on 1 September 2004, more than 20 months prior to Prosecution Witness ANF's expected testimony. Prosecution Witness ANF's redacted statement was disclosed in March 2004, the unredacted version in November 2005. The Chamber considers that the summary of Prosecution Witness ANF's proposed testimony as annexed to the Pre-Trial Brief, the specific reference to Counts 2-5, the indications in paragraphs 92 and 97 of the Pre-Trial Brief itself and the list of points in the Indictment put the Accused on sufficient notice that the alleged events in Witness ANF's statement are part of the Prosecution case. The Chamber further considers that the Defence has had timely notice of, and reasonable opportunity to investigate, these allegations. The Chamber therefore finds that the defect in the Indictment has been cured by subsequent disclosure. Accordingly, the Prosecution is allowed to lead evidence through Prosecution Witness ANF on the alleged events in Butare *préfecture* in 1994.

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[16] *Niyitegeka*, Judgement (AC), para. 196.
[17] Annex IV of the Pre-Trial Brief, p. 108.
[18] Ibid.
[19] Filed on 9 May 2006.

FOR THE ABOVE REASONS, THE CHAMBER

DISMISSES the Motion.

Arusha, 15 June 2006.

[Signed] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

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Decision on Ndindiliyimana's Motion for Certification to Appeal the Chamber's Decision dated 15 June 2006
14 July 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

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

Augustin Ndindiliyimana – Certification of appeal, Criteria for certification, Decisions under Rule 73 are in principle without interlocutory appeal, Admissibility of material facts not pleaded in the Indictment as issue which would significantly affect the fairness and expeditious conduct of the proceedings, Possible remedies to cure the defects : strong safeguards to ensure that an accused is not prejudiced – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 73 (B)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Eliezer Niyitegeka, Judgement, 9 July 2004 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and ICTR-96-17) ; Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on Sagahutu's Request for Certification to Appeal, 9 June 2005 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on Bizimungu's Request for Certification to Appeal the Oral Decision Dated 8 June 2005, 30 June 2005 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on Ndindiliyimana's Request for Certification to Appeal the Chamber's Decision Dated 21 September 2005, 26 October 2005 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on Bizimungu's Motion for Certification to Appeal the Chamber's Oral Decision of 2 February 2006 Admitting Part of Witness GFA's Confessional Statement into Evidence", 27 February 2006 (ICTR-2000-56) ; Appeals Chamber, Silvestre Gacumbitsi v. The Prosecutor, Judgement, 7 July 2006 (ICTR-2001-64) ; Appeals Chamber, The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe, Arrêt, 7 July 2006 (ICTR-99-46)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Zoran Kupreškić, Judgement, 23 October 2001 (IT-95-16) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Judgement, 29 July 2004 (IT-95-

14) ; Appeals Chamber, The Prosecutor v. Mladen Naletilić and Vinko Martinović, Judgement, 3 May 2006 (IT-98-34)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

NOTING that Judge Taghrid Hikmet, who is currently away from the seat of the Tribunal, has had the opportunity to read this Decision in draft, agrees with it, and has authorised the Presiding Judge to sign it on her behalf.

Introduction

The trial is proceeding on the basis of the amended Indictment of 23 August 2004. The Prosecution has already called 66 witnesses and is still continuing its case. Prior to the appearance of Prosecution Witness ANF (the Witness), the Defence for Ndindiliyimana filed a motion objecting to the admissibility of the anticipated evidence of the Witness on the basis that it related to material facts not pleaded in the Indictment.[1] In its Decision of 15 June 2006 (the "Impugned Decision"), the Chamber acknowledged that the Indictment was defective in respect of the facts contained in the Witness statement. Nonetheless, the Chamber found that the defects had been cured through subsequent disclosure, specifically the summary of the Witness proposed testimony as annexed to the Pre-Trial Brief and paragraphs 92 and 97 of the Pre-Trial Brief, which provided the necessary details to put the Accused on notice.[2] The Chamber further noted that such notice was given since 1 September 2004, more than 20 months prior to the expected testimony of the Witness, thus providing timely, clear and consistent information to enable the defence to fully prepare its case. The Chamber therefore denied the Defence Motion. On 22 June 2006, the Defence for Ndindiliyimana filed a Motion requesting for certification of appeal against the Impugned Decision.[3] On 26 June 2006, the Prosecution filed its response.[4]

Submission of the Parties

The Defence

1. The Defence submits that the Impugned Decision raises a question that affects the fairness, progress and outcome of the proceedings and that a resolution by the Appeals Chamber would materially advance the proceedings as per Rule 73 (B).

2. The Defence further submits that the Impugned Decision touches upon a fundamental problem since it allows the Prosecution to introduce into evidence material facts and massacre sites not contained in the Indictment, bearing in mind that the latter is the only accusatory instrument against which the Accused has to defend himself. The Defence further submits that by the Impugned

[1] The proposed testimony relates to events alleged to have occurred in Ntyazo *Commune* and in the town of Nyanza and in which *gendarmes* allegedly were involved.
[2] See paras. 30-32 of the Impugned Decision.
[3] « *Requête en certification d'appel contre la* "Decision on Ndindiliyimana's Extremely Urgent Motion to Prohibit the Prosecution from Leading Evidence on Important Material Facts not Pleaded in the Indictment through Witness ANF" *du 15 juin 2006* » ("Motion for Certification to Appeal against the 'Decision on Ndindiliyimana's Extremely Urgent Motion to Prohibit the Prosecution from Leading Evidence on Important Material Facts not Pleaded in the Indictment through Witness ANF' of 15 June 2006") (Unofficial Translation).
[4] « Observations du Procureur sur la Requête en certification d'appel introduite par le conseil d'Augustin Ndindiliyimana contre la décision de la Chambre de première instance II en date du 15 juin 2006 (admission du témoignage de ANF) » ("The Prosecution's Observation on the Motion for Certification introduced by Counsel for Augustin Ndindiliyimana against the Decision of Trial Chamber II dated 15 June 2006 [Admissibility of ANF's Testimony])" (Unofficial Translation).

Decision, the Chamber indirectly allowed an amendment and an extension of the Indictment without having followed the procedure provided to that effect, in flagrant violation of the Statute, the Rules and the jurisprudence developed by the two *ad hoc* Tribunals.

3. The Defence contends that a favourable decision by the Appeals Chamber would save the Chamber time in two ways. Firstly, the Chamber will not have to spend several hours or days listening to the Witness testimony; and secondly, it will not have to spend several hours at a later stage of the proceedings analyzing the transcripts relating to that testimony in order to draw any legal or factual conclusions.

4. Finally, the Defence submits that an immediate resolution by the Appeals Chamber would materially advance the proceedings as it would reduce the number of potential Defence witnesses and the Defence itself would not need to oppose the allegations contained in the Witness statement.

The Prosecution

5. In its response, the Prosecution did not address any of the relevant issues raised by the Defence.[5]

Deliberations

6. The Chamber recalls Rule 73 (B) which reads as follows:

> Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

7. The Chamber recalls its previous Decisions in which it discussed the criteria for certification under Rule 73 (B).[6] In particular, the Chamber stresses the principle that decisions under Rule 73 are "without interlocutory appeal" and that certification to appeal is an exception that the Chamber may grant, if the two criteria under Rule 73 (B) are satisfied.

8. The Chamber is of the view that the admissibility of material facts not pleaded in the Indictment is an issue which would significantly affect the fairness and expeditious conduct of the proceedings.

9. However, the Chamber considers that the Appeals Chamber has already provided ample and clear directions as to how to address the issue of defective indictments and the possible remedies to cure such defects.[7] In particular, the jurisprudence provides strong safeguards to ensure that an accused is not prejudiced by reliance on evidence adduced to sustain material facts for which he was not put on

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[5] In its Response of 26 June 2006, the Prosecution submits that the French version of its Pre-Trial Brief was disclosed to the Defence on 17 June 2004 and that it was the translated English version that was disclosed on 1 September 2004. The Prosecution further submits that that before the end of its case, it intends to call four more witnesses, including ANF. After having done so, the Prosecution will have called a total 70 out of 116 factual witnesses initially listed.

[6] *The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu*, ICTR-00-56-T, "Decision on Sagahutu's Request for Certification to Appeal", 9 June 2005, para. 16; "Decision on Bizimungu's Request for Certification to Appeal the Oral Decision Dated 8 June 2005", 30 June 2005, para. 17; "Decision on Ndindiliyimana's Request for Certification to Appeal the Chamber's Decision Dated 21 September 2005", 26 October 2005, para. 7; "Decision on Bizimungu's Motion for Certification to Appeal the Chamber's Oral Decision of 2 February 2006 Admitting Part of Witness GFA's Confessional Statement into Evidence", 27 February 2006, para. 11.

[7] See in particular *Silvestre Gacumbitsi v. The Prosecutor*, Case N°ICTR-2001-64-A, Judgement, 7 July 2006, paras. 54-58. See also *The Prosecutor v. Kupreskic et al.*, Case N°IT-95-16-A, Judgement, 23 October 2001, paras. 88-90; *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases N°ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, para. 24; *The Prosecutor v. Tihomir Blaskic*, Case N°IT-95-14-A, Judgement, 29 July 2004; *The Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Case N°IT-98-34-A, Judgement, 3 May 2006, para. 26; *The Prosecutor v. Niyitegeka*, Case N°ICTR-96-14-T, Judgement, 9 July 2004, para. 197.

notice so as to prepare a proper defence.[8] The Chamber is therefore of the opinion that an immediate resolution by the Appeals Chamber in the present case would not "materially advance the proceedings."

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion.

Arusha, 14 July 2006.

[Signed] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

[8] See in particular, *Le Procureur c. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe*, Affaire N ICTR-99-46-A, Arrêt, 7 juillet 2006, paras. 159-165.

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Decision on Nzuwonemeye's Request for Disclosure of All Sources Quoted in the Proposed Expert Report by Alison Des Forges 14 July 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Silva, Presiding Judge ; Seon Ki Park (Sitting under Rule 15*bis*)

François-Xavier Nzuwonemeye – Right of the Accused to cross-examine a witness, Disclosure of reports of expert witnesses, Curriculum vitae of the expert witness, Documents mentioned in the footnotes are not part of the expert report or testimony and therefore not part of the case against the Accused, Witnesses are not party to the proceedings and therefore under no disclosure obligations – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rules 73 (A), 94 bis and 94 bis (A) ; Statute, art. 20 (4) (e)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Oral Decision on Defense Motions Challenging the Qualification of Expert Witness Dr. Alison Des Forges, 4 September 2002 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on the Expert Witnesses for the Defence, 24 January 2003 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision of Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, 28 September 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Mugenzi's Confidential Motion for the Filing, Service or Disclosure of Expert Reports and/or Statements (Rule 94 bis), 10 November 2004 (ICTR-99-50)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, and Judge Seon Ki Park (the "Chamber") pursuant to Rule 15 *bis* of the Rules of Procedure and Evidence;

BEING SEIZED OF Nzuwonomeye's "Request for Disclosure of all Sources Quoted in the Proposed Expert Report by Alison des Forges", filed on 28 June 2006 (the "Motion");

HAVING RECEIVED AND CONSIDERED the

(i) « Réponse du Procureur à la Requête présentée par le conseil de François-Xavier Nzuwonemeye, demandant à la Chambre de première instance II d'ordonner à l'expert Alison des Forges de communiquer à la Défense l'ensemble des documents ou publications qui font l'objet des notes en bas de pages qui figurent dans son rapport »,[1] filed on 3 July 2006 (the "Response");

[1] "The Prosecution's Response to the Motion presented by Counsel for Francois-Xavier Nzuwonemeye praying Trial Chamber II to order the Expert Alison des Forges to disclose to the Defence all documents and publications mentioned in the footnotes of her report" (Unofficial Translation).

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 94 *bis*;

HEREBY DECIDES the Motion on the basis of the written brief filed by the Parties pursuant to Rule 73 (A) of the Rules.

Submissions of the Parties

The Defence

1. The Defence for Nzuwonemeye prays the Chamber to order Dr. Alison des Forges to disclose to the Defence documents mentioned in the footnotes of her expert report.

2. The Defence submits that the material quoted in support of the expert's report can be divided in three categories: books and reports that are in the public domain and therefore accessible by the Defence ('first category'); documents in possession of the office of the Prosecutor ('second category') and finally, documents that appear to be only in the possession of Dr. Alison des Forges ('third category').

3. The Defence acknowledges possession of the documents falling in the first category, and that it has asked the Prosecution to disclose to it the documents of the second category. With respect to the documents of the third category, the Defence submits that those documents are crucial for the Defence to conduct a proper cross-examination.

4. Finally, the Defence submits that it should not be required to search for all the documents, which form the basis of the report of the proposed expert witness.

The Prosecution Response

5. The Prosecution submits that there is no Rule requiring an expert to disclose to the Defence, prior to his or her testimony, the text of publications that he or she read or documents that the expert has consulted in order to form his or her opinion.

6. The Prosecution further submits that there is nothing to indicate that the expert is in possession of all of the documents to which he or she refers in the report at the time she files the report.

7. Prosecution submits that it would have complied with all its obligations once it discloses to the Defence, as soon as possible, the documents that are in its possession and to which the footnotes of the expert report refer.

8. Finally, the Prosecution refers to an oral ruling in the *Bagosora et al*. case of 4 September 2004, in which Trial Chamber I held that it was incumbent upon the Defence to get hold of "materials that may, or may not, arise from footnotes" and that it was not the Prosecution's obligation to provide those documents.[2]

Deliberations

9. The Chamber notes that the Defence for Nzuwonemeye has not cited any Rule, jurisprudence or other authority in support of its Motion. The Defence's only contention is that the documents mentioned in the footnotes of Dr. Des Forges' report are "crucial" for its cross-examination of the expert witness.

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[2] Le Procureur c. Bagosora et autres, Affaire N ICTR-98-41-T, Transcription du 4 Septembre 2002, page 28.

10. The Chamber recalls Rule 94 *bis* (A) which governs the disclosure of reports of expert witnesses:

> Notwithstanding the provisions of Rule 66 (A) (ii), Rule 73 *bis* (B) (iv) (b) and Rule 73 *ter* (B) (iii) (b) of the present Rules, the full statement of any expert witness called by a party shall be disclosed to the opposing party as early as possible and shall be filed with the Trial Chamber not less than twenty-one days prior to the date on which the expert is expected to testify.

11. The Chamber notes that Rule 94 *bis* (A) is addressed to the Parties and that witnesses, be they factual or expert, are not party to the proceedings and therefore under no disclosure obligations.

12. The Chamber notes that in the *Nahimana et al*. case, Trial Chamber I instructed the Defence to disclose, in addition to the expert report, the *curriculum vitae* of expert witnesses "as verification or in support of their expert status".[3] This finding was subsequently adopted in the *Bizimungu et al*. case.[4] The Chamber notes that in the instant case, the Prosecution filed with the registry Dr. Des Forges' report in English together with a *curriculum vitae* on 13 June 2006, more than three months prior to the expected testimony of the Witness.

13. Therefore the issue before the Chamber is to determine whether the right of the Accused to cross-examine a witness as stipulated in Article 20 (4) (e) of the Statute is infringed upon if the Defence is not in possession of the said 'third category' documents. The Chamber recalls the Decision of 28 September 2004 in the *Bagosora* case where Trial Chamber I held that it is the disclosure of the expert report itself that ensures that "the opposing party has sufficient notice of the content of the expert witness's testimony to effectively prepare for cross-examination".[5] The Chamber recalls that the inclusion of footnotes in the report is done to put the opposing party on notice of what documents the expert used as the basis of her opinion.[6] However the documents mentioned in the footnotes themselves are not part of her report or her expected testimony and therefore not part of the case against the Accused.

14. Accordingly, the Chamber concludes that the disclosure of the expert report, inclusive of footnotes and a *curriculum vitae*, more than three months prior to the expected date of the expert's testimony is sufficient for the Defence to prepare for cross-examination and to guarantee the rights of the Accused under Article 20 (4) (e).

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha, 14 July 2006.

[Signed] : Asoka de Silva ; Seon Ki Park

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[3] *The Prosecutor v. Nahimana et al*., Decision on the Expert Witnesses for the Defence, Case N°ICTR-99-52-T, 24 January 2003.
[4] *The Prosecutor v. Casimir Bizimungu et al*., Decision on Mugenzi's Confidential Motion for the Filing, Service or Disclosure of Expert Reports and/or Statements (Rule 94 *bis*), Case N°ICTR-99-50-T, 10 November 2004, para. 22.
[5] *The Prosecutor v. Bagosora et al*., Case N°ICTR-98-41-T, Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, 28 September 2004, para. 6.
[6] *The Prosecutor v. Bagosora et al*., Case N°ICTR-98-41-T, Oral Decision on Defense Motions Challenging the Qualification of Expert Witness Dr. Alison Des Forges, 4 September 2002, para. 11.

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Decision on the Prosecutor's Extremely Urgent Ex-Parte Motion for the Transfer of Detained Witness ANF Pursuant to Rule 90 bis of the Rules of Procedure and Evidence
23 August 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

Judge : Seon Ki Park (Designated pursuant to Rule 73 (A))

Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu – Transfer of detained witness, Cooperation of Rwanda requested

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A) and 90 bis (B)

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

SITTING as Trial Chamber II, composed of Judge Seon Ki Park (the "Chamber");

BEING SEISED OF the "Requête non contentieuse du Procureur, en extrême urgence, aux fins de transfert du témoin détenu ANF: article 90 bis du Règlement de procédure et de preuve"[1], filed on 18 August 2006 (the "Motion");

NOTING the Prosecutor's letter of 10 July 2006 to the Rwandan Minister of Justice seeking confirmation that the conditions for transfer of detained witnesses under the Rules are met;

TAKING INTO CONSIDERATION the letter of 2 August 2006 from the Rwandan Minister of Justice to the Tribunal's Prosecutor, in which it is confirmed that Witness ANF is available during the period he is required to be present at the Tribunal as a Prosecution witness;

TAKING INTO CONSIDERATION that the trial against the four accused is scheduled to resume on 4 September 2006;

TAKING INTO ACCOUNT the provisions in Rule 90 *bis* (B) which require that a transfer order for a detained witness shall be issued only after prior verification that:

(i) The presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;
(ii) Transfer of the witness does not extend the period of his detention as foreseen by the requested State.

SATISFIED that these conditions have been met in the present case;

HEREBY ORDERS that for the purpose of enabling him to appear before the Tribunal and giving his testimony in the trial of the four accused, Witness ANF shall at any time after the date of this

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[1] The Prosecutor's Extremely Urgent *ex-parte* Motion for the Transfer of Detained Witness ANF Pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence (Unofficial Translation).

Order be transferred temporarily to the Tribunal's Detention Facilities in Arusha. His detention in Arusha shall not go beyond 31 October 2006;

INSTRUCTS the Registry to:

- transmit this Order to the Government of Rwanda and the Government of Tanzania;
- ensure the proper conduct of the transfer, including the supervision of the witness in the Detention Unit of the Tribunal;
- remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the length of the temporary detention, and, as promptly as possible, inform the Trial Chamber of any such change.

REQUESTS the Government of Rwanda and the Government of Tanzania to cooperate with the Registry in the implementation of this Order;

Arusha, 23 August 2006.

[Signed : Seon Ki Park

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Decision on the Prosecution Request for Witness Roméo Dallaire to Give Testimony by Video-Link
15 September 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

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

Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu – Video-Link Testimony, Discretion of the Chamber to grant the hearing of testimony by video-conference in lieu of physical appearance for purposes of witness protection under, Interests of justice, No good reason adduced in support of the inability of the Witness to testify in person – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 75 and 90 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 October 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Aloys Simba, Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link, 4 February 2005 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Arsène Shalom Ntahobali's Extremely Urgent Motion for Video Link Testimony of Defence Witness WDUSA in Accordance With Rule 71 (A) and (D) of the Rules of Procedure and Evidence, 15 February 2006 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Sylvain Nsabimana's extremely urgent – strictly confidential – under seal-Motion to have Witness AGWA testify via video-link, 17 August 2006 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Nsengiyumva Motion for Witness Higaniro to Testify by Video-Conference, 29 August 2006 (ICTR98-41)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEISED OF the "Requête du Procureur dans l'intérêt de la justice et sur le fondement des articles 71 et 90 du Règlement de procédure et de preuve en vue d'autoriser le témoin de l'accusation Roméo Dallaire à déposer par voie de vidéoconférence"[1], filed on 23 August 2006 (the "Motion");

HAVING RECEIVED AND CONSIDERED the

(i) "Réponse de la Défense d'Augustin Bizimungu à la Requête du Procureur intitulée « Requête dans l'intérêt de la justice et sur le fondement des articles 71 et 90 du Règlement de procédure et de preuve en vue d'autoriser le témoin de l'accusation Roméo Dallaire à déposer par voie de vidéoconférence »"[2], filed on 29 August 2006;

(ii) "Réponse à la « Requête du Procureur dans l'intérêt de la justice et sur le fondement des articles 71 et 90 du Règlement de procédure et de preuve en vue d'autoriser le témoin de l'accusation Roméo Dallaire à déposer par voie de vidéoconférence »"[3], filed by the Defence for Augustin Ndindiliyimana on 29 August 2006;

NOTING that the Responses by the Defence for Sagahutu and the Defence for Nzuwonemeye were filed out of time without any explanation for the delay;

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

HEREBY DECIDES the Motion on the basis of the written submissions filed by the Parties pursuant to Rule 73 (A) of the Rules.

Submissions by the Parties

The Prosecution

1. The Prosecution requests the Chamber to allow Witness Roméo Dallaire to testify by video-conference.

2. The Prosecution submits that General Dallaire's activities as a member of the Canadian Senate and his participation in the UN Secretary General's Advisory Committee on the Prevention of Genocide now make it impossible for him to be absent from Canada for the period during which he would be required to testify in Arusha. However, the Prosecution submits that Roméo Dallaire could be available to testify at any hour of the day or night on the following dates: 23, 24, 25, 26, 30 and 31 October 2006, as well as 1, 2, 3, 6, 7 and 8 November 2006. The Prosecution further submits that the Canadian Department of National Defence is willing to do whatever may be necessary to facilitate General Dallaire's testimony by video-conference.

[1] "Prosecution Request, in the Interests of Justice and Pursuant to Rules 71 and 98 of the Rules and Procedure, to allow Prosecution Witness Roméo Dallaire to testify by video-link" (Unofficial Translation).
[2] Response by the Defence for Augustin Bizimungu to the "Prosecution Request, in the Interests of Justice and Pursuant to Rules 71 and 98 of the Rules and Procedure, to allow Prosecution Witness Roméo Dallaire to testify by video-link" (Unofficial Translation).
[3] Response [by the Defence for Augustin Ndindiliyimana] to the "Prosecution Request, in the Interests of Justice and Pursuant to Rules 71 and 98 of the Rules and Procedure, to allow Prosecution Witness Roméo Dallaire to testify by video-link" (Unofficial Translation).

3. The Prosecution refers to Rule 71 (D) which allows for a witness to be heard by video-link and submits that this procedure would not affect the Chamber's ability to control the proceedings.

4. The Prosecution contends that General Dallaire's testimony is indispensable for the manifestation of the truth.

5. Finally, the Prosecution submits that General Dallaire could be both a Prosecution and a Defence Witness.

Bizimungu's Response

6. The Defence for Bizimungu opposes the Motion and contends that the reasons advanced by General Dallaire are not sufficient to allow him to be heard by video-link.

7. The Defence submits that General Dallaire is able to travel to Arusha since he is willing to testify day or night during the dates mentioned in the Motion. The Defence for Bizimungu further submits that the letter by Mr. Yaroski on behalf of General Dallaire, which is the only material in support of the Motion, has no probative or legal value since it is not dated nor does it indicate whether Mr. Yaroski has a mandate to represent General Dallaire. Furthermore, the Defence submits that there is no direct or indirect proof of General Dallaire's inability to travel other than the explanations in the said letter.

8. The Defence refers to Article 20 (4) (d) and (e) of the Statute and contends that an Accused has a fundamental right to personally confront his principal accusers.

9. Finally, the Defence submits that the Accused should not suffer prejudice as a result of the Prosecution's strategic decision to call General Dallaire at this stage of the proceedings given that the Motion does not indicate whether any efforts have been made to call the witness at an earlier date.

Ndindiliyimana's Response

10. The Defence for Ndindiliyimana prays the Chamber to dismiss the Motion.

11. In addition to the submissions made by the Defence for Bizimungu concerning General Dallaire's inability to travel to Arusha, the Defence for Ndindiliyimana contends that as a practical matter, testimony by video-link would make it impossible for the Defence to confront the witness with any of the numerous United Nations or Rwandan government documents in its possession, which would be chosen depending on the content of General Dallaire's testimony.

12. The Defence further submits that since there is no witness statement, it is not in a position to know the areas that the testimony of General Dallaire will cover and therefore to select any document in advance.

Deliberations

13. The Chamber recalls the general principle articulated in Rule 90 (A), that "witnesses shall […] be heard directly by the Chamber." Nonetheless, the Chamber has the discretion to grant the hearing of testimony by video-conference in lieu of physical appearance for purposes of witness protection under Rule 75, or where it is in the interests of justice. In determining the interests of justice, the Chamber has to assess: (i) the importance of the testimony; (ii) the inability or unwillingness of the witness to

travel to Arusha; and iii) whether a good reason has been adduced for that inability and unwillingness.[4] The burden of proof lies with the Party making the request.[5]

14. With respect to the first criterion, the Chamber is satisfied that General Dallaire's testimony as former UNAMIR Commander, who was based in Kigali between September 1993 and July 1994, might be important to the present case.

15. With respect to the second and third criteria, the Chamber notes the letter sent by General Dallaire's legal representative stating the reasons for Dallaire's inability to travel to Arusha to testify in person. The Chamber notes that the letter contains no further explanations as to why General Dallaire's activities as a member of the Canadian Senate and his participation in the UN Secretary General's Advisory Committee on the Prevention of Genocide would prevent him from travelling to Arusha in the next few months, and why he is not in a position to travel during the dates suggested for the video-link. The Chamber therefore considers that no good reason has been adduced in support of the inability of the Witness to testify in person. Accordingly, the Chamber finds that the exceptional circumstances required to authorise a testimony by video-link have not been established.

16. Finally, the Chamber notes that it has not been served with the waiver of immunity from the UN-Headquarters in respect of General Dallaire's testimony requested by the Prosecutor on 26 July 2006.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion.

Arusha, 15 September 2006.

[Signed] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

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[4] *Prosecutor v. Bagosora et al,* ICTR-98-41-T, Decision on Nsengiyumva Motion for Witness Higaniro to Testify by Video-Conference, 29 August 2006, Para. 3; Decision on prosecution Request for testimony of Witness BT via Video-Link, 8 October 2004, para.6; *Prosecutor v. Nyiramasuhuko et al*., Case N°ICTR-98-42-T, Decision on Sylvain Nsabimana's extremely urgent – strictly confidential – under seal-Motion to have Witness AGWA testify via video-link, 17 August 2006, para. 8; Decision on Arsène Shalom Ntahobali's Extremely Urgent Motion for Video Link Testimony of Defence Witness WDUSA in Accordance With Rule 71 (A) and (D) of the Rules of Procedure and Evidence, 15 February 2006, para. 8; Prosecutor v. Aloys Simba, Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link, Case N°ICTR-01-76-T, 4 February 2005, para. 4.

[5] Ibid.

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Decision on Sagahutu's Motion for a Site Visit 6 October 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

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

Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu – Site Visit to various locations in the Republic of Rwanda, Visit conducted at a time when it will be instrumental to the discovery of the truth, End of the presentation of its evidence by the Prosecutor – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 4, 73 (A) and 89 (D)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Jean-Paul Akayesu, Decision on the Defence Motion Requesting an Inspection of the Site and the Conduct of a Forensic Analysis, 17 February 1998 (ICTR-96-4) ; Trial Chamber, The Prosecutor v. Elie Ndayambaje et al., Decsion on Prosecutior's Motion for Site Visits in the Republic of Rwanda Under Rules 4 and 73 of the Rules of Procedure and Evidence, 23 September 2004 (ICTR-98-42) , Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda, 29 September 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Aloys Simba, Decision on the Defence Request for Site Visits in Rwanda, 31 January 2005 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. André Rwamakuba, Decision on Defence Motion for a View of Locus in Quo Rule 4 of the Rules of Procedure and Evidence, 16 December 2005 (ICTR-98-44)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEISED OF "*Requête aux fins de la descente sur les lieux*",[1] filed by the Defence for Innocent Sagahutu on 20 September 2006;

HAVING RECEIVED AND CONSIDERED:

i. the "Réponse du Procureur à la requête d'Innocent Sagahutu sollicitant une descente sur les lieux"[2] filed on 25 September 2006;
ii. "Soutien et complément à la 'requête aux fins de la descente sur les lieux' introduite par la défense d'Innocent Sagahutu" [3] , filed by Ndindiliyimana's Defence on 25 September 2006;

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[1] "Motion for a Site Visit", Unofficial Translation.
[2] "Prosecutor's Response to Sagahutu's Motion for a Site visit", Unofficial Translation.
[3] "Ndindiliyimana's Motion in Support of Sagahutu's Motion for a Site Visit", Unofficial Translation.

iii. "Nzuwonomeye's Submission with respect to Sagahutu's Motion for an on-site Visit" filed on 26 September 2006; and
iv. "Réplique de la réponse du Procureur relative la requête aux fins d'une descente sur les lieux"[4], filed by the Defence for Sagahutu on 28 September 2006;

NOTING that the "Réponse de la Défense d'Augustin Bizimungu au soutien de la Requête d'Innocent Sagahutu intitulée 'Requête aux fins de la descente sur les lieux'"[5] was filed out of time on 29 September 2006;

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rules 4 and 89 (D) of the Rules;

HEREBY DECIDES the Motion on the basis of the written submissions filed by the Parties pursuant to Rule 73 (A) of the Rules.

Submissions

1. The Defence for Innocent Sagahutu requests that the Chamber visit certain sites in Kigali that are identified in paragraph 4 of the Motion. It submits that a visit to these sites will enable the Chamber to understand the configuration of the crime sites mentioned by the Prosecution witnesses and, at the same time, assist the Chamber to better evaluate the evidence of those witnesses. Furthermore, the Defence argues that a visit to these sites will serve the interests of justice and its own case.

2. The Accused Ndindiliyimana, Nzuwonomeye and Bizimungu each filed pleadings in support of Sagahutu's motion. In addition to the sites listed in Sagahutu's Motion, the Defence for Ndindiliyimana requests the Chamber to visit several additional sites in Kigali, Gitarama, Gikongoro and Nyaruhengeri *préfectures*.

3. Nzunomeye's Defence indicated its intention to file further submissions relating to other sites that the Trial Chamber should visit, and with respect to the modalities of the visit. It requests a status conference for the latter purpose.

4. Bizimunugu's Defence urged the Chamber to accept its late filing because it was pre-occupied with the cross-examination of a Prosecution expert witness. The Defence requests the Trial Chamber for an opportunity at the end of the Prosecution case, to provide a list of sites that the Chamber should visit in the interest of Bizimungu's defence, especially in the *préfectures* of Ruhengeri and Gitarama.

Deliberations

5. The Chamber notes that the Defence for Bizimungu has not shown good cause for its late filing. The Chamber expects all Parties to sufficiently organize their internal workings to enable them to respect timelines set for the filing of pleadings. Otherwise, the rights of the Accused to trial without undue delay would be violated.

6. The Chamber notes Rule 4 of the Rules which provides that

> "[a] Chamber or a Judge may exercise their functions away from the Seat of the Tribunal, if so authorized by the President in the interests of justice."

[4] "Sagahutu's Reply to the Prosecutor's Response to Sagahutu's Motion for a Site Visit", Unofficial Translation.
[5] "Augustin Bizimungu's Response in Support of Sagahutu's Motion for a Site Visit", Unofficial Translation.

7. Pursuant to this provision, this Tribunal has considered the issue of site visits to various locations in the Republic of Rwanda.[6] The jurisprudence establishes that the need for a site visit must be considered in light of the particular circumstances of each case. With respect to the timing of such a visit, the jurisprudence holds that a site visit should be conducted at a time when it will be instrumental to the discovery of the truth and the determination of the matter before the Chamber.[7]

8. The Chamber notes that in this case, the Prosecution is approaching the end of the presentation of its evidence. The Chamber has heard evidence from many Prosecution witnesses about various sites in Rwanda, and received photographic and sketch images of some of these locations. As indicated in the various Defence submissions, other sites and locations are likely to be mentioned in the course of presentation of the remainder of the Prosecution case, or, during the Defence cases. Similarly, the Chamber may receive further evidence about the sites listed by the various Defence teams, thereby eliminating the need to visit those sites. In the circumstances of the present case therefore, it is the Chamber's view that a site visit to Rwanda at this stage of the proceedings would not be instrumental in the discovery of the truth and the determination of the matter before the Chamber.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha, 6 October 2006.

[Signed] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

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[6] *The Prosecutor v. Ndayambaje et al,* "Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda under Rules 4 and 73 of the Rules of Procedure and Evidence", filed on 23 September 2004; *The Prosecutor v. Bagosora et al*, "Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda" filed on 29 September 2004; *The Prosecutor v. Aloys Simba*, "Decision on the Defence Request for Site Visits in Rwanda", filed on 31 January 2005; and *The Posecutor v. A. Rwamakuba*, "Decision on Defence Motion for a View [of] *Locus in Quo* Rule 4 of the Rules of Procedure and Evidence, filed on 16 December 2005.

[7] *The Prosecutor v. Jean-Paul Akayesu*, "Decision on the Defence Motion Requesting an Inspection of the Site and the Conduct of a Forensic Analysis", filed on 17 February 1998, para. 8. In *The Prosecutor v. Ndayambaje et al, supra*, para. 14, the Trial Chamber expressed the view that even if site visits were to be made, it would be desirable to hold them at the end of the presentation of evidence by all the Parties. In *The Prosecutor v.Bagosora et al*, *supra,* at para. 4, the Chamber considered the timing of the proposed site visit, the costs and logistics involved and concluded that a site visit in the circumstances of the case would not be instrumental in the discovery of the truth and the determination of the matter before the Chamber. Similarly, in *The Prosecutor v. Aloys Simba, supra,* para. 3, the Trial Chamber held that a site visit during the course of the presentation of the evidence was not appropriate in the circumstances of that case, and denied the Defence request without ruling out the possibility that the Defence could, if it thought fit, re-file the motion at a later stage of the proceedings.

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Decision on the Prosecutor's Motion for Subpoena 6 October 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

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

Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu – Issuance of an order of subpoena, Special position of the witness regarding facts described in the Indictment, Evidence cannot be reasonably obtained elsewhere, Reasonable efforts to secure the witness voluntary cooperation – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 54 and 73 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3, 12 July 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for a Subpoena, 11 September 2006 (ICTR-98-41)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Radislav Krstić, Decision on Application for subpoenas, 1 July 2003 (IT-98-33) ; Appeals Chamber, The Prosecutor v. Sejér Halilović, Decision on Issuance of Subpoenas, 21 June 2004 (IT-01-48)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEIZED OF the Prosecutor's "Motion for the Subpoena of Annonciata Kavaruganda Pursuant to Rule 54 of the Rules of Procedure and Evidence", filed on 25 September 2006 (the "Motion");

HAVING RECEIVED AND CONSIDERED

(i) "Nzuwonemeye's Response to Motion for Subpoena of Annonciata Kavaruganda Pursuant to Rule 54 of the Rules of Procedure and Evidence", filed on 27 September 2006;

(ii) The « *Réponse à la* "Motion for the Subpoena of Annonciata Kavaruganda Pursuant to Rule 54 of the Rules of Procedure and Evidence"», filed by Innocent Sagahutu on 29 September 2006;

(iii) The « *Réponse d'Augustin Ndindiliyimana au* "Motion for Subpoena of Annonciata Kavaruganda Pursuant to Rule 54 of the Rules of Procedure and Evidence"», filed on 2 October 2006;

(iv) The « *Réponse de la Défense d'Augustin Bizimungu à la requête du Procureur intitulée* "Motion for the Subpoena of Annonciata Kavaruganda"», filed on 2 October 2006.

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 54;

HEREBY DECIDES the Motion on the basis of the written submissions filed by the Parties pursuant to Rule 73 (A) of the Rules.

Submissions of the Parties

The Prosecution

1. The Prosecution requests that a *subpoena* be issued to Annonciata Kavaruganda. The Prosecution claims that because Madame Kavaruganda was the wife of late Joseph Kavaruganda, former President of the Constitutional Court in Rwanda at the beginning of the genocide in April 1994, she has a unique and special knowledge of the events leading to the abduction and killing of her husband by Rwandan Armed Forces on 7 April 1994.

2. Referring to paragraphs 22, 25, 48, 49 and 50 of the Amended Indictment, the Prosecution submits that Madame Kavaruganda's testimony is necessary to prove the existence and execution of a common scheme by the accused persons in collaboration with others mentioned in the Indictment to eliminate certain members of opposition parties and other important actors with a view to obstructing the implementation of the Arusha Accords. According to the Prosecution, this information will significantly corroborate prosecution evidence of a deliberate and systematic targeting and elimination of those political and other actors by the Rwandan Armed Forces in the early days of the genocide in April 1994.

3. The Prosecution further submits that Madame Kavaruganda is uniquely positioned to provide a useful insight into the activities of her husband within the framework of the implementation of the Arusha Accords and to inform the Court of her husband's activities.

4. Finally, the Prosecution submits that substantial and serious attempts have been made to secure the voluntary attendance of Madame Kavaruganda but to no avail.

Nzuwonemeye's Response

5. The Defence for Nzuwonemeye opposes the Motion and submits that the Prosecution has not addressed the reasons put forward by Madame Kavaruganda for her refusal to testify in this case, that is, that she does not hold the accused persons accountable for the death of her husband.

6. The Defence further submits that the Prosecution has omitted to mention that, according to Madame Kavaruganda, Major Protais Mpiranya from the Presidential Guard and Major Kabera, Officer *d'Ordonnance* of President Habyarimana, were involved in the killing of her husband. The Defence argues that there is no connection between the Presidential Guard and the Reconnaisance Battalion.

7. Finally, the Defence submits that leading this evidence with respect to Major Protais Mpiranya and the Presidential Guard, would only waste court time and delay the end of the Prosecution case.

Sagahutu's Response

8. The Defence for Sagahutu submits that the testimony of Madame Kavaruganda would not assist the Prosecution at all since Major Mpiranya and Major Kabera, whom the witness believes are responsible for the death of her husband, have not been tried and any attempt to convince the Chamber of a conspiracy is a waste of time.

9. The Defence further submits that Madame Kavaruganda's testimony is not necessary since it has no direct or indirect link to any of the accused persons in the present case and prays the Chamber to dismiss the Motion.

Ndindiliyimana's Response

10. The Defence for Ndindiliyimana adopts the submissions made by Nzuwonemeye's Defence and further submits that the Prosecution has not shown that Madame Kavaruganda is best placed to describe the contents of the Arusha Accords since she did not participate in their negotiation and the Prosecution has not indicated any public or political functions that Madame Kavaruganda held in Rwanda in 1994 that may have enabled her to form an opinion about the full details of the Arusha Accords and the obstacles to their implementation.

11. The Defence argues that Madame Kavaruganda would not assist in ascertaining the truth, in particular since the paragraphs of the Indictment on which the Prosecution tries to lead evidence through this witness, have been cited with regard to the testimonies of several other witnesses and will be the subject of General Dallaire's testimony.

Bizimungu's Response

12. The Defence for Bizimungu adopts the submissions made by Nzuwonemeye and Ndindiliyimana's Defence and, recalling the Chamber's decision of 24 November 2005, further submits that it had already on that occasion opposed the appearance of Madame Kavaruganda arguing that this witness's testimony could not go to proof of the count of conspiracy to commit genocide or to Bizimungu's superior responsibility.

Deliberations

13. The Chamber recalls Rule 54 of the Rules which authorizes a Trial Chamber to issue

> "orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation of the trial."

According to the jurisprudence of both this Tribunal and the International Criminal Tribunal for the former Yugoslavia (ICTY), an applicant for *subpoena* must show that (i) reasonable attempts have been made to obtain the voluntary cooperation of the witness; (ii) the witness's testimony can materially assist the applicant in respect of clearly identified issues; and (iii) the witness's testimony must be necessary and appropriate for the conduct and fairness of the trial.[1] The Chamber recalls that "*subpoenas* should not be issued lightly" and that it must consider

> "not only … the usefulness of the information to the applicant but … its overall necessity in ensuring that the trial is informed and fair."[2]

In this respect, it may also be considered whether the information sought can reasonably be obtained elsewhere.[3]

14. After having carefully read the material disclosed by the Prosecution in respect of this witness, the Chamber is satisfied that Madame Kavaruganda holds a special position with respect to the events leading to death of her husband and that she may provide insight into the activities of her husband

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[1] *Prosecutor* v. *Bagosora,* Case N°ICTR-98-41 T, Decision on Request for a Subpoena, 11 September 2006, para. 5; *Prosecutor* v. *Krstić,* Case N°IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para.10; *Prosecutor* v. *Karemara,* Case N°ICTR-9-44-T, Decision on Nzirorera's *Ex Parte* motion for order for Interview of Defence Witnesses NZ1, NZ2 and NZ3, 12 July 2006, para 9.
[2] *Prosecutor v. Halilovic*, Case N°IT-01-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, paras. 6, 7.
[3] *Prosecutor* v. *Bagosora,* Case N°ICTR-98-41 T, Decision on Request for a Subpoena, 11 September 2006, para. 7.

within the framework of the implementation of the Arusha Accords. The Chamber notes paragraphs 48 and 50 of the Amended Indictment of 23 August 2004 which refer to the killing of Joseph Kavaruganda and the alleged obstruction of the implementation of the Arusha Accords. The Chamber further notes paragraph 49 of the Indictment which alleges that the *Gendarmerie* was, *inter alia*, responsible for protecting Joseph Kavaruganda. Finally, the Chamber notes paragraph 22 of the Indictment which describes Major Mpiranya as a co-conspirator of the accused persons. Based on the aforementioned, the Chamber concludes that Madame Kavaruganda's testimony can materially assist the Prosecution case.

15. The Chamber is further satisfied that Madame Kavaruganda's evidence cannot be reasonably obtained elsewhere and, based on the material annexed to the Motion, that the Prosecution has made reasonable efforts to secure her voluntary cooperation, without success.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion;

ORDERS the Registrar to prepare a *subpoena*, in accordance with this decision, and to serve it, through appropriate channels in the Kingdom of Belgium, pursuant to Article 28 of the Statute, to Annonciata Kavaruganda, requiring her appearance before this Chamber to testify in the present case;

DIRECTS the Registry to communicate with the Prosecutor with respect to the timeframe within which the evidence of the witness would be heard.

Arusha, 6 October 2006.

[Signed] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

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Decision on Nzuwonemeye's Motion to Exclude the Exhibits tendered through Alison Des Forges' Testimony and related to Jean Kambanda 20 October 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

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

Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu – Arguments raised by the Defence Motion already heard, Reconsideration and modification of prior decision if a new fact has come to light, Miscarriage of justice, Authenticity of evidence while important in the Chamber's assessment of weight at the end of the trial is not a criterion for admissibility – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A) and 89 (C)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye and Innocent Sagahutu, Decision on Bizimungu's Motion for

Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials, 3 November 2004 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on Motion to Strike or Exclude Portions of Prosecutor's Exhibit No. 34, alternatively Defence Objections to Prosecutor's Exhibit No. 34, 30 May 2006 (ICTR-2000-55A) ; Trial Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on Muvunyi's Motion to Exclude Prosecution Exhibit P33, 13 June 2006 (ICTR-2000-55A)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Zejnil Delalić et al., Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998 (IT-96-1) ; Trial Chamber, The Prosecutor v. Tihomir Blaškić, Decision on the Defence Motion for Reconsideration of the Ruling to Exclude from Evidence Authentic and Exculpatory Documentary Evidence, 30 January 1998 (IT-95-14)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEISED OF "Nzuwonemeye's Motion to Exclude the Exhibits Tendered through Alison Des Forges' Testimony and Related to Jean Kambanda", filed on 4 October 2006;

HAVING RECEIVED AND CONSIDERED the "Prosecutor's Response to Nzuwonemeye's Motion to Exclude the Exhibits Tendered through Alison Des Forges' Testimony and Related to Jean Kambanda", filed on 9 October 2006;

RECALLING its Oral Decision of 21 September 2006 admitting into evidence Exhibits P117A and P117B (the "Oral Decision of 21 September 2006")

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 89 (C) of the Rules;

HEREBY DECIDES the Motion on the basis of the written submissions filed by the Parties pursuant to Rule 73 (A) of the Rules.

Introduction

1. On 21 September 2006, in the course of the examination-in-chief of expert witness Alison Des Forges, the Prosecution sought to tender two documents respectively entitled "*Les circonstances entourant mon arrestation le 18 juillet 1997 à Nairobi au Kenya, ma détention en Tanzanie, mon transfert aux Pays-Bas et mon procès en appel"*, and "*Éléments de défense de Jean Kambanda, Le Procureur c/ Jean Kambanda, N°ICTR-97-23-DP*". The were said to have been tendered as Exhibits during appellate proceedings in the case of *Jean Kambanda v. The Prosecutor*. The Defence objected to the admission of the documents as exhibits on the ground that the documents were never admitted in the *Kambanda* proceedings and urged the Chamber to reserve its ruling until it could establish as a matter of certainty whether or not these documents were so admitted. Having considered the oral submissions of the Parties, the Chamber ruled that the documents were admissible and marked them as Exhibits P117A and 117B respectively.

Submissions

2. The Defence requests the Chamber to reconsider its Oral Decision of 21 September 2006 on the ground that it has received confirmation from the ICTR Registry that exhibits P117A and P117B were never admitted in the *Kambanda* proceedings; that there are serious questions about the provenance and authenticity of the said documents; and that admitting them as exhibits would violate the right to a fair trial guaranteed under the Statute.

3. In its Response, the Prosecution submits that the issues raised are *res judicata* because they were all ventilated during the Defence's oral submissions on 21 September 2006, and were considered by the Chamber which nonetheless proceeded to admit the documents as exhibits.

4. In the alternative, the Prosecution submits that the said documents were properly admitted pursuant to the Chamber's broad discretion under Rule 89 (C) and that the only requirement for admissibility of evidence under that sub-rule, is that the evidence must be relevant. The Prosecution further argues that the said documents are relevant to the present trial because they constitute part of the sources that Prosecution expert witness Alison des Forges relied upon to form her opinion. Furthermore, the Prosecution submits that matters of authenticity go to the weight to be attached to the documents, rather than to the Chamber's consideration relating to admissibility.

Deliberations

5. The Chamber notes that most of the arguments raised by the Defence Motion were already heard by the Chamber during oral hearings on 21 September 2006. Having heard those arguments and ruled that the documents were admissible as exhibits, the Defence cannot reopen those issues except where it can demonstrate that good cause exists for the Chamber to reconsider its prior decision.

6. The jurisprudence recognizes that a Trial Chamber may reconsider and modify its prior decision if it is persuaded that the decision was made in error because a new fact has come to light, which, if it had been known to the Chamber, would have led to a different outcome; that there has been a material change in circumstances; or that the decision could occasion a miscarriage of justice.[1]

7. The Chamber considers that the only ground raised by the Motion for reconsideration is that exhibits P117A and P117B were not admitted in the *Kambanda* proceedings. This implies that the Defence relies upon a presumed lack of authenticity of exhibits P117A and P117B to challenge their admissibility. The Chamber notes that the authenticity of evidence, while important in the Chamber's assessment of weight at the end of the trial, is not a criterion for admissibility.[2]

8. Furthermore, the Chamber recalls the provisions of Rule 89 (C) which give the Chamber discretion to admit any relevant evidence which it deems to have probative value. Based on the plain language of that sub-rule, there is no other requirement for admissibility of evidence before the Tribunal.

9. The Chamber notes that exhibits P117A and P117B are part of a large number of documentary sources that informed the opinion and testimony of Prosecution expert Witness Alison Des Forges. As such, the documents are relevant to the trial even if only for the limited purpose of evaluating her testimony and determining what weight to attach to it at the end of the trial.

10. The Chamber therefore concludes that the criteria for reconsideration have not been satisfied.

FOR THE ABOVE REASONS, THE CHAMBER

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[1] *The Prosecutor v. Tharcisse Muvunyi*, "Decision on Muvunyi's Motion to Exclude Prosecution Exhibit P33", 13 June 2006, para. 11; *The Prosecutor v. Tharcisse Muvunyi*, "Decision on Motion to Strike or Exclude Portions of Prosecutor's Exhibit No. 34, alternatively Defence Objections to Prosecutor's Exhibit N°34", 30 May 2006, para. 8; *The Prosecutor v. Ndindiliyimana et al*, "Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials", 3 November 2004, para. 21.

[2] *The Prosecutor v. Blaskic*, "Decision on the Defence Motion for Reconsideration of the Ruling to Exclude from Evidence Authentic and Exculpatory Documentary Evidence", 30 January 1998, para. 10, 12; *Prosecutor v. Delacic et al,* "Decision on the Motion of the Prosecution for the Admissibility of Evidence", 19 January 1998, para. 16.

DENIES the Defence Motion.

Arusha, 20 October 2006.

[Signed] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

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Decision on the Prosecution Request for Reconsideration of the Chamber's Decision of the Chamber's Decision of 15 September 2006 Concerning the Testimony of Witness Roméo Dallaire by Video-Link 20 October 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

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

Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu – Reconsideration of a previous decision, Medical certificate explaining that General Dallaire has been under treatment for a health condition arising from his experience in Rwanda in 1994, Information publicly known, Waiver of immunity from the UN-Headquarters in respect of General Dallaire's testimony – Video-Link testimony allowed

International Instrument cited :

Rules of Procedure and Evidence, rule 73 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye and Innocent Sagahutu, "Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials", 3 November 2004 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye and Innocent Sagahutu, Decision on Nzwuwonemeye's Motion for Reconsideration of the Chamber's Oral Decision of 14 September 2005 on Admissibility of Witness XXO's Testimony in the Military I Case in Evidence, 10 October 2005 (ICTR-2000-56)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEISED OF the "Prosecutor's Urgent Motion for Reconsideration of the Trial Chamber's Decision on Prosecutor's Request for Witness Romeo Dallaire to give Testimony via Video-Link", filed on 5 October 2006 (the "Motion");

HAVING RECEIVED AND CONSIDERED the
(i) "Reply to the Prosecutor's Urgent Motion for Reconsideration of the Trial Chamber's Decision on Prosecutor's Request for Witness Romeo Dallaire to Give Testimony by Video-Link", filed by the Defence for Nzuwonemeye on 9 October 2006;

(ii) "Reply to Prosecutor's Urgent Motion for Reconsideration Re Decision Re Video-Link Testimony of Romeo Dallaire and Motion for Cross-Examination of Romeo Dallaire", filed by the Defence for Ndindiliyimana on 9 October 2006;

(iii) « *Réponse de la Défense d'Augustin Bizimungu à la Requête du Procureur intitulée* "Prosecutor's Urgent Motion for Reconsideration of the Trial Chamber's Decision on Prosecutor's Request for Witness Romeo Dallaire to give Testimony via Video-Link" », filed on 10 October 2006;

(iv) "Prosecutor's Reply to Nzuwonemeye's Response to Prosecutor's Urgent Motion for Reconsideration of the Trial Chamber's Decision on the Prosecutor's Motion for Witness Roméo Dallaire to Testify via Video-Link", filed on 10 October 2006;

(v) « Réponse à la Requête du Procureur aux fins de Révision de la Décision de la Chambre de première instance relative à la Requête du Procureur tendant à obtenir la disposition du témoin Roméo Dallaire par voie de vidéoconférence », filed by the Defence for Sagahutu on 13 October 2006 ;

HEREBY DECIDES the Motion on the basis of the written submissions filed by the Parties pursuant to Rule 73 (A) of the Rules.

Introduction

1. On 15 September 2006, the Chamber rendered a decision denying the Prosecution request for Witness Romeo Dallaire to give testimony by video-link. The Chamber held that the reasons brought forward by the Prosecution for General Dallaire's inability to travel to Arusha did not meet the criteria established by the jurisprudence of the Tribunal to grant a request for a video-link. On 5 October 2006 the Prosecution filed the present Motion praying the Chamber to reconsider its previous decision and to allow Witness Romeo Dallaire to testify by video-link, or, in the alternative, to order *proprio motu* and in the interest of justice his testimony by the same means.

2. The Prosecution essentially submits that the overriding factor in General Dallaire's inability to travel to Arusha is related to his present health condition. Referring to a letter by General Dallaire's counsel and a medical certificate prepared by General Dallaire's personal physician, the Prosecution contends that living again the horrible events of 1994, both in the process involved in preparing his testimony, and in actually testifying, would be most stressful and would take a serious toll on General Dallaire's health. The Prosecution concedes that this situation would be the same even if the testimony were taken by video-link. However, adds the Prosecutor, if allowed to testify by video-link from Canada, General Dallaire would have available to him professional support and resources that could not be available in Arusha.

3. Finally, the Prosecution submits that the Trial Chamber may reconsider its Decision of 15 September 2006 in the exercise of its discretion and urges the Chamber to grant the Motion in the interests of justice and pursuant to Article 21 of the Statute and Rules 71, 75 and 90 of the Rules.

4. All four Defence teams oppose the Motion and submit that the criteria for reconsideration, as established by the jurisprudence the Tribunal, have not been met by the Prosecution. The Defence argues in particular that General Dallaire's health situation does not constitute a new fact since it was known well before the Prosecution filed its initial Motion on 23 August 2006.

5. The Defence teams submit further that the medical certificate provided by Romeo Dallaire's physician is contradictory to the General's various activities as Canadian Senator and his engagements in the campaigns to eradicate child soldiers in Africa and to have the International Community intervene effectively in Darfur.

6. The Defence for Ndindiliyimana and the Defence for Bizimungu additionally request to be permitted to cross-examine General Dallaire, *inter alia*, on his health condition and pray the Chamber to differ any decision on the Prosecution Motion until the conclusion of such a cross-examination and until the Chamber has the benefit of all facts.

Deliberations

7. The reconsideration of a previous decision is warranted if the moving party demonstrates the discovery of a new fact, which, if known by the Chamber before making its decision, would have led to a different outcome; or if there has been a material change in circumstances; or finally, when the previous decision was erroneous and therefore prejudicial to either party.[1]

8. The Chamber notes the medical certificate annexed to the Motion which explains that since May 1999, General Dallaire has been under treatment for a health condition arising from his experience in Rwanda in 1994. The Chamber further notes that according to the treating physician, testimony by video-link from Canada, although inadvisable, would be preferable to testimony in Arusha.

9. The Chamber agrees with the Defence submission that the health situation of General Dallaire is not a new fact or circumstance that would warrant reconsideration of the Chamber's prior Decision. As conceded by the Prosecution, this information is publicly known, and the Prosecution could therefore have included it in the earlier motion had it exercised due diligence. Nonetheless, it is the Chamber's considered view that the Defence request to cross-examine General Dallaire on his health situation prior to the commencement of his testimony, is neither necessary nor practical; such cross-examination would require that the witness be made available to testify which is the very issue to the Chamber has to determine.

10. The Chamber, however, notes the opinion of General Dallaire's physician that during his testimony, the General may require specialist professional care and resources which would not be readily available in Arusha. Taking this fact into account, the Chamber hereby reconsiders its Decision of 15 September 2006 and allows General Dallaire to testify by video -link.

11. Finally, the Chamber notes that it has now been served with the waiver of immunity from the UN-Headquarters in respect of General Dallaire's testimony.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion;

ORDERS that the testimony of General Dallaire be taken by video-link from Canada;

ORDERS the Registrar, in consultation with the Prosecution, to organize a video-link conference for the testimony of Romeo Dallaire to be heard from 15 November 2006 to 8 December 2006;

ORDERS that all examinations of the witness shall be conducted from the courtroom in Arusha;

ORDERS the Parties to make available to the Registry not less than seven days prior to the commencement of General Dallaire's testimony, all documents they intend to tender as exhibits during their respective examinations of the witness;

DIRECTS that the Prosecution shall send one representative, and the Defence teams shall jointly nominate one representative to attend to their interests during General Dallaire's testimony. The

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[1] *The Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye and Innocent Sagahutu*, ICTR-00-56-T, Decision on Nzwuwonemeye's Motion for Reconsideration of the Chamber's Oral Decision of 14 September 2005 on Admissibility of Witness XXO's Testimony in the Military I Case in Evidence, 10 October 2005, para. 11; Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials, 3 November 2004; para. 21.

Defence teams are hereby instructed to consult with each other and designate one representative for this purpose and provide his/her name to the Registry.

Arusha, 20 October 2006.

[Signed] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

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Decision on Prosecutor's Extremely Urgent Motion for a Rescheduling Order 3 November 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

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

Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu – Dates of General Dallaire's testimony by video-link, Right of the Accused to adequate time and facilities for the preparation of their Defence, Right to cross-examine all witnesses, Chamber's duty to control the proceedings – Motion granted

International Instrument cited :

Statute, art. 20 (4)

International Case cited :

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Jadranko Prlić et al., "Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination by Defence and o Association of Defence Counsel's Request for Leave to File an Amicus Curiae Brief", 4 July 2006 (IT-04-74)

Introduction

1. On 15 September 2006, the Chamber issued a Decision denying the Prosecution Motion for General Roméo Dallaire's evidence to be heard by video-link from Canada. On the basis of a Prosecution Motion for reconsideration, the Chamber issued another Decision on 20 October 2006, in which it reconsidered its prior Decision on the ground that General Dallaire's health situation would require that he receives specialist professional care and resources in the course of his testimony, and that unlike Canada, such resources are not available in Arusha. The Chamber granted the Motion for reconsideration and ordered that General Dallaire's testimony will be heard by video-link from Canada, from 15 November to 8 December 2006.

2. On 25 October, the Prosecution filed the current Motion seeking a variation of the dates upon which General Dallaire would testify.[1] Based on correspondence from General Dallaire's lawyer, the Prosecution submits that it is impossible for the General to free himself from certain prior commitments, and that he would therefore be unavailable for testimony from 15 to19 November, and from 27 November to 4 December inclusive. In the circumstances, the Prosecution requests that

[1] "Prosecutor's Extremely Urgent Motion for a Rescheduling Order", field on 25 October, 2006.

General Dallaire's testimony be heard from 20 to 24 November, and from 5 to 8 or 15 December 2006, if necessary. The Defence for Ndindiliyimana, Bizimungu and Nzuwonomeye each filed a Response in which they opposed the Motion; the Prosecutor filed a Reply.[2]

Deliberations

3. The only issue raised by the Motion is whether the dates of General Dallaire's testimony by video-link should be varied from those indicated in the Decision of 20 October 2006. The Chamber notes that the newly proposed dates imply that General Dallaire's evidence must be heard within 9 or 13 half-day sessions, rather than 18 half-day sessions as stated in the 20 October Decision. The Chamber notes the submission of the Defence teams that if General Dallaire is allowed to testify on the proposed new dates, they may not have enough time to adequately cross-examine him, and that the right of the Accused to a full and complete defence would be violated.

4. The Chamber notes that whilst the 20 October Decision indicated that General Dallaire's evidence would be heard from 15 November to 8 December, there is nothing in that Decision to suggest that the entirety of that period would be required for the General's testimony. The period of 18 half-day sessions indicated an upper limit, the maximum time that, in the Chamber's view, would be required for all Parties to conduct their respective examinations of General Dallaire. The Chamber notes that the 9 to 13 days proposed in the Motion, fall squarely within the period envisaged in the Decision of 20 October.

5. The Chamber recognizes the right of the Accused to adequate time and facilities for the preparation of their Defence, including the right to cross-examine all witnesses called to testify for the Prosecution as enshrined in Article 20 (4) of the Statute. The Chamber notes, however, that these rights must be exercised in the context of the Chamber's duty to control the proceedings, including the manner of cross-examining witnesses, so as to ascertain the truth and avoid needless consumption of time.[3]

6. The Chamber reminds all Parties that it must operate within the limits of the temporal and material resources available to it. The Prosecution has indicated that it would not require more than eight or nine hours (or two half-day sessions), to conduct the examination-in-chief of General Dallaire. This will leave a minimum of seven half-days for the Defence to conduct cross-examination. The Defence must properly organize itself to cross-examine the witness during the said period. The Chamber recognizes that it is sometimes hard to accurately predict the course of examination-in-chief or cross-examination, but urges all Parties to sufficiently organize their respective examinations so as to ensure the most efficient utilization of the available time.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution Motion and

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[2] "*Réponse D'Augustin Ndindiliyimana au* 'Prosecutor's Extremely Urgent Motion for a Rescheduling Order", filed on 26 October 2006; "*Reponse d'Augustin Bizimungu à la Requête intitulée* – Prosecutor's Extremely Urgent Motion for a Rescheduling Order", filed on 30 October 2006; "Nzuwonomeye's Response to Prosecutor's Extremely Urgent Motion for a Rescheduling Order and Motion to Hold Roméo Dallaire in Contempt of Court", filed on 30 October 2006; *Réplique du Procureur aux réponses introduites par Maitres Christopher Black, Gilles St-Laurent et Charles Taku relativement à la requête en 'Rescheduling Order' du 25 October 2006*, filed on 30 October 2006.

[3] *Prosecutor v. Prlić et al*, "Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination by Defence and o Association of Defence Counsel's Request for Leave to File an *Amicus Curiae* Brief", 4 July 2006, A.C.

HEREBY REVISES the Order contained in its Decision of 20 October 2006 to the effect that General Dallaire's evidence will now be heard from 20 to 24 November, and from 5 to 8 December 2006;

ORDERS that the Prosecution shall have a maximum of two half-days within which to conduct the examination-in-chief of General Dallaire; each of the Defence teams shall have 2 half-days within which to cross-examine General Dallaire.

The Chamber will, in its discretion, determine whether or not any of the Parties would require additional time for cross-examination or re-examination;

The Chamber will, at a later date, issue a Scheduling Order indicating the exact times at which General Dallaire's evidence will be heard.

Arusha, 3 November 2006, done in English.

[Signed] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

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Decision on the Defence Requests for Certification to Appeal the Chamber's Decision of 20 October 2006
7 November 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

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

Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu – Certification to appeal, Roméo Dallaire's video-link testimony, Principle that decisions under Rule 73 are "without interlocutory appeal", Lack of demonstration that the conditions required for certification under Rule 73 (B) are met – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 73 (B)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on Sagahutu's Request for Certification to Appeal, 9 June 2003 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on Bizimungu's Request for Certification to Appeal the Oral Decision Dated 8 June 2005, 30 June 2005 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu**,** Decision on Ndindiliyimana's Request for Certification to Appeal the Chamber's Decision Dated 21 September 2005, 26 October 2005 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on Bizimungu's Motion for Certification to Appeal the Chamber's Oral Decision of 2 February 2006 Admitting Part of Witness GFA's Confessional Statement into Evidence", 27 February 2006 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye,

Innocent Sagahutu, Decision on Ndindiliyimana's Motion for Certification to Appeal the Chamber's Decision Dated 15 June 2006, 14 July 2006 (ICTR-2000-56)

Introduction

1. On 15 September 2006, the Chamber rendered a decision denying the Prosecution request for Witness Roméo Dallaire to give testimony by video-link. The Chamber held that the reasons brought forward by the Prosecution for General Dallaire's inability to travel to Arusha did not meet the criteria established by the jurisprudence of the Tribunal to grant a request for a video-link.[1] On 20 October 2006, the Chamber granted a Prosecution request to reconsider its Decision of 15 September 2006. The Chamber took particular note of the opinion of General Dallaire's physician that the General may require specialist professional care and resources during his testimony which would not be readily available in Arusha and, on that basis, allowed Witness Roméo Dallaire to give his testimony by video-link.[2] On 26 and 27 October 2006 the Defence for Augustin Ndindiliyimana and the Defence for Augustin Bizimungu respectively filed the present Motions[3] asking the Chamber to grant certification of Appeal from its Decision of 20 October 2006 (the "Impugned Decision").

2. The Defence teams submit that the Chamber, after having found in the Impugned Decision that General Dallaire's health condition does not amount to a new fact, contradicts itself by granting the motion for reconsideration on the basis that during his testimony, the General may require specialist care and resources which would not be readily available in Arusha. The Defence teams argue that since Dallaire's health situation was already known, the incidental fact that he may need professional care was also known and could therefore not be a basis for reconsideration.

3. The Defence teams further submit that there is no evidence that such specialist care is not available in Arusha and therefore there is no basis for denying the applicants' right to cross-examine the witness in person.

4. Referring to Dallaire's testimony in the Military 1 case, the Defence for Ndindiliyimana brings to the Chamber's attention that the General appeared neither distressed nor actually in need of specialist care, despite a lengthy and intense cross-examination, and he was not accompanied by a medical specialist on that occasion.

5. Finally, the Defence for Ndindiliyimana submits that it is in the interests of a more efficient, effective and speedy trial for General Dallaire to testify in person, since it would avoid all the problems associated with testimony by video-link and prays the Chamber to restore "in the interests of justice" its Decision of 15 September 2006.

Deliberations

6. The Chamber recalls Rule 73 (B) which reads as follows:

> Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

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[1] "Decision on the Prosecution Request for Witness Roméo Dallaire to give Testimony by Video-Link", para. 15.
[2] "Decision on the Prosecution Request for Reconsideration of the Chamber's Decision of 15 September 2006 concerning the Testimony of Witness Roméo Dallaire by Video-Link", Para. 10.
[3] "Application for Certification of Interlocutory Appeal Re Trial Chamber's Decision of October 20 Granting Video link Testimony of Roméo Dallaire"; "*Demande de Certification d'Appel de la Décision rendue par cette Chambre le 20 Octobre 2006 autorisant que la Déposition du Témoin Roméo Dallaire soir recueillie par Vidéo Conférence.*"

7. The Chamber has on several occasions discussed the criteria for certification under Rule 73 (B).[4] In particular, the Chamber stresses the principle that decisions under Rule 73 are "without interlocutory appeal" and that certification to appeal is an exception that the Chamber may grant, if the two criteria under Rule 73 (B) are satisfied.

8. Having reviewed the submissions of the applicants, the Chamber notes that the Defence teams essentially reargue the Impugned Decision and reiterate some of the arguments brought forward prior to the rendering of the said Decision rather than demonstrating that the conditions required for certification under Rule 73 (B) are met. In fact, the Defence for Ndindiliyimana explicitly prays the Chamber to restore "in the interests of justice" its Decision of 15 September 2006 and, as such, requests the Chamber to reconsider its Decision a second time. This is not the purpose of Rule 73 (B).

9. The Motions therefore fail.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motions.

Arusha, 7 November 2006.

[Signed] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

[4] *The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu,* ICTR-00-56-T, "Decision on Sagahutu's Request for Certification to Appeal", 9 June 2003, para. 16; "Decision on Bizimungu's Request for Certification to Appeal the Oral Decision Dated 8 June 2005", 30 June 2005. para. 17; "Decision on Ndindiliyimana's Request for Certification to Appeal the Chamber's Decision Dated 21 September 2005", 26 October 2005, para. 7; "Decision on Bizimungu's Motion for Certification to Appeal the Chamber's Oral Decision of 2 February 2006 Admitting Part of Witness GFA's Confessional Statement into Evidence", 27 February 2006, para. 11; "Decision on Ndindiliyimana's Motion for Certification to Appeal the Chamber's Decision Dated 15 June 2006", 14 July 2006, para. 7.

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Decision on Defence Requests for Certification and Reconsideration of the Chamber's Rescheduling Order of 3 November 2006
17 November 2006 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

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

Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu – Certification to appeal, Principle that decisions under Rule 73 are "without interlocutory appeal", Right to cross-examine witnesses is a cornerstone of the Accused's right to a fair trial, Flexibility to adjust the timeframes of cross-examinations, Each Defence team shall have for cross-examination the same amount of time as allocated to the Prosecution – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rule 73 (B) ; Statute, art. 20 (4)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on Sagahutu's Request for Certification to Appeal, 9 June 2003 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on Bizimungu's Request for Certification to Appeal the Oral Decision Dated 8 June 2005, 30 June 2005 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on Ndindiliyimana's Request for Certification to Appeal the Chamber's Decision Dated 21 September 2005, 26 October 2005 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on Bizimungu's Motion for Certification to Appeal the Chamber's Oral Decision of 2 February 2006 Admitting Part of Witness GFA's Confessional Statement into Evidence", 27 February 2006 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on Ndindiliyimana's Motion for Certification to Appeal the Chamber's Decision Dated 15 June 2006, 14 July 2006 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, Decision on the Defence Requests for Certification to Appeal the Chamber's Decision of 20 October 2006; 7 November 2006 (ICTR-2000-56)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Jadranko Prlić et al., "Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination by Defence and o Association of Defence Counsel's Request for Leave to File an Amicus Curiae Brief", 4 July 2006 (IT-04-74)

Introduction

1. On 15 September 2006, the Chamber denied the Prosecution request for Witness Roméo Dallaire to give testimony by video-link. On 20 October 2006, the Chamber reconsidered its earlier

Decision and ordered that Witness Roméo Dallaire's testimony would be taken by video-link from Canada between 15 November and 8 December 2006.[1] On 3 November 2006 and upon a request by the Prosecution, the Chamber varied the dates of General Dallaire's testimony and ordered that his testimony be taken from 20 to 24 November and from 5 to 8 December 2006.[2] The Chamber also ordered that the Prosecution should have a maximum of two half-days within which to conduct the examination-in-chief of General Dallaire and that each of the Defence teams should have two half-days within which to cross-examine the witness. The Chamber further held that it would, at a later stage, decide whether additional time would be required for further cross-examination or reexamination.

2. On 8 November 2006, the Defence for Augustin Ndindiliyimana filed a Motion[3] asking the Chamber to grant certification of Appeal from its Decision of 3 November 2006 (the "Impugned Decision"). On 9 and 13 November 2006 the Defence for Innocent Sagahutu and the Defence for Augustin Bizimungu respectively filed Motions[4] requesting the Chamber to reconsider its Decision of 3 November 2006. The Prosecution did not respond to any of the Motions.

Submissions

3. The Defence for Ndindiliyimana submits that the artificial time limitation imposed on the Defence by the Impugned Decision goes to the heart of the rights of the Accused to have a fair trial, to cross-examine witnesses and to ascertain the truth as set out in the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"). The Defence argues that the Impugned Decision has the effect of denying the Applicant's right to make full answer and defence to the charges against him and therefore goes to the very outcome of the trial.

4. The Defence further submits that an immediate resolution of this issue by the Appeals Chamber would materially advance the proceedings since a favourable decision would make it easier to authenticate the many UN documents that have been filed as identification [ID] documents in the course of the proceedings. The Defence contends that without enough time for cross-examination, it would be necessary to call several other UN military officers and administrative personnel and other witnesses to speak to matters and issues which could be better dealt with more expeditiously and efficiently by General Dallaire.

5. Both the Defence for Sagahutu and for Bizimungu question also the sufficiency, thus the fairness of the time allocated for cross-examination. They pray the Chamber to revisit the issue and allocate more time to enable a full defence.

Deliberations

6. Since al1 three Motions relate to the Scheduling Order of 3 November 2006, judicial economy requires that they be dealt with in one single Decision.

(i) Request for Certification

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[1] "Decision on the Prosecution Request for Reconsideration of the Chamber's Decision of 15 September 2006 concerning the Testimony of Witness Roméo Dallaire by Video-Link", Para. 10.
[2] "Decision on Prosecutor's Extremely urgent Motion for a Rescheduling Order."
[3] "Application for Certification of Interlocutory Appeal Re Trial Chamber's Decision of 3 November on Prosecutor's Extremely Urgent Motion for a Rescheduling Order."
[4] *"Requête en Reconsidération de la* 'Decision *on* Prosecutor's Extremely Urgent Motion for a Rescheduling Order'." *"Requête de la défense d'Augustin Bizimungu en reconsidération de la* 'Decision on Prosecutor's Extremely Urgent Motion for a Rescheduling Order' *datée du 3 novembre 2006*."

7. The Chamber has on several occasions discussed the criteria for certification under Rule 73 (B).[5] In particular, the Chamber stresses the principle that decisions under Rule 73 are "without interlocutory appeal" and that certification to appeal is an exception that the Chamber may grant, if the two criteria under Rule 73 (B) are satisfied.

8. The Chamber agrees with the Ndindiliyimana Defence that the right to cross-examine witnesses is a cornerstone of the Accused's right to a fair trial. The Chamber recalls however the Decision of the ICTY Appeals Chamber in the *Prlić* case, in which the Appeals Chamber found that the Trial Chamber's allocation to each of the six Defence Counsel of one sixth of the time allocated to the Prosecution, with sufficient flexibility to adjust the timeframes, complies with the right to cross-examine witnesses as stipulated under Article 2[0] (4) of the Statute.[6] In reaching that Decision, the Appeals Chamber considered in particular that

> "time and resource constraints exist in all judicial institutions and that a legitimate concern ... is to ensure that the proceedings do not suffer undue delays and that the trial is completed within a reasonable time, which is recognized as a fundamental right of due process under international human rights law."[7]

9. In light of the Chamber's directive to the effect that each Defence team shall have, for cross-examination, the same amount of time as allocated to the Prosecution and its indication that it may, where appropriate, consider granting additional time, the Chamber does not see how deferring the defence grievances to the Appeal Chambers would advance any further the proceedings in the instant case.

(ii) Requests for Reconsideration

10. The Chamber is of the opinion that there is no basis to reconsider its Decision in the present case. No new material fact has been brought to the attention of the Chamber and the decision rendered on 3 November 2006 was neither erroneous nor prejudicial to the Defence, since it complied with the relevant guidelines set forth by the Appeals Chamber in *Prlić*. Furthermore, the Chamber considers that the Defence requests to allocate additional time for cross-examination are moot since the Chamber has already indicated its disposition to consider such an extension under appropriate circumstances.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES Ndindiliyimana's request for certification;

DENIES the requests for reconsideration filed by the Defence for Sagahutu and Bizimungu.

Arusha, 17 November 2006.

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[5] *The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier ,Nzuwonemeye, Innocent Sagahutu,* ICTR-00-56-T, "Decision on Sagahutu's Request for Certification to Appeal", 9 June 2005, para. 16; "Decision on Bizimungu's Request for Certification to Appeal the Oral Decision Dated 8 June 2005". 30 June 2005, para. 17; "Decision on Ndindiliyimana's Request for Certification to Appeal the Chamber's Decision Dated 21 September 2005", 26 October 2005, para. 7; "Decision on Bizimungu's Motion for Certification to Appeal the Chamber's Oral Decision of 2 February 2006 Admitting Part of Witness GFA's Confessional Statement into Evidence". 27 February 2006, para. 11; "Decision on Ndindiliyimana's Motion for Certification to Appeal the Chamber's Decision Dated 15 June 2006". 14 July 2006, para. 7; Decision on the Defence Requests for Certification to Appeal the Chamber's Decision of 20 October 2006; 7 November 2006, para. 7

[6] *The Prosecutor v. Jadranka Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Corić, Berisla Pusić,* Case N°IT-04-74-AR73.2, Decision on Joint Defence Interlocutory Appeal against the Trial Chamber's oral Decision of 8 May 2006 relating to Cross-examination by Defence and on Association of Defence Counsel's Request for Leave to File an *Amicus Curiae* Brief, 4 July 2006, p. 4.

[7] *Ibid*., pp. 4-5.

[Signed] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

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Le Procureur c. Augustin BIZIMUNGU, Augustin NDINDILIYIMANA, François-Xavier NZUWONEMEYE et Innocent SAGAHUTU

Affaire N° ICTR-2000-56

Fiche technique: Augustin Bizimungu

- Nom: BIZIMUNGU
- Prénom: Augustin
- Date de naissance: 28 août 1952
- Sexe: masculin
- Nationalité: rwandaise
- Fonction occupée au moment des faits incriminés: chef d'état-major de l'armée rwandaise
- Date de confirmation de l'acte d'accusation: 23 janvier 2000
- Chefs d'accusation: génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date et lieu de l'arrestation : 2 août 2002, en Angola
- Date du transfert: 14 août 2002
- Date de la comparution initiale: 21 août 2002
- Date du début du procès : 20 septembre 2004

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Fiche technique: Augustin Ndindiliyimana

- Nom: NDINDILIYIMANA
- Prénom: Augustin

• Date de naissance: 1943

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: chef du personnel de la gendarmerie nationale

• Date de confirmation de l'acte d'accusation: 28 janvier 2000

• Chefs d'accusation: génocide, complicité de génocide, entente en vue de commettre le génocide, incitation directe et publique à commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date et lieu de l'arrestation: 29 janvier 2000, en Belgique

• Date du transfert: 22 avril 2000

• Date de la comparution initiale: 27 avril 2000

• Précision sur le plaidoyer: non coupable

• Date du début du procès : 20 septembre 2004

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Fiche technique: François-Xavier Nzuwonemeye

• Nom: NZUWONEMEYE

• Prénom: François-Xavier

• Date de naissance: 30 août 1955

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: commandant du 42ème bataillon de reconnaissance de l'armée rwandaise

• Date de confirmation de l'acte d'accusation: 28 janvier 2000

• Chefs d'accusation: génocide, complicité de génocide, entente en vue de commette le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date et lieu de l'arrestation: 15 février 2000, en France

• Date du transfert: 23 mai 2000

• Date de la comparution initiale: 25 mai 2000

• Précision sur le plaidoyer: non coupable

• Date du début du procès : 20 septembre 2004

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Fiche technique: Innocent Sagahutu

• Nom: SAGAHUTU

• Prénom: Innocent

• Date de naissance: inconnue

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: commandant en second du bataillon de reconnaissance de l'armée rwandaise

• Date de confirmation de l'acte d'accusation: 28 janvier 2000

• Chefs d'accusation: génocide, complicité de génocide, entente en vue de commette le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date et lieu de l'arrestation: 15 février 2000, au Danemark

• Date du transfert: 24 novembre 2000

• Date de la comparution initiale: 28 novembre 2000

• Précision sur le plaidoyer: non coupable

• Date du début du procès : 20 septembre 2004

Décision relative à la requête de Nzuwonemeye intitulée « Motion Requesting the Cooperation from the Government of The Netherlands Pursuant to Article 28 of the Statute »
13 février 2006 (ICTR-2000-56-T)

(Original : Anglais)

Chambre de première instance II

Juges : Asoka de Silva, Présidente de Chambre ; Taghrid Hikmet ; Seon Ki Park

François-Xavier Nzuwonemeye – Demande de coopération, Interrogatoire d'un ancien soldat de la MINUAR : limites de l'entretien fixées par le Sous-Secrétaire Général aux affaires juridiques de l'ONU, Pays-Bas : pour politique de ne pas donner suite aux requêtes relatives au mandat des Tribunaux spéciaux qui n'ont pas un caractère contraignant – Requête acceptée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 54 ; Statut, art. 28

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana, 25 mai 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au général de division Yaache et la coopération de la République du Ghana, 23 juin 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la demande de coopération et d'assistance adressée au Royaume des Pays-Bas, 7 février 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la demande d'assistance adressée à la République togolaise en vertu de l'article 28 du Statut, 31 octobre 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Augustin Ndindiliyimana et consorts, Décision relative à la requête ex parte et confidentielle de Nzuwonemeye aux fins d'obtenir la coopération du Gouvernement du Royaume de Belgique, 9 novembre 2005 (ICTR-2000-56)

T.P.I.Y. : Chambre d'appel, Le Procureur c. Radislav Krstić, Arrêt relative à la demande d'injonction, 1er juillet 2003 (IT-98-33)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIEGEANT en la Chambre de première instance II, composée des juges Asoka de Silva, Président de Chambre, Taghrid Hikmet et Seon Ki Park (la « Chambre »),

SAISI de la requête de Nzuwonemeye intitulée « Motion Requesting the Cooperation from the Government of The Netherlands Pursuant to Article 28 of the Statute » (la « Requête »), déposé le 25 janvier 2006,

NOTANT que le Procureur n'a pas déposé de réponse à la Requête,

VU le Statut du Tribunal (le « Statut ») et le Règlement de procédure et de preuve (le « Règlement »), en particulier l'article 28 du Statut et l'article 54 du Règlement,

STATUE sur la Requête en vertu de l'article 73 (A) du Règlement, sur la base des arguments écrits de la Défense.

Arguments de la Défense

1. La Défense de Nzuwonemeye demande à la Chambre de rendre une ordonnance en vue d'obtenir la coopération et l'assistance du Gouvernement néerlandais pour faciliter un entretien avec le Major Robert Alexander Van Putten[1]. L'équipe de la Défense souhaite interroger le Major Van Putten sur différentes questions relatives à son rôle comme soldat de la MINUAR au Rwanda en 1994, notamment (a) sa perception des événements survenus au Rwanda en 1994 ; (b) sa perception de la situation militaire au Rwanda et le rôle de la MINUAR ; (c) les réunions auxquelles il a assisté avec des officiers supérieurs rwandais les 6 et 7 avril 1994 ; (d) la mort de 10 casques bleus belges de la MINUAR le 7 avril 1994 ; et (e) le meurtre de l'ancienne Première Ministre du Rwanda, Agathe Uwilingiyimana[2].

2. La Défense fait valoir qu'elle a reçu une lettre du Sous-Secrétaire Général aux affaires juridiques de l'Organisation des Nations Unies indiquant que l'Organisation n'avait aucune objection à cette rencontre et à cet entretien, à condition que ne soit abordée aucune question « liée (i) à des informations confidentielles fournies à l'ONU par un tiers ou un Etat, (ii) au déroulement de réunions à huis clos ou de consultations informelles tenue par le Conseil de Sécurité ou (iii) à des informations dont la divulgation risquerait de mettre des vies en danger »[3] [traduction].

3. La Défense affirme que le 28 novembre 2005, elle a adressé une lettre au Ministre néerlandais de la défense pour lui demander l'autorisation d'obtenir les coordonnées du major Robert Alexander Van Putten et de rencontrer ce témoin potentiel[4]. Le 19 décembre 2005, le Ministre a rejeté la demande de la Défense, en expliquant dans sa lettre, entre autres, qu'en raison de la nécessité d'un emploi judicieux des ressources, les Pays-Bas ont pour politique de ne pas donner suite aux requêtes relatives au mandat des Tribunaux spéciaux qui n'ont pas un caractère contraignant. Le Ministre a toutefois indiqué que le Gouvernement néerlandais donnerait suite à une ordonnance de la Chambre de première instance lui demandant de produire le Major Van Putten en qualité de témoin[5].

4. La Défense fait valoir qu'elle ne peut déterminer si le Major Van Putten sera appelé comme témoin sans d'abord s'être entretenue avec celui-ci. Elle soutient enfin que, selon la jurisprudence des deux Tribunaux spéciaux, lorsque la Défense ne connaît pas la nature précise et la pertinence des éléments de preuve qu'un témoin éventuel peut fournir, il est dans l'intérêt de la justice de lui permettre de rencontrer le témoin et apprécier la valeur de son témoignage[6].

Délibération

5. La Chambre rappelle que l'article 28 du Statut fait obligation aux Etats de « collabore[r] avec le Tribunal pénal international pour le Rwanda à la recherche et au jugement des personnes accusées d'avoir commis des violations graves du droit international humanitaire ». Le paragraphe 2 dudit article énumère de manière non exhaustive les types de demande de coopération ou d'assistance que le Tribunal peut adresser aux Etats. Selon la jurisprudence du Tribunal, les pouvoirs conférés à la Chambre par l'article 28 du Statut peuvent s'étendre à toute demande ou ordonnance pouvant assister

[1] Requête, par. 1.
[2] Requête, par. 3.
[3] Requête, annexe 1.
[4] Requête, par. 4 annexe 2.
[5] Requête, par. 5 annexe 3.
[6] Requête, par. 6 et 7.

le Tribunal dans son mandat[7]. De plus, la Chambre rappelle que l'article 54 du Règlement l'autorise à délivrer les ordonnances nécessaires aux fins de l'enquête, de la préparation ou de la conduite du procès. Ainsi habilitée par l'article 28 du Statut et l'article 54 du Règlement, la Chambre de première instance I a récemment délivré une ordonnance demandant la coopération d'un Etat dans la présente espèce[8].

6. La Chambre rappelle que selon la jurisprudence du Tribunal, la Partie qui sollicite une ordonnance en vertu de l'article 28 du Statut doit préciser autant que possible la nature et le but de l'assistance demandée à l'Etat en question, et indiquer la pertinence de sa demande par rapport à l'espèce. Elle doit également établir qu'elle a fait des efforts pour obtenir cette assistance mais qu'elle n'y est pas parvenue[9].

7. La Chambre note que le paragraphe 3 de la requête précise la nature des informations recherchées ainsi que leur pertinence par rapport à l'espèce. Il ressort de l'annexe 2 jointe à la requête que la Défense a fait des efforts raisonnables pour obtenir la coopération du Gouvernement néerlandais en demandant l'autorisation de rencontrer l'ancien soldat de la MINUAR. La Chambre relève également que les efforts de la Défense n'ont pas été couronnés de succès en raison de la politique des Pays-Bas consistant à ne pas donner suite aux requêtes relatives au mandat des Tribunaux spéciaux si celles-ci n'ont pas un caractère contraignant. La Chambre conclut que les conditions pour obtenir la délivrance d'une ordonnance de demande de coopération en vertu de l'article 28 du Statut sont donc réunies.

8. De plus, la Chambre s'accorde avec la jurisprudence des Tribunaux spéciaux selon laquelle lorsque la Défense ne connaît pas la nature précise et la pertinence des éléments de preuve qu'un témoin éventuel peut fournir, il est dans l'intérêt de la justice de lui permettre de rencontrer le témoin et d'apprécier la valeur de son témoignage[10].

9. Toutefois, en délivrant l'ordonnance de demande de coopération, la Chambre est consciente de ce que le Sous-Secrétaire général aux affaires juridiques de l'Organisation des Nations Unies a consenti moyennant le respect de certaines conditions, à la tenue des rencontres proposées.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la Requête ;

PRIE le Gouvernement néerlandais de fournir toute l'assistance requise à l'équipe de la Défense de Nzuwonemeye pour lui permettre de rencontrer le Major Van Putten et de s'entretenir avec lui à un endroit qui conviendrait à toutes les parties ;

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[7] *Le Procureur c. Bagosora et consorts*, affaire n°ICTR-98-41-T, Chambre de première instance, Décision relative à la demande de coopération et d'assistance adressée au Royaume des Pays-Bas, par. 4 [ci-après dénommée « Décision *Bagosora* du 7 février 2005 »].

[8] *Le Procureur c. Ndindiliyimana et consorts*, affaire n°ICTR-00-56-T, Chambre de première instance II, Décision relative à la requête *ex parte* et confidentielle de Nzuwonemeye aux fins d'obtenir la coopération du Gouvernement du Royaume de Belgique, 9 novembre 2005 [ci-après dénommée « Décision Ndindiliyimana du 9 novembre 2005 »].

[9] Le Procureur c. Bagosora et consorts, Chambre de première instance I, Decision on the Defense for Bagosora's Request to obtain the Cooperation of the Republic of Ghana, 25 mai 2004, par. 6, cité par la Chambre qui y souscrit dans la décision Ndindiliyimana du 9 novembre 2005, par. 10. Voir également Le Procureur c. Bagosora et consorts, Chambre de première instance I, Décision relative à la demande d'assistance adressée à la République togolaise en vertu de l'article 28 du Statut, 31 octobre 2005, par. 2 ; Décision Bagosora du 23 juin 1994, par. 4 ; Décision Bagosora du 7 février, par. 5.

[10] *Le Procureur c. Bagosora et consorts*, Chambre de première instance I, Décision relative à la requête tendant à obtenir délivrance d'une injonction de comparaître au général de division Yaache et la coopération de la république du Ghana, 23 juin 2004, par. 4. Voir également, *Le Procureur c. Krstić*, affaire n°IT-98-33-A, Chambre d'appel du TPIY, arrêt relatif à la demande d'injonction, 1er juillet 2003, par. 8.

ORDONNE que la Défense ne pourra aborder lors de cet entretien aucune question liée (i) à des informations confidentielles fournies à l'ONU par un tiers ou un Etat, (ii) au déroulement de réunions à huis clos ou de consultations informelles tenue par le Conseil de Sécurité ou (iii) à des informations dont la divulgation risquerait de mettre des vies en danger.

CHARGE le Greffier de transmettre la présente Décision aux autorités compétentes du Gouvernement néerlandais, de collaborer avec l'équipe de la Défense de Nzuwonemeye en vue de la réalisation de l'objet de la présente demande et de faire rapport à la Chambre.

Arusha, le 13 février 2006.

[Signé] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

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Décision relative à la requête de Nzuwonemeye intitulée Motion Requesting the Cooperation from the Government of Ghana Pursuant to Article 28 of the Statute 13 février 2006 (ICTR-2000-56-T)

(Original : Anglais)

Chambre de première instance II

Juges : Asoka de Silva, Présidente de Chambre ; Taghrid Hikmet ; Seon Ki Park

François-Xavier Nzuwonemeye – Demande de coopération, Interrogatoire d'un ancien soldat de la MINUAR : limites de l'entretien fixées par le Sous-Secrétaire Général aux affaires juridiques de l'ONU, Ghana, Intérêt de la justice de permettre à la Défense de rencontrer un témoin et d'apprécier la valeur de son témoignage – Requête acceptée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 54 ; Statut, art. 28

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana, 25 mai 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au général de division Yaache et la coopération de la République du Ghana, 23 juin 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la demande de coopération et d'assistance adressée au Royaume des Pays-Bas, 7 février 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la demande d'assistance adressée à la République togolaise en vertu de l'article 28 du Statut, 31 octobre 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Augustin Ndindiliyimana et consorts, Décision relative à la requête ex parte et confidentielle de Nzuwonemeye aux fins d'obtenir la coopération du Gouvernement du Royaume de Belgique, 9 novembre 2005 (ICTR-2000-56)

T.P.I.Y. : Chambre d'appel, Le Procureur c. Radislav Krstić, Arrêt relative à la demande d'injonction, 1er juillet 2003 (IT-98-33)

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIEGEANT en la Chambre de première instance II, composée des juges Asoka de Silva, Président de Chambre, Taghrid Hikmet et Seon Ki Park (la « Chambre »),

SAISI de la requête de Nzuwonemeye intitulée « Motion for Request of Cooperation from the Government of Ghana and the Government of Togo Pursuant to Article 28 of the Statute » (la « Requête »), déposée le 25 janvier 2006,

NOTANT que le Procureur n'a pas déposé de réponse à la Requête,

VU le Statut du Tribunal (le « Statut ») et le Règlement de procédure et de preuve (le « Règlement »), en particulier l'article 28 du Statut et l'article 54 du Règlement,

STATUE sur la Requête en vertu de l'article 73 (A) du Règlement, sur la base des arguments écrits de la Défense.

Arguments de la Défense

1. La Défense de Nzuwonemeye demande à la Chambre de rendre une ordonnance en vue d'obtenir la coopération et l'assistance du Gouvernement ghanéen pour faciliter un entretien avec les personnes ci-après : le sergent Aboagye, le général de corps d'armée Henry Kuame Ayidiho ainsi que les capitaines Amoako, Kwesi Doe et Samdow Zambulugu[1]. L'équipe de la Défense souhaite interroger ces personnes sur différentes questions relatives à leur rôle comme soldats de la MINUAR au Rwanda en 1994, en l'occurrence (a) leur perception des événements survenus au Rwanda en 1994; (b) leur perception de la situation militaire au Rwanda et le rôle de la MINUAR; (c) les réunions auxquelles elles ont avec des officiers supérieurs rwandais les 6 et 7 avril 1994; (d) la mort de dix casques bleus belges de la MINUAR le 7 avril 1994 et (e) le meurtre de l'ancienne Première ministre du Rwanda, Agathe Uwilingiyimana[2].

2. La Défense fait valoir qu'elle a reçu une lettre du Sous-Secrétaire général aux affaires juridiques de l'Organisation des Nations Unies indiquant que l'organisation n'avait aucune objection à cette rencontre et cet entretien, à condition que ne soit abordée aucune question « liée (i) à des informations confidentielles fournies à 1'ONU par un tiers ou un Etat, (ii) au déroulement de réunions à huis clos ou de consultations informelles tenues par le Conseil de sécurité, ou (iii) à des informations dont la divulgation risquerait de mettre des vies en danger »[3] [traduction].

3. La Défense affirme que le 29 novembre 2005, elle a adressé une lettre au Ministre ghanéen de la défense pour lui demander l'autorisation de rencontrer les anciens soldats de la MINUAR susmentionnés et d'obtenir les adresses de ceux-ci[4]. Elle déclare qu'elle n'a toujours pas reçu de réponse bien qu'elle ait envoyé une lettre de rappel au Ministre de la défense le 19 décembre 2005. Elle craint donc que sa demande ne soit rejetée[5].

4. La Défense fait enfin valoir que le Procureur va probablement achever la présentation de ses moyens à charge cette année et elle n'a donc plus beaucoup de temps devant elle pour mener ses enquêtes. Il devient par conséquent urgent pour l'Equipe de la Défense de pouvoir rencontrer ces

[1] Requête, par. 1.
[2] Requête, par. 3.
[3] Requête, annexe 1.
[4] Requête, par. 4, annexe 2.
[5] Requête, par. 7.

témoins, de les interroger et d'apprécier la pertinence de leurs témoignages. La Défense estime qu'une ordonnance de la Chambre pourrait contribuer à accélérer la procédure[6].

Délibération

5. La Chambre rappelle que l'article 28 du Statut fait obligation aux Etats de « collabore[r] avec le Tribunal pénal international pour le Rwanda à la recherche et au jugement des personnes accusées d'avoir commis des violations graves du droit international humanitaire », Le paragraphe 2 dudit article énumère de manière non exhaustive les types de demande de coopération ou d'assistance que le Tribunal peut adresser aux Etats. Selon la jurisprudence du Tribunal, les pouvoirs conférés à la Chambre par l'article 28 du Statut peuvent s'étendre à toute demande ou ordonnance pouvant assister le Tribunal dans son mandat[7]. De plus, la Chambre rappelle que l'article 54 du Règlement l'autorise à délivrer les ordonnances nécessaires aux fins de l'enquête, de la préparation ou de la conduite du procès. Ainsi habilitée par l'article 28 du Statut et l'article 54 du Règlement, la Chambre de première instance II a récemment délivré une ordonnance demandant la coopération d'un Etat dans la présente espèce[8].

6. La Chambre rappelle que selon la jurisprudence du Tribunal, la partie qui sollicite une ordonnance en vertu de l'article 28 du Statut doit préciser autant que possible la nature et le but de l'assistance demandée à l'Etat en question, et indiquer la pertinence de sa demande par rapport à l'espèce. Elle doit également établir qu'elle a fait des efforts pour obtenir cette assistance mais qu'elle n'y est pas parvenue[9].

7. La Chambre note que le paragraphe 3 de la requête précise la nature des informations recherchées ainsi que leur pertinence par rapport à l'espèce. Il ressort de l'annexe 2 jointe à la requête que la Défense a fait des efforts raisonnables pour obtenir la coopération du Gouvernement ghanéen en demandant l'autorisation de rencontrer les anciens soldats de la MINUAR en question. La Chambre relève également que les efforts de la Défense n'ont pas été couronnés de succès, et que malgré une lettre de rappel adressée au Ministre ghanéen de la défense, elle n'a toujours pas reçu de réponse. La Chambre conclut que les conditions pour obtenir la délivrance d'une ordonnance de demande de coopération en vertu de l'article 28 du Statut sont donc réunies.

8. De plus, la Chambre s'accorde avec la jurisprudence des Tribunaux spéciaux selon laquelle lorsque la Défense ne connait pas la nature précise et la pertinence des éléments de preuve qu'un témoin éventuel peut fournir, il est dans l'intérêt de la justice de lui permettre de rencontrer le témoin et d'apprécier la valeur de son témoignage[10].

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[6] Requête, par. 8.

[7] *Le Procureur c. Bagosora et consorts*, affaire n°ICTR-98-41-T, Chambre de première instance, Décision relative à la demande de coopération et d'assistance adressée au Royaume des Pays-Bas, par. 4 [ci-après dénommée « Décision *Bagosora* du 7 février 2005 »].

[8] *Le Procureur c. Ndindiliyimana et consorts*, affaire n°ICTR-00-56-T, Chambre de première instance II, Décision relative à la requête *ex parte* et confidentielle de Nzuwonemeye aux fins d'obtenir la coopération du Gouvernement du Royaume de Belgique, 9 novembre 2005 [ci-après dénommée « Décision *Ndindiliyimana* du 9 novembre 2005 »].

[9] Le Procureur c. Bagosora et consorts, Chambre de première instance I, Decision on the Defense for Bagosora's Request to obtain the Cooperation of the Republic of Ghana, 25 mai 2004, par. 6, cité par la Chambre qui y souscrit dans la décision Ndindiliyimana du 9 novembre 2005, par. 10. Voir également Le Procureur c. Bagosora et consorts, Chambre de première instance I, Décision relative à la demande d'assistance adressée à la République togolaise en vertu de l'article 28 du Statut, 31 octobre 2005, par. 2 ; Décision Bagosora du 23 juin 1994, par. 4 ; Décision Bagosora du 7 février, par. 5.

[10] *Le Procureur c. Bagosora et consorts*, Chambre de première instance I, Décision relative à la requête tendant à obtenir délivrance d'une injonction de comparaître au général de division Yaache et la coopération de la république du Ghana, 23 juin 2004, par. 4. Voir également, *Le Procureur c. Krstić*, affaire n°IT-98-33-A, Chambre d'appel du TPIY, arrêt relatif à la demande d'injonction, 1er juillet 2003, par. 8.

9. Toutefois, en délivrant l'ordonnance de demande de coopération, la Chambre est consciente que le Sous-Secrétaire général aux affaires juridiques de l'Organisation des Nations Unies a consenti moyennant le respect de certaines conditions, à la tenue des rencontres proposées.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la Requête ;

PRIE le Gouvernement ghanéen de fournir toute l'assistance requise à l'équipe de la Défense de Nzuwonemeye pour lui permettre de rencontrer le sergent Aboagye, le général de corps d'armée Henry Kuame Ayidiho ainsi que les capitaines Amoako, Kwesi Doe et Samdow Zambulugu, et de s'entretenir avec eux à un endroit qui conviendrait à toutes les parties ;

ORDONNE que la Défense ne pourra aborder lors de ces entretiens aucune question liée (i) des informations confidentielles fournies à l'Organisation des Nations Unies par un tiers ou un Etat ou (ii) au déroulement de réunions à huis clos ou de consultations informelles tenues par le Conseil de sécurité, ou (iii) à des informations dont la divulgation risquerait de mettre des vies en danger.

CHARGE le Greffier de transmettre la présente Décision aux autorités compétentes du Gouvernement ghanéen, de collaborer avec l'équipe de la Défense de Nzuwonemeye en vue de la réalisation de l'objet de la présente demande et de faire rapport à la Chambre.

Arusha, le 13 février 2006.

[Signé] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

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Décision sur la requête de Nzuwonemeye intitulée Request of Cooperation from the Kingdom of Belgium Pursuant to Article 28 of the Statute 7 juin 2006 (ICTR-2000-56-T)

(Original : Anglais)

Chambre de première instance II

Juges : Asoka de Silva, Présidente de Chambre ; Taghrid Hikmet ; Seon Ki Park

François-Xavier Nzuwonemeye – Coopération des Etats, Belgique, Partie sollicitant une ordonnance en application de l'article 28 du Statut doit préciser dans la mesure du possible la nature et le but de l'assistance sollicitée et sa pertinence au regard du procès, Démonstration que les efforts préalables à la demande d'ordonnance ont été infructueux, Soldats de la MINUAR, Consentement du Sous-Secrétaire Général des Nations Unies aux affaires juridiques pour les entrevues proposées – Requête acceptée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 54 et 73 (A) ; Statut, art. 28 et 28 (2)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana, 25 mai 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et

consorts, Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au général de division Yaache et la coopération de la République du Ghana, 23 juin 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la demande de coopération et d'assistance adressée au Royaume des Pays-Bas, 7 février 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la demande d'assistance adressée à la République togolaise en vertu de l'article 28 du Statut, 31 octobre 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Augustin Ndindiliyimana et consorts, Décision relative à la requête ex parte et confidentielle de Nzuwonemeye aux fins d'obtenir la coopération du Gouvernement du Royaume de Belgique, 9 novembre 2005 (ICTR-2000-56) ; Chambre de première instance, Le Procureur c. François-Xavier Nzuwonemeye, Décision relative à la requête de Nzuwonemeye intitulée « Motion Requesting the Cooperation from the Government of The Netherlands Pursuant to Article 28 of the Statute », 13 février 2006 (ICTR-2000-56) ; Chambre de première instance, Le Procureur c. François-Xavier Nzuwonemeye, Décision relative à la requête de Nzuwonemeye intitulée Motion Requesting the Cooperation from the Government of Ghana Pursuant to Article 28 of the Statute, 13 février 2006 (ICTR-2000-56) ; Chambre de première instance, Le Procureur c. François-Xavier Nzuwonemeye, Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of Togo Pursuant to Article 28 of the Statute, 13 février 2006 (ICTR-2000-56)

T.P.I.Y.: Chambre d'appel, Le Procureur c. Radislav Krstić, Arrêt relative à la demande d'injonction, 1er juillet 2003 (IT-98-33)

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance II, composée des juges Asoka de Silva, Président de Chambre, Taghrid Hikmet et Seon Ki Park (la « Chambre »),

SATSI de la requête de Nzuwonemeye intitulée « Motion for Request of Cooperation from the Kingdom of Belgium Pursuant to Article 28 of the Statute » (la « Requête »), déposée le 18 mai 2006,

NOTANT que le Procureur n'a pas déposé de réponse à la Requête,

VU le Statut du Tribunal (le « Statut ») et le *Règlement de procédure et de preuve* (le « Règlement »), en particulier l'article 28 du Statut et l'article 54 du Règlement,

STATUE sur la Requête sur la base des arguments écrits de la Défense, déposés conformément à l'article 73 (A) du Règlement.

Arguments de la Défense

1. La Défense de Nzuwonemeye demande à la Chambre de rendre une ordonnance en vue d'obtenir la coopération et l'assistance du Gouvernement belge pour faciliter un entretien avec le major Maggen et le colonel Joseph Dewez[1]. La Défense souhaite les interroger sur différentes questions concernant leur rôle en tant que soldats de la MINUAR (Mission des Nations Unies pour l'assistance au Rwanda) au Rwanda en 1994, en l'occurrence (a) leur perception des événements survenus au Rwanda en 1994 ; (b) leur perception de la situation militaire au Rwanda et du rôle de la MINUAR; (c) les réunions auxquelles ils ont participé avec des officiers supérieurs rwandais les 6 et 7 avril 1994; (d) la mort de dix casques bleus belges de la MINWAR le 7 avril 1994 et (e) le meurtre de l'ancien Premier Ministre du Rwanda, Agathe Uwilingiyimana[2].

[1] Requête, par. 8.
[2] *Ibid*., par. 3.

2. La Défense fait valoir qu'elle a reçu une lettre du Sous-secrétaire général aux affaires juridiques de l'organisation des Nations Unies indiquant que l'organisation n'avait aucune objection à cette rencontre et à cet entretien, à condition que ne soit abordée aucune question « se rapportant (i) à des informations confidentielles fournies à 1'ONU par un tiers ou un État, (ii) au déroulement de réunions à huis clos ou de consultations informelles tenues par le Conseil de sécurité, ou (iii) à des informations dont la divulgation risquerait de mettre des vies en danger »[3].

3. La Défense affirme que le 28 novembre 2005, elle a adressé une lettre au Ministre belge de la défense dans laquelle elle demandait l'adresse de ces anciens soldats de la MINUAR et sollicitait l'autorisation de les rencontrer[4]. Le 4 janvier 2006, elle a reçu une lettre du Ministre belge de la défense indiquant que la demande avait été transmise au Ministère de la justice[5]. Le 10 février 2006, la Défense a reçu une lettre du Ministère de la justice l'informant qu'elle n'était pas autorisée à rencontrer le major Maggen et le colonel Dewez, au motif que le Ministre considérait que l'article 28 du Statut ne s'appliquait qu'aux demandes émanant du Bureau du Procureur ou du Tribunal, et que par conséquent il ne pouvait accéder à la requête de la Défense[6]. Le Ministère indiquait cependant qu'il pourrait faire droit à cette demande sur ordonnance du Tribunal[7].

4. La Défense déclare enfin qu'elle n'est pas en mesure d'apprécier pleinement la nature et la pertinence de ces témoins potentiels, et qu'il est donc dans l'intérêt de la justice qu'elle soit autorisée à rencontrer le major Maggen et le colonel Dewez afin de pouvoir apprécier la pertinence de leurs témoignages[8].

Délibération

5. La Chambre rappelle qu'aux termes de l'article 28 du Statut, les États sont tenus de « collabore[r] avec le Tribunal international pour le Rwanda à la recherche et au jugement des personnes accusées d'avoir commis des violations graves du droit international humanitaire ». Au paragraphe 2 de l'article 28, figure une liste non-exhaustive des types de demande de coopération ou d'assistance que le Tribunal peut adresser à un État. Selon la jurisprudence du Tribunal, les pouvoirs conférés à la Chambre par l'article 28 du Statut peuvent s'étendre à toute demande ou toute ordonnance visant à assister le Tribunal dans l'exercice de son mandat[9]. La Chambre rappelle par ailleurs l'article 54 du Règlement qui l'autorise à délivrer, à la demande d'une des parties ou de sa propre initiative, toute ordonnance qu'elle juge nécessaire aux fins de l'enquête, de la préparation ou de la conduite du procès. Agissant en vertu de l'article 28 du Statut et de l'article 54 du Règlement, la Chambre a récemment rendu quatre ordonnances enjoignant à des États de collaborer avec le Tribunal en l'espèce[10].

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[3] Requête, par. 2, annexe 1.
[4] Requête, par. 4, annexe 2.
[5] Requête, par. 5.
[6] Requête, par. 6, annexe 3.
[7] Id.
[8] Requête, par. 7.
[9] *Le Procureur c. Bagosora* et consorts, affaire n°ICTR-98-41-T, (Chambre de première instance I), Décision relative à la demande de coopération et d'assistance adressée au Royaume des Pays-Bas, 7 février 2005, par. 4. [Ci-après dénommée la « décision *Bagosora* du 7 février 2005 »].
[10] *Le Procureur c. Ndindiliyimana* et consorts, affaire n°ICTR-00-56-T, (Chambre de première instance II), Décision relative à la requête *ex parte* et confidentielle de Nzuwonemeye aux fins d'obtenir la coopération du Royaume de Belgique, 9 novembre 2005, [Ci-après dénommée la à décision *Ndindiliyimana* du 9 novembre2005 »], Décision relative à la requête de Nzuwonemeye intitulée « *Motion Requesting the Cooperation from the Government of the Netherlands pursuant to Article 28 of the Statute* », 13 février 2006 ; Décision relative à la requête de Nzuwonemeye intitulée « *Motion Requesting the Cooperation from the Government of Ghana pursuant to Article 28 of the Statute* », 13 février 2006 ; Décision relative à la Requête de Nzuwonemeye intitulée « *Motion Requesting the Cooperation from the Government of Togo pursuant to Article 28 of the Statute* », 13 février 2006 ; [Ci-après dénommées les « décisions *Ndindiliyimana* du 13 février 2006 »)].

6. La Chambre rappelle également la jurisprudence du Tribunal selon laquelle la partie sollicitant une ordonnance en application de l'article 28 du Statut doit préciser, dans la mesure du possible, la nature et le but de l'assistance sollicitée et sa pertinence au regard du procès. Elle doit également établir qu'elle a fait des efforts pour obtenir cette assistance, mais que ceux-ci ont été vains[11].

7. La Chambre relève que dans la Requête[12], la Défense précise la nature des informations sollicitées tout comme leur pertinence au regard du procès. Le document joint en annexe 2 de la Requête montre que la Défense a fait des efforts raisonnables pour obtenir l'assistance du gouvernement belge, en demandant l'autorisation de rencontrer les anciens soldats de la MINUAR dont il est question. La Chambre ajoute que l'annexe 3 montre que les efforts de la Défense ont été vains, Elle conclut donc que les critères requis pour faire droit à une demande d'ordonnance en vue d'obtenir la coopération d'un État conformément à l'article 28 ont été remplis. Qui plus est, les autorités belges ont indiqué qu'elles étaient disposées à répondre à cette demande à condition qu'elle soit présentée sous la forme d'une ordonnance délivrée par le Tribunal.

8. Par ailleurs, la Chambre fait sienne la jurisprudence des deux Tribunaux *ad hoc* selon laquelle lorsque la Défense ne connaît pas la nature précise et la pertinence des éléments de preuve qu'un témoin éventuel peut fournir, il est dans l'intérêt de la justice de lui permettre de rencontrer le témoin et d'évaluer sa déposition[13].

9. Néanmoins, en rendant l'ordonnance de coopération en l'espèce, la Chambre est consciente que le Sous-Secrétaire général aux affaires juridiques de l'organisation des Nations Unies avait consenti à la rencontre susmentionnée en y mettant un certain nombre de conditions.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la Requête,

PRIE le gouvernement belge de fournir toute l'assistance requise pour permettre à l'équipe de défense de Nzuwonemeye de rencontrer et d'interroger le major Maggen et le colonel Dewez, en un lieu convenant à toutes les parties ;

ORDONNE que lors des entretiens, la Défense ne pose pas de questions portant sur

(i) des informations confidentielles fournies à l'organisation des Nations Unies par un tiers ou un État;
(ii) le déroulement de réunions à huis clos ou de consultations informelles tenues par le Conseil de sécurité et ;
(iii) des informations dont la divulgation risquerait de mettre des vies en danger.

CHARGE le Greffe de transmettre la présente ordonnance aux autorités compétentes du Royaume de Belgique, d'assister la Défense de Nzuwonemeye dans l'exécution de la présente demande et d'en faire rapport à la Chambre.

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[11] Le Procureur c. Bagosora et consorts, (Chambre de première instance I), « Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana », 25 mai 2004, par. 6, citée dans la décision Ndindiliyimana du 9 novembre 2005, par. 10, et dans les décisions Ndindiliyimana du 13 février 2006, par. 6. Voir aussi, Le Procureur c. Bagosora et consorts, (Chambre de première instance I) Décision relative à la demande d'assistance adressée à la République togolaise en vertu de l'article 28 du Statut, 31 octobre 2005, par. 2 ; décision Bagosora du 23 juin 2004, par. 4 ; décision Bagosora du 7 février2005, par. 5.

[12] Requête, par. 3.

[13] *Le Procureur c. Bagosora et consorts*, (Chambre de première instance I), Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au général de division Yaache et la coopération de la République du Ghana, 23 juin 2004, par. 4. Voir aussi, *Le Procureur c. Krstić*, affaire n°IT-98-33-A, 2003 (Chambre d'appel du TPIY), Arrêt relatif à la demande d'injonctions, 1er juillet 2003, par. 8. Requête, par. 7

[Signé] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

The Prosecutor v. Sylvestre GACUMBITSI

Case N° ICTR-2001-64

Case History

• Name: GACUMBITSI

• First Name: Sylvestre

• Date of Birth: 1947

• Sex: male

• Nationality: Rwandan

• Former Official Function: *Bourgmestre* of Rurumo

• Date of Indictment's Confirmation: 20 June 2001

• Counts: genocide and, alternatively, complicity in genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

• Date and Place of Arrest: 20 June 2001, in Kigoma, in Tanzania

• Date of Transfer: 20 June 2001

• Date of Initial Appearance: 26 June 2001

• Pleading: not guilty

• Date Trial Began: 28 July 2003

• Date and content of the Sentence: 17 June 2004, sentenced to 30 years imprisonment

• Appeal: 7 July 2006, sentenced to life imprisonment

Scheduling Order
26 May 2006 (ICTR-2001-64-A)

(Original : English)

Appeals Chamber

Judges : Mohamed Shahabuddeen, Presiding Judge ; Mehmet Güney; Liu Daqun ; Theodor Meron ; Wolfgang Schomburg

Sylvestre Gacumbitsi – Schedule, Judge Theodor Meron unable to be present when the Appeal Judgement is to be delivered (Authorized Tribunal Business Travel), Remaining Judges of the Appeals Chamber satisfied that it would be in the interests of justice for the hearing to continue and for the Appeal Judgement to be delivered

International Instrument cited :

Rules of Procedure and Evidence, rules 15 bis (A), 107, and 118 (D)

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal" respectively);

NOTING Rule 118 (D) of the Rules of Procedure and Evidence of the Tribunal ("Rules");

NOTING that the Appeals Chamber heard the oral arguments of the parties in respect of this appeal on 8 and 9 February 2006;

CONSIDERING that the Appeals Chamber has determined that the judgement in this appeal ("Appeal Judgement") will be ready for delivery on 7 July 2006;

NOTING that for reasons of authorized Tribunal business, Judge Theodor Meron is unable to be present when the Appeal Judgement is to be delivered;

NOTING that pursuant to Rule 15 *bis* (A) of the Rules, if a Judge is unable, for illness or other urgent personal reasons, or for reasons of authorized Tribunal business, to continue sitting on a partially heard case for a period which is likely to be of short duration, the remaining Judges of the Appeals Chamber may order the hearing of the case to continue in the absence of that Judge for a period of not more than five working days if they are satisfied that it is in the interests of justice to do so;

CONSIDERING that the remaining Judges of the Appeals Chamber are satisfied that it would be in the interests of justice for the hearing in this case to continue and for the Appeal Judgement to be delivered notwithstanding Judge Meron's absence;

PURSUANT to Rules 15 *bis* (A), 107, and 118 (D) of the Rules;

HEREBY ORDERS that a public hearing shall be held in Arusha, Tanzania on 7 July 2006 at 11.00 a.m. to deliver the Appeal Judgement in the absence of Judge Meron.

Done in English and French, the English text being authoritative.

Done this 26th day of May 2006, At The Hague, The Netherlands.

[Signed]: Mohamed Shahabuddeen

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Judgement
7 July 2006 (ICTR-2001-64-A)

(Original : English)

Appeals Chamber

Judges : Mohamed Shahabuddeen, Presiding Judge ; Mehmet Güney; Liu Daqun ; Theodor Meron ; Wolfgang Schomburg

Sylvestre Gacumbitsi – Appellant challenges a series of interlocutory decisions made by the Trial Chamber but none of the errors alleged was pleaded properly in the Notice of Appeal : consideration of the arguments advanced in the Appeal Brief, Vague dates in the Indictment : no prejudice to the Accused regarding the fact that none of the Appellant's convictions depended on the incidents of those dates, Defence team difficulties : reversal of a Trial Chamber's scheduling decision only upon a showing of abuse of discretion resulting in prejudice, In absence of a timely motion from the party opposing an expert a Trial Chamber is obligated to admit expert testimony or to accept a witness's qualification as an expert, Procedure by which an expert's report can be accepted into evidence without that expert testifying, Trial Chamber's discretion regarding the qualification of an expert witness, Same person might be qualified as an expert in one case and not in another – Genocide, Typographical error in the trial judgement which the Appeals Chamber corrects the error proprio motu, Legal characterization of the dolus specialis, Genocidal intent can be proven through inference from the facts and circumstances of a case : intent must usually be inferred, Inferential approach does not relieve the Prosecution of its burden to prove each element of its case, No serious contention raised by the Defence that the Trial Chamber's findings of fact were insufficient to support an inference of genocidal intent, Lack of specificity of the Indictment in Respect of the Murder of a Tutsi civilian : indictement defective, Material facts concerning a particular incident not pleaded in the indictment but included in a chart of witnesses that set forth the facts to which each witness would testify and clearly identified the charges in the indictment to which those facts corresponded : Indictment cured by timely, clear, and consistent information, Definition of the term "committed" in Article 6 (1) of the Statute, In the context of genocide "direct and physical perpetration" need not mean physical killing, Modes of liability used by the Trial Chamber to categorize the Accused's conduct ("ordering" and "instigating") do not fully capture the Appellant's criminal responsibility – Extermination as a Crime against Humanity, Requisite Intent for the Crime of Extermination : accused must have acted with knowledge of the broader context of the attack and with knowledge that his act formed part of the widespread and systematic attack against the civilian population, Proof of a plan or policy is not a prerequisite to a conviction for extermination, Individual identification of the victims of the crime of extermination not required – Rape as a Crime against Humanity, Elucidation of the "widespread or systematic" requirement, Acquaintance between Witness and her assailant does not mean that her rape cannot constitute a crime against humanity, Instigation of the crime : sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime, Superior liability (art. 6 (3)), Convictions should not be entered under both Articles 6 (1) and 6 (3) of the Statute for the same crime based on the same conduct, Question of whether the Appellant had effective control over the perpetrators, Non-consent and the knowledge are elements of the crime of rape, Proof of the non-consent by proving the existence of coercive circumstances under which meaningful consent is not possible : not necessary to introduce evidence concerning the words or conduct of the victim or the victim's relationship to the perpetrator, Knowledge of non-consent may be proven by establishing beyond reasonable doubt that the accused was aware or had reason to be aware

of the coercive circumstances that undermined the possibility of genuine consent – Murder as a Crime against Humanity, Permissible to base a conviction on circumstantial evidence and/or hearsay evidence – Authority for Ordering, Ordering does not require the existence of a formal superior-subordinate relationship, Actus reus of "ordering" is that a person in a position of authority instruct another person to commit an offence – Joint Criminal Enterprise, Liability for murder, genocide, extermination and rape, Absence of the words "joint criminal enterprise" of the Indictment. does not in and of itself indicate a defect, Words "acted in concert with" do not suffice, Necessity to refer to concerted action among a plurality of persons in support of a common scheme, strategy or plan to exterminate the Tutsi – Witness' credibility, Mere existence of inconsistencies between the testimonies of Witnesses does not necessarily undermine either witness's credibility, Not inappropriate per se for the parties to discuss the content of testimony and witness statements with their witnesses, Broad discretion of the Trial Chamber to determine the weight to be given to discrepancies between a witness's testimony and his prior statements – Assessment of the Evidence, Vocal distortion due to the use of a megaphone, Assessment of the Indictment as a whole – Trial and Appeals Chambers have a duty to consider all of the implications of the evidence presented, and to render judgment based on all theories of culpability disclosed in the pleadings and on the evidence – Sentencing : Appeals Chamber's prerogative to substitute a new sentence when the one given by the Trial Chamber cannot be reconciled with the principles governing sentencing at the Tribunal, Trial Chamber erred in not holding the Appellant liable for ordering the crimes committed not only by the police but also by the "other perpetrators", Trial Chamber erred in considering that the good relationships of the Appellant's family with its neighbors constituted a factor in mitigation – Sentence upheld to life imprisonment

International Instruments cited :

Rules of Procedure and Evidence, rules 7 ter, 15 bis, 70 (A), 73 (E), 89, 94 bis, 94 bis (C), 96, 96 (ii), 98 bis, 101 (D), 103, 107, 108 and 118 ; Statute, art. 2 (2), 2 (2) (a), 2 (2) (b), 2 (3) (a), 2 (3) (b), 3 (a), 3 (g), 6 (1), 6 (3), 20 (4) (a), 20 (4) (b) and 24

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Omar Serushago, Grounds of judgement, 6 April 2000 (ICTR-98-39) ; Trial Chamber, The Prosecutor v. Georges Ruggiu, Judgement and Sentence, 1st June 2000 (ICTR-97-32) ; Appeals Chamber, The Prosecutor v. Jean-Paul Akayesu, Judgement, 1st June 2001 (ICTR-96-4) ; Appeals Chamber, The Prosecutor v. Clément Kayishema and Obed Ruzindana, Judgement (Reasons), 1 June 2001 (ICTR-95-1) ; Appeals Chamber, The Prosecutor v. Alfred Musema, Judgement, 16 November 2001 (ICTR-96-13) ; Trial Chamber, The Prosecutor v. Sylvestre Gacumbitsi, Decision on Defence Motion to Amend Indictment and to Drop Certain Counts, 25 July 2002 (ICTR-2001-64) ; Appeals Chamber, The Prosecutor v. Ignace Bagilishema, Judgement (Reasons), 3 July 2002 (ICTR-95-1A) ; Appeals Chamber, The Prosecutor v. Georges Rutaganda, Judgement, 26 May 2003 (ICTR-96-3); Appeals Chamber, The Prosecutor v. Théoneste Bagosora et al.,Decision (Appeal of the Trial Chamber I 'Decision on Motions By Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses' of 9 September 2003), 28 October 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. André Ntagerura et al., Judgement and Sentence, 25 February 2004 (ICTR-99-46) ; Trial Chamber, The Prosecutor v. Sylvestre Gacumbitsi, Judgement, 17 June 2004 (ICTR-2001-64) ; Appeals Chamber, The Prosecutor v. Eliezer Niyitegeka, Judgement, 9 July 2004 (ICTR-96-14) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Mugiraneza Interlocutory Appeal against Decision of the Trial Chamber on Exclusion of Evidence, 15 July 2004 (ICTR-99-50) ; Appeals Chamber, The Prosecutor v. André Rwamakuba, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004 (ICTR-98-44) ; Appeals Chamber, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and 96-17) ; Appeals Chamber, The Prosecutor v. Laurent Semanza, Judgement, 20 May 2005 (ICTR-97-20) ; Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgement, 23 May 2005 (ICTR-98-44A) ; Appeals Chamber, The Prosecutor v. Jean de Dieu Kamuhanda, Judgement, 19 September 2005 (ICTR-99-

54A) ; Trial Chamber, The Prosecutor v. Aloys Simba, Judgement, 13 December 2005 (ICTR-2001-76)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Dražen Erdemović, Judgement II, 5 March 1998 (IT-96-22); Appeals Chamber, The Prosecutor v. Duško Tadić, Judgement, 15 July 1999 (IT-94-1) ; Appeals Chamber, The Prosecutor v. Zlatko Aleksovski, Judgement, 24 March 2000 (IT-95-14/1) ; Appeals Chamber, The Prosecutor v. Zdravko Mucić et al., Judgment, 20 February 2001 (IT-96-21) ; Trial Chamber, The Prosecutor v. Radoslav Brđanin and Momir Talić, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001 (IT-99-36) ; Appeals Chamber, The Prosecutor v. Goran Jelisić, Judgment, 5 July 2001 (IT-95-10) ; Appeals Chamber, The Prosecutor v. Zoran Kupreškić, Judgement, 23 October 2001 (IT-95-16) ; Trial Chamber, The Prosecutor v. Pavle Strugar, Prosecution's Response to the Defence Preliminary Motion, 21 February 2002 (IT-01-42) ; Appeals Chamber, The Prosecutor v. Dragoljub Kunarac, Judgement, 12 June 2002 (IT-96-23 and IT-96-23/1) ; *Appeals Chamber,* The Prosecutor v. Milorad Krnojelac, Judgment, 17 September 2003 (IT-97-25) ; Appeals Chamber, The Prosecutor v. Slobodan Milošević, Decision on the Interlocutory Appeal by the Amici Curiae against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004 (IT-02-54) ; Appeals Chamber, The Prosecutor v. Mitar Vasiljević, Judgement, 25 February 2004 (IT-98-32); Trial Chamber, The Prosecutor v. Ranko Češić, Judgement, 11 March 2004 (IT-95-10/1) ; Trial Chamber, The Prosecutor v. Milodrag Jokić, Judgement, 18 March 2004 (IT-01-42/1) ; The Appeals Chamber, The Prosecutor v. Radislav Krstić, Judgement, 19 April 2004 (IT-98-33) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Judgement, 29 July 2004 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Judgement, 17 December 2004 (IT-95-14/2) ; Appeals Chamber, The Prosecutor v. Miroslav Kvočka, Judgement, 28 February 2005 (IT-98-30/1) ; Appeals Chamber, The Prosecutor v. Milan Babić, Judgment on Sentencing Appeal, 18 July 2005 (IT-03-72) ; Appeals Chamber,The Prosecutor v. Miroslav Deronjić, Judgement on Sentencing Appeal, 20 July 2005 (IT-02-61) ; Appeals Chamber, The Prosecutor v. Milodrag Jokić, Judgement on Sentencing Appeal, 30 August 2005 (IT-01-42/1) ; Appeals Chamber, The Prosecutor v. Milomir Stakić, Judgement, 22 March 2006 (IT-97-24) ; Appeals Chamber, The Prosecutor v. Mladen Naletilić and Vinko Martinović, Judgement, 3 May 2006 (IT-98-34)

International Military Tribunal for the Trial of German Major War Criminals, Nuremberg : Judgments of the 30th September and 1st October, 1946

Israel : Israel Supreme Court, Attorney General of Israel v. Adolf Eichmann, 29 May 1962, 36 I.L.R. 5

Contents

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of appeals by Sylvestre Gacumbitsi ("Appellant") and the Prosecution against the Judgement rendered by Trial Chamber III on 17 June 2004 in the case of *The Prosecutor v. Sylvestre Gacumbitsi* ("Trial Judgement").[1]

I. Introduction

A. Background

2. The Appellant, Sylvestre Gacumbitsi, was born in 1943 in Kigina Sector, Rusumo *Commune*, Kibungo *Préfecture*, Rwanda.[2] The Appellant was *bourgmestre* of Rusumo *Commune* in April 1994, a position he had held since 1983.[3] As such, he was the highest-ranking local administrative official.[4]

3. The Appellant was tried on the basis of an indictment dated 20 June 2001 ("Indictment"), which charged him with individual criminal responsibility for certain crimes committed against the Tutsi population of Kibungo *Préfecture* between 6 and 30 April 1994.[5] The Trial Chamber found the Appellant guilty of genocide (Count 1),[6] and dismissed the alternative charge of complicity in genocide (Count 2).[7] It also convicted him of extermination and rape as crimes against humanity (Counts 3 and 5, respectively),[8] but acquitted him of murder as a crime against humanity (Count 4).[9] It imposed a single sentence of thirty years' imprisonment.[10]

B. The Appeals

4. The Appellant appeals his convictions and challenges his sentence.[11] He divides his allegations of error into five categories; the Appeals Chamber will refer to these as "grounds of appeal" and the specific alleged errors as "sub-grounds". The Appellant alleges errors in certain interlocutory decisions of the Trial Chamber (Ground 1); and errors relating to his convictions for genocide, extermination as a crime against humanity, and rape as a crime against humanity (Grounds 2, 3, and 4, respectively). The Appellant submits that his sentence should be reduced to fifteen years in the event that his convictions are not quashed on

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[1] For ease of reference, two annexes are appended to this Judgement: Annex A: Procedural Background, Annex B: Cited Materials/Defined Terms.
[2] Trial Judgement, para. 5.
[3] Trial Judgement, para. 6.
[4] Trial Judgement, para. 241.
[5] With respect to one incident, the expulsion of some of the Appellant's tenants, the temporal scope of the Indictment extends through June 1994.
[6] Trial Judgement, paras. 293, 334.
[7] Trial Judgement, paras. 295, 334.
[8] Trial Judgement, paras. 316, 333, 334.
[9] Trial Judgement, paras. 320, 334.
[10] Trial Judgement, para. 356.
[11] Notice of Appeal, filed confidentially in French on 20 July 2004 ("Gacumbitsi Notice of Appeal"); Appellant's Brief, filed in French originally on 30 September 2004 but returned as deficient and filed again on 4 October 2004 ("Gacumbitsi Appeal Brief"); Brief in Reply, filed in French on 1 April 2005 ("Gacumbitsi Reply"). It should be noted that, pursuant to an order of the Pre-Appeal Judge dated 24 March 2005, the Appellant was to file his reply no later than 29 March 2005. Order, 24 March 2005. The reply was thus filed late. The Appellant did not attempt to show good cause for this delay. Nevertheless, the Prosecution did not object to the Gacumbitsi Reply on this basis. Considering the concrete circumstances present in this instance, and in the interest of justice, the Appeals Chamber will take into account the submissions made in the reply. The Appeals Chamber emphasizes, however, that it proceeds in this manner exceptionally, and that this exception should not be interpreted to suggest that filing deadlines will not be strictly enforced in other cases.

appeal (Ground 5). The Prosecution responds that all grounds of appeal raised by the Appellant should be dismissed.[12]

5. The Prosecution presents six grounds of appeal.[13] It avers that the Trial Chamber erred in various respects in sentencing (Ground 1), in acquitting the Appellant of murder as a crime against humanity (Ground 2), in failing to find him criminally responsible for certain rapes (Ground 3), in its enunciation of the elements of rape (Ground 4), in refusing to consider joint criminal enterprise ("JCE") as a mode of liability because it had not been pleaded adequately in the Indictment (Ground 5), and in holding that the Appellant lacked authority to order participants in the attack in Rusumo *Commune* other than communal policemen (Ground 6). The Appellant objects to all grounds of appeal raised by the Prosecution, except Ground 4 (elements of rape), with respect to which the Appellant does not take a position.[14]

C. STANDARDS OF APPELLATE REVIEW

6. The Appeals Chamber now recalls some of the applicable standards of appellate review pursuant to Article 24 of the Statute of the Tribunal ("Statute"). The Appeals Chamber reviews only errors of law which invalidate the decision of the Trial Chamber and errors of fact which have occasioned a miscarriage of justice.

7. As regards errors of law, the Appeals Chamber has recently stated:

> Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[15]

8. As regards errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by a Trial Chamber.

> Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.[16]

9. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the Trial Chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[17] Arguments which do not have the potential to cause the impugned decision to be reversed or revised may immediately be dismissed by the Appeals Chamber and need not be considered on the merits.[18]

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[12] Respondent's Brief, filed on 12 November 2004 ("Prosecution Response").
[13] Prosecution's Amended Notice of Appeal, filed on 16 December 2004 pursuant to the Appeals Chamber's *Décision relative à la requête du Procureur en modification de son acte d'appel*, issued on 15 December 2004 ("Prosecution Notice of Appeal"); Appellant's Brief, filed on 28 September 2004 ("Prosecution Appeal Brief"); Prosecution's Reply to Defence's Response, filed on 19 January 2005 ("Prosecution Reply").
[14] Respondent's Brief, filed confidentially in French on 10 January 2005 ("Gacumbitsi Response"). Because the French translation of the Prosecution Appeal Brief was communicated to the Defence only on 1 December 2004, notwithstanding its being filed on 17 November 2004, See Gacumbitsi Response, para. 31, the Appeals Chamber considers that there was good cause for the delay in the filing of the Response Brief beyond the forty days allowed by Rule 112 of the Rules. The Appeals Chamber notes that in its reply, the Prosecution did not argue that the Gacumbitsi Response was untimely.
[15] *Ntakirutimana* Appeal Judgement, para. 11 (internal citations omitted). See also, e.g., *Kamuhanda* Appeal Judgement, para. 6; *Niyitegeka* Appeal Judgement, para. 7.
[16] *Krstić* Appeal Judgement, para. 40 (internal citations omitted). See also, e.g., *Kamuhanda* Appeal Judgement, para. 7; *Kajelijeli* Appeal Judgement, para. 5; *Ntakirutimana* Appeal Judgement, para. 12.
[17] See, e.g., *Kamuhanda* Appeal Judgement, para. 8; *Kajelijeli* Appeal Judgement, para. 6; *Ntakirutimana* Appeal Judgement, para. 13.
[18] See, e.g., *Kamuhanda* Appeal Judgement, para. 8; *Kajelijeli* Appeal Judgement, para. 6; *Ntakirutimana* Appeal Judgement, para. 13.

10. In order for the Appeals Chamber to assess the appealing party's arguments, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is being made.[19] Further,

> "the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies."[20]

Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing and will dismiss arguments which are evidently unfounded without providing detailed reasoning.[21]

II. The Appeal of Sylvestre Gacumbitsi

A. Interlocutory Decisions (Ground of Appeal 1)

11. The Appellant challenges, on various grounds, a series of interlocutory decisions made by the Trial Chamber.[22] None of the errors he alleges was pleaded properly in his Notice of Appeal, which merely lists the decisions challenged and states, with respect to each one, that there is an "*erreur de droit [et/ou] de fait à développer*".[23] The notice thus fails to "indicate the substance of the alleged errors and the relief sought" as required by Rule 108 of the Tribunal's Rules of Procedure and Evidence ("Rules"). The Prosecution does not object to this failure, however. Instead it argues that the Appeal Brief itself suffers from similar shortcomings. In light of this, the Appeals Chamber will consider the Appellant's arguments as advanced in his Appeal Brief.[24]

1. Decision on the Indictment

12. The Appellant challenges a decision issued on 25 July 2002, in which the Trial Chamber, *inter alia*, rejected his argument that the dates specified in the Indictment were insufficiently specific.[25] He argues that references to acts committed "on or about" a certain date violated his rights under Article 20 (4) (a) of the Statute.[26] He further contends that subsequent witness testimony specifying the dates did not cure this lack of notice.[27]

13. The Appeals Chamber finds that the Trial Chamber was reasonable in holding that the trial could proceed fairly on the basis of the Indictment as drafted. The dates of specific incidents alleged in the Indictment are for the most part provided with considerable precision,[28] and the use of the phrase "on or about", to which the Appellant objects, is not enough to undermine the notice that was given to the Appellant.

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[19] Practice Direction on Formal Requirements for Appeals from Judgement, para. 4 (b). See also *Kamuhanda* Appeal Judgement, para. 9; *Kajelijeli* Appeal Judgement, para. 7; *Niyitegeka* Appeal Judgement, para. 10.
[20] *Vasiljević* Appeal Judgement, para. 12. See also, e.g., *Kamuhanda* Appeal Judgement, para. 9; *Kajelijeli* Appeal Judgement, para. 7; *Niyitegeka* Appeal Judgement, para. 10.
[21] See, e.g., *Kamuhanda* Appeal Judgement, para. 10; *Kajelijeli* Appeal Judgement, para. 8; *Niyitegeka* Appeal Judgement, para. 11.
[22] Gacumbitsi Notice of Appeal, paras. 9-15.
[23] Gacumbitsi Notice of Appeal, paras. 9-15.
[24] The Appeals Chamber is only required to grant relief for a violation of the Rules where a party has objected in a timely manner and has suffered material prejudice. See Rule 5 of the Rules.
[25] Decision on Defence Motion to Amend Indictment and to Drop Certain Counts, filed on 25 July 2002 ("Decision on Indictment"), paras. 21, 22. See *Requête aux fins de modification de l'acte d'accusation et de retrait de certains chefs d'accusation*", filed on 26 November 2001 ("Motion on Indictment"). The Appeals Chamber will not consider the other aspects of the Decision on Indictment because the Appellant makes no specific argument against them.
[26] Gacumbitsi Appeal Brief, paras. 41, 42 ("*le «[…] ou vers […] le […]»*" in the French version). See also Gacumbitsi Reply, paras. 24-32.
[27] Gacumbitsi Appeal Brief, paras. 43, 44.
[28] See, e.g., Indictment, paras. 5, 6, 7, 11, 12, 14, 15, 21, 38, 39. In each of these paragraphs the Indictment gives the exact date or range of two to three days during which each incident took place, but uses the expression "on or about", as in "on or about 15 April 1994".

14. It is true that the dates included in paragraphs 32 and 33 of the Indictment ("On a date uncertain during April 1994") as well as in paragraph 36 ("On a date uncertain during April-June 1994") are even less specific. But none of the Appellant's convictions depended on the incidents described in these paragraphs, so any vagueness in this regard, even if constituting a defect, has not prejudiced him. The Trial Chamber held that the Prosecution had not proven the incidents described in paragraphs 32 and 33.[29] As to paragraph 36, it found that the Appellant had expelled his tenants, but held that he was not criminally responsible for their subsequent murder.[30] The Trial Chamber did mention this last incident as one indicator of the Appellant's *mens rea* for crimes against humanity.[31] The Appeals Chamber finds that this reference did not affect the verdict, as the other evidence of the Appellant's *mens rea* cited by the Trial Chamber was ample.[32] Furthermore, the Appellant does not contest the Trial Chamber's holding that the Pre-Trial Brief, which provided further details of the incident, cured any vagueness in paragraph 36 of the Indictment.[33]

15. Accordingly, this sub-ground of appeal is dismissed.

2. Decisions of 28 July 2003 and 28 August 2003

16. On 23 May and 10 July 2003, the President of the Tribunal ("President") held two informal conferences with the parties to determine the starting date of the Appellant's trial.[34] The date of 28 July 2003 was selected, with the Prosecution expected to finish presenting its evidence by the end of August 2003 and the Appellant expected to start his defence on 6 October 2003. On 22 July 2003, the Appellant submitted a motion seeking the postponement of his trial.[35] On 28 July 2003, after hearing the parties on the issue,[36] the Trial Chamber dismissed the Motion to Postpone.[37]

17. The Appellant's trial thus started as planned, on 28 July 2003, and by the end of August 2003 the Prosecution finished presenting its case. In a status conference held on 28 August 2003, the Appellant requested the Trial Chamber to postpone the commencement of the Defence case until 6 December 2003.[38] This request was denied by the Trial Chamber.[39] The Appellant now asks the Appeals Chamber to reverse the Decisions of 28 July and 28 August 2003.[40]

18. The Appellant asserts that at both of the informal conferences, his counsel informed the President that his team had encountered difficulties, including having been prevented from going on mission since October 2002, that prevented it from being ready for the start of the trial on 28 July 2003. On both occasions, the President proposed the same solution: adding a co-counsel and an additional assistant to his team.[41] Nonetheless, the Appellant asserts, his co-counsel was not appointed until 14 July 2003, and as of 22 July 2003, the additional assistant had still not been appointed and his investigators had still not returned from mission.[42] The Appellant submits that the Trial Chamber's failure to postpone the proceedings violated his right to have adequate time and facilities to prepare his defence as provided by Article 20 (4) (b) of the Statute.[43] He further argues that, in its Decision of 28 August 2003, the Trial Chamber erroneously attributed to his counsel a statement that Defence investigators had met with approximately 200 potential witnesses;

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[29] Trial Judgement, paras. 177, 190.
[30] Trial Judgement, paras. 196, 197, 319.
[31] Trial Judgement, paras. 302-304.
[32] See *infra* section II.C.1.
[33] See Trial Judgement, para. 194.
[34] No record of these meetings was kept. Judges Reddy and Egorov (two of the Judges on the Trial Chamber Bench) were also present at the meeting of 10 July 2003.
[35] Defence Motion Seeking Postponement of Trial Date, Pursuant to Rule 73 of the Rules of Procedure and Evidence, filed confidentially in French on 22 July 2003 ("Motion to Postpone").
[36] T. 28 July 2003 pp. 1-12.
[37] T. 28 July 2003 pp. 13, 14 ("Decision of 28 July 2003").
[38] T. 28 August 2003 p. 5.
[39] T. 28 August 2003 pp. 20, 21 ("Decision of 28 August 2003").
[40] Gacumbitsi Notice of Appeal, paras. 10, 12; Gacumbitsi Appeal Brief, para. 116.
[41] Gacumbitsi Appeal Brief, paras. 45-52.
[42] Gacumbitsi Appeal Brief, paras. 54, 55.
[43] Gacumbitsi Appeal Brief, para. 58.

this statement had in fact been made by the representative of the Defence Counsel Management Section ("DCMS") of the Registry of the Tribunal.[44]

19. The Appeals Chamber notes that trial scheduling is subject to the Trial Chamber's discretion.[45] The accused of course has a right, under Article 20 (4) (b) of the Statute, to "adequate time and facilities for the preparation of his or her defence". But it is the Trial Chamber that is best positioned to consider the demands of trial preparation in each particular case and to set a schedule that respects that right while also avoiding undue delay in the administration of justice.[46] The Appeals Chamber thus will only reverse a Trial Chamber's scheduling decision upon a showing of abuse of discretion[47] resulting in prejudice, that is, rendering the trial unfair.[48] The Appellant has not made such a showing, as will be demonstrated below.

(a) Decision of 28 July 2003

20. The Appeals Chamber finds that the Appellant has not shown that the Trial Chamber abused its discretion in rejecting his Motion to Postpone. First, the Appellant does not contest that, prior to 28 July 2003, he had been in contact with more than 200 potential witnesses. He states that not all of these contacts were fruitful and that the Defence had problems finding credible witnesses,[49] but he does not demonstrate that these problems were the result of inadequate time being allotted or that they impaired his defence. Second, although the Appellant contends that he twice mentioned to the President problems that were affecting his preparation for the trial, he does not dispute that, as the Trial Chamber found, on both occasions he nonetheless ultimately agreed to the starting date of 28 July 2003. Under the circumstances, the Trial Chamber acted within its discretion to determine that the Appellant's rights under Article 20 (4) (b) of the Statute were not impaired.

21. Moreover, even if the Trial Chamber's decision had amounted to an abuse of discretion, the Appellant has not demonstrated that it caused him any prejudice. He does not, for instance, point to any way in which he would have defended himself differently had he had more time to prepare.[50] Moreover, the Decision of 28 July 2003 included safeguards to ensure the fairness of the proceedings. For instance, the Trial Chamber left open the possibility that the Appellant could

> "recall back Prosecution witnesses to interview or cross-examine them on specific issues if the Defence justify that before the Chamber".[51]

Further, the Decision of 28 July 2003 was concerned principally with the commencement of the Prosecution's case. The Trial Chamber left open the possibility for the Defence to request that the start of its own case be postponed, and the Defence later did so.[52] For these reasons, the Appeals Chamber dismisses this sub-ground of appeal.

(b) Decision of 28 August 2003

22. The Appeals Chamber is likewise not convinced that the Decision of 28 August 2003 amounted to an abuse of discretion. First, the errors to which the Appellant points are of no consequence. It was, indeed, a representative of DCMS who stated that the Defence had contacted more than 200 potential witnesses – but that figure was based on information provided by the Appellant, and the Appellant did not challenge its

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[44] Gacumbitsi Appeal Brief, paras. 64, 65, referring to T. 28 July 2003 p. 7; T. 28 August 2003 p. 5.
[45] See Statute, art. 19 (1); *Ntabakuze* Decision, p. 4.
[46] *Milošević* Scheduling Appeal Decision, para. 18.
[47] See *Ntabakuze* Decision, p. 4; *Milošević* Scheduling Appeal Decision, para. 16.
[48] See, e.g., *Semanza* Appeal Judgement, para. 73 (rejecting an allegation of procedural error for lack of prejudice). When the Appeals Chamber considers, in the context of an appeal from judgement, allegations of procedural error violating the right to a fair trial, the standard of prejudice is whether the error in fact rendered the trial unfair. *Cf. Ntakirutimana* Appeal Judgement, para. 27 (discussing indictment defects).
[49] See Gacumbitsi Reply, para. 63.
[50] See Gacumbitsi Appeal Brief, paras. 58-61; Gacumbitsi Reply, paras. 34, 47-49, 53-56.
[51] T. 28 July 2003 p. 13. The Appellant does not contend that he ever took advantage of this option.
[52] T. 28 July 2003 p. 13.

accuracy at the time it was brought up. It is also true that the Appellant did initially object, during the 10 July 2003 conference, to the 6 October 2003 start date for the Defence case. But after he was told that co-counsel and an assistant would be appointed, he agreed to that start date.[53] The promised appointments were made after the conference.[54]

23. Second, the Appellant has shown no reason to question the Trial Chamber's conclusion that, under the circumstances, the Defence had "had sufficient time and resources to prepare its case and to draw up a list of witnesses to testify for Defence as of 6th October 2003".[55] Counsel had been appointed in October 2001, and since then the Defence team had billed more than 7,500 hours of preparatory work.[56] Further, the Appellant demonstrates no error in the Trial Chamber's finding that the Defence team's difficulties in contacting witnesses in Rwanda did not merit postponement of the trial.[57] Finally, he again fails to demonstrate any way in which his defence was materially impaired.[58] For these reasons, the Appeals Chamber dismisses this sub-ground of appeal.

3. Decision of 1 August 2003

24. On 14 July 2003, the Defence filed a motion seeking further information concerning certain Prosecution witnesses.[59] The Prosecution responded that the information in question was not subject to disclosure pursuant to Rule 70 (A) of the Rules, but nonetheless agreed to provide it, and did so in Annex A to its Response to Motion for Disclosure.[60] The Defence replied that the information in Annex A suggested that the Prosecution possessed further material relating to proceedings commenced by the Rwandan authorities against the witnesses.[61]

25. On 1 August 2003, the Trial Chamber rendered a decision ordering the Prosecution, "if the information contained in Annex A is based on specific materials," to allow the Defence to inspect such materials within forty-eight hours.[62] The Appellant now challenges this decision.[63] He submits that the Trial Chamber erred in rendering a "conditional decision" because Annex A of the Response to the Motion for Disclosure showed that the Prosecution had knowledge of the material requested.[64] The Appellant also contends that the Prosecution never complied with the decision, and that this was brought to the attention of the Trial Chamber on several occasions, to no effect.[65]

26. The Appeals Chamber finds that the Appellant has demonstrated no error on the Trial Chamber's part. There is no evidence that the material in question even existed, nor that the Prosecution had the material in its possession but failed to disclose it. Accordingly, this sub-ground of appeal is dismissed.

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[53] T. 28 August 2003 p. 12.
[54] Co-counsel was appointed on 14 July 2003, with retroactive effect to 1 July 2003 (Gacumbitsi Appeal Brief, para. 54). One additional assistant was appointed on 23 July 2003 (See T. 28 July 2003 pp. 5, 6), and the Trial Chamber accepted that the delay in appointing the second assistant was due to a potential conflict of interest (T. 28 July 2003 p. 13).
[55] T. 28 August 2003 p. 20.
[56] See T. 28 July 2003 p. 7; T. 28 August 2003 p. 5.
[57] T. 28 August 2003 p. 20.
[58] See, e.g., Gacumbitsi Reply, paras. 47, 53-58.
[59] Motion to Disclose to the Defence All the Facts and Authorities that Led to the Arrest, Detention and Provisional Release of Prosecution Witnesses TBG, TBH, TBI, TBJ and TBK (Rule 66 of the Rules), filed in French on 14 July 2003 ("Motion for Disclosure").
[60] Prosecutor's Brief in Reply [*sic*] to a Defence Motion for Disclosure pursuant to Rule 66, filed confidentially on 17 July 2003 ("Response to Motion for Disclosure"), paras. 8-14.
[61] Defence's Reply to Prosecutor's Brief in Reply to a Defence Motion for Disclosure of Certain Information Relating to Prosecution Witnesses TBG, TBH, TBI, TBJ and TBK, filed confidentially in French on 22 July 2003 ("Reply to Response to Motion for Disclosure"), paras. 11-14.
[62] Decision on Motion to Disclose to the Defence All the Facts and Authorities that Led to the Arrest, Detention and Provisional Release of Prosecution Witnesses TBG, TBH, TBI, TBJ and TBK (Rule 66 of the Rules), filed on 1 August 2003 ("Decision of 1 August 2003"), p. 4.
[63] Gacumbitsi Notice of Appeal, para. 11; Gacumbitsi Appeal Brief, para. 117.
[64] Gacumbitsi Appeal Brief, para. 69.
[65] Gacumbitsi Appeal Brief, paras. 70, 71. The Appellant's assertion at paragraphs 70 through 73 of his Reply that the dispute was, in fact, over access to the materials contained in Annex A itself is obviously incorrect because Annex A had already been provided to the Defence; the Appeals Chamber need not address this assertion further.

4. Decisions of 11 and 18 November 2003

27. On 6 October 2003, the Defence filed the first version of a proposed expert report written by Mr. Pascal Ndengejeho.[66] On 17 October 2003, the Prosecution filed a notice of objection to the proposed expert report.[67] During the presentation of the Defence case, Judge Reddy fell ill, and, on 21 October 2003, the hearing was adjourned until 17 November 2003, pursuant to Rule 15 *bis* of the Rules.[68] On 3 November 2003, the Prosecution filed a motion arguing that Mr. Ndengejeho did not qualify as an expert witness, and seeking his removal from the list of Defence experts.[69] On the same day, the Prosecution filed a notice in which it communicated its acceptance of the report of expert witnesses Prof. Dominique Lecomte and Dr. Walter Vorhauer, informed the Trial Chamber that it did not intend to cross-examine these experts, and asked the Trial Chamber to admit the report into evidence without calling the expert witnesses to appear.[70]

28. On 11 November 2003, the Trial Chamber rendered a decision (1) admitting into evidence the report of Prof. Lecomte and Dr. Vorhauer and holding that it was not necessary that these experts be heard at trial; and (2) denying the status of expert witness to Mr. Ndengejeho, but allowing him to testify as a fact witness.[71] On 13 November 2003, unaware of the Decision of 11 November 2003, the Defence filed a response to the Motion for Exclusion of Expert, arguing that (1) the response was timely filed as counsel had only received the motion on 10 November 2003, and (2) the motion should be rejected as untimely.[72] On 17 November 2003, the Defence filed a request for reconsideration of the Decision of 11 November 2003.[73] The Trial Chamber dismissed this request on 18 November 2003.[74]

29. The Appellant challenges the Decisions of 11 and 18 November 2003 on several grounds.[75] He argues that the Prosecution did not object to Mr. Ndengejeho's qualification as an expert until well after fourteen days past the filing of his report, violating Rule 94 *bis* of the Rules; that the Trial Chamber granted the Motion for Exclusion of Expert without giving the defence a chance to respond to it; and that the decisions violated his right to call expert witnesses to counter the Prosecution experts, and thereby prejudiced him, contrary to the Trial Chamber's finding in the Decision of 18 November 2003.[76] The Appellant adds, in his reply, that (1) Mr. Ndengejeho was recognized as an expert in the *Semanza* and *Simba* cases;[77] (2) the Trial Chamber took its decision "on the basis of the information […] brought to the Chamber's attention," without indicating its sources of information;[78] and (3) while the Trial Chamber allowed Mr. Ndengejeho to testify as a fact witness, it knew that Mr. Ndengejeho was not in Rusumo in April and May 1994,[79] and it unfairly limited the duration of his testimony to two hours.[80]

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[66] Historical Background to the Events of 1994 in Rwanda and the Social Situation in Rusumo *Commune*, filed confidentially in French on 6 October 2003. The final version of the report was filed confidentially on 10 October 2003.
[67] The Prosecutor's Notice of Objection to the Expert Report of Pascal Ndengejeho, filed on 17 October 2003 ("Notice of Objection").
[68] See Gacumbitsi Appeal Brief, paras. 77-79; Prosecution Response, para. 74.
[69] Prosecutor's Motion for the Exclusion of the Proposed Expert Report and Evidence of Pascal Ndengejeho, filed on 3 November 2003 ("Motion for Exclusion of Expert").
[70] The Prosecutor's Notice of No Objection to the Expert Report of Dominique Lecomte and Walter Vorhauer, filed on 3 November 2003 ("Notice Accepting Expert Report").
[71] Decision on Expert Witness for the Defence Rules 54, 73, 89 and 94 *bis* of the Rules of Procedure and Evidence, issued in French on 11 November 2003 ("Decision of 11 November 2003").
[72] Réponse de la Défense à la requête du Procureur tendant à solliciter le rejet du rapport du témoin Pascal Ndengejeho, filed confidentially on 13 November 2003 ("Response to Motion for Exclusion of Expert").
[73] Extremely Urgent Motion for Review of the Decision Rendered by Trial Chamber III on 11 November 2003, filed confidentially in French on 17 November 2003 ("Request for Reconsideration"). In the alternative, the Defence asked the Trial Chamber to grant leave to appeal the Decision of 11 November 2003. *Ibid*., p. 10.
[74] T. 18 November 2003 pp. 1, 2 ("Decision of 18 November 2003"). By the same token, the Trial Chamber dismissed the Defence's motion for certification to appeal the Decision of 11 November 2003 (T. 18 November 2003 p. 2).
[75] Gacumbitsi Notice of Appeal, paras. 13, 14; Gacumbitsi Appeal Brief, para. 116.
[76] Gacumbitsi Appeal Brief, paras. 72-93, 102-112; Gacumbitsi Reply, paras. 128-132.
[77] Gacumbitsi Reply, paras. 120, 121.
[78] Gacumbitsi Reply, paras. 122 (quoting from Decision of 11 November 2003, para. 9), 123.
[79] Gacumbitsi Reply, para. 124.
[80] Gacumbitsi Reply, paras. 125, 126.

30. The Appeals Chamber observes that while the Motion for Exclusion of Expert was filed on 3 November 2003, it appears that Defence counsel received it on 10 November 2003. According to Rules 7 *ter* and 73 (E) of the Rules, the Defence had five days from that date to file its response, and the Response to the Motion for Exclusion of Expert was thus timely filed. However, there is no indication that the Trial Chamber was aware of the delay in transmission of the motion to the Defence and a decision had to be rendered before the resumption of trial on 17 November 2003 to allow the Registry to make the necessary arrangements. Under these circumstances, the Trial Chamber did not err in rendering its Decision of 11 November 2003.[81] Moreover, the views of the Appellant were eventually heard: after it learned of the transmission delay, the Trial Chamber admitted, and considered the merits of, the Request for Reconsideration.[82]

31. The Appeals Chamber agrees with the Appellant that the Prosecution's Motion for Exclusion of Expert itself was untimely. However, nothing in Rule 94 *bis* of the Rules implies that, absent a timely motion from the party opposing an expert, a Trial Chamber is obligated to admit expert testimony or to accept a witness's qualification as an expert. Rule 94 *bis* only sets forth a procedure by which an expert's report can be accepted into evidence without that expert testifying.[83] In other respects, the admission of expert testimony is governed only by the general provision of Rule 89, which entrusts the Trial Chamber with broad discretion to employ rules of evidence that

> "best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."[84]

The determination of whether an expert witness is qualified is subject to the Trial Chamber's discretion.[85]

32. For these reasons, the Appeals Chamber agrees with the Trial Chamber's holding that it had the discretion to reject Mr. Ndengejeho as an expert witness *proprio motu* even if no timely motion was filed opposing him.[86] Moreover, the Trial Chamber did not abuse its discretion in deciding that Mr. Ndengejeho did not qualify as an expert. The Trial Chamber correctly recalled that

> "in contributing special knowledge to assist the Chamber, the expert must do so with the utmost neutrality and with scientific objectivity."[87]

It then found:

> The Chamber is of the opinion that certain elements in the report submitted by Ndengejeho are not relevant to the instant case and cannot constitute an expert's contribution to justice. Furthermore, on the basis of the information about Mr. Ndengejeho brought to the Chamber's attention, his curriculum vitae and his report, the Chamber is of the opinion that Ndengejeho is not an expert within the meaning of Rule 94 *bis* of the Rules.[88]

The Appellant does not show any error in this analysis. The fact that Mr. Ndengejeho is a professor and a former Rwandan minister does not automatically qualify him as an expert witness; it was left to the Trial Chamber's discretion to determine whether, based on the circumstances of the particular case, his background gave him a special insight.[89] Likewise, it is not relevant that he may have been recognized as an expert in the *Semanza* and *Simba* trials. Inherent in the notion of discretion is that different Trial Chambers are permitted to reach different decisions within that sphere of discretion, even if they are each presented

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[81] See Decision of 11 November 2003, para. 6.
[82] T. 18 November 2003 p. 1.
[83] *Rutaganda* Appeal Judgement, para. 164.
[84] Rule 89 (B) of the Rules; See *Rutaganda* Appeal Judgement, para. 164.
[85] See *Semanza* Appeal Judgement, para. 304; *Rutaganda* Appeal Judgement, para. 166.
[86] T. 18 November 2003 p. 1, recalling Decision of 11 November 2003, para. 8.
[87] Decision of 11 November 2003, para. 8.
[88] Decision of 11 November 2003, para. 9.
[89] Here, the Appellant points to no reason to believe that Mr. Ndengejeho had any particular expertise relative to this case. His academic degrees and teaching appointments were apparently in the field of education, and he served as Rwanda's minister of information; neither these qualifications nor anything else on his *curriculum vitae* demonstrates any obvious basis for specialized knowledge regarding the events in Rusumo *Commune* during April 1994. See *Curriculum Vitae* of Pascal Ndengejeho, appended to the Motion for Exclusion of Expert.

with the same question.[90] Moreover, the questions faced by the Trial Chambers were not in fact the same. A witness's qualification as an expert turns on the contribution he or she can make to a Trial Chamber's analysis of a particular case. Thus, the same person might be qualified as an expert in one case and not in another.

33. Moreover, the Appellant has not demonstrated that the challenged decisions prejudiced him. He asserts that Mr. Ndengejeho's testimony would have had an impact on the Trial Chamber's assessment of the evidence provided by Prosecution experts, but provides no explanation of what effect it might have had. Indeed, the Appellant does not even explain how the conclusions reached by Mr. Ndengejeho in his report differed from those offered by the Prosecution experts.[91]

34. Finally, the Appellant submits that Prof. Lecomte and Dr. Vorhauer should have been allowed to testify at trial.[92] In its Notice Accepting Expert Report, the Prosecution accepted the report of these experts and waived its right to cross-examine them. The Appellant filed no response to this notice. In accordance with Rule 94 *bis* (C) of the Rules, the Trial Chamber thus admitted the report into evidence and found that it was not necessary for the experts to appear at trial.[93] The Appeals Chamber finds no error in this.[94] Moreover, the Appellant does not appear to have raised his present objection at trial, and thus cannot do so on appeal.

35. Accordingly, this sub-ground of appeal is dismissed and the appeal under this ground is dismissed in its entirety.

B. GENOCIDE (GROUND OF APPEAL 2)

36. The Trial Chamber convicted the Appellant of planning, instigating, ordering, committing, and aiding and abetting the crime of genocide pursuant to Article 6 (1) of the Statute.[95] The Appellant asserts that this conviction was based on errors in law and in fact. Specifically, he argues that the Trial Chamber erred in law in its legal characterization of the *dolus specialis* for genocide; that his conviction for committing genocide should be vacated because the Indictment did not allege his personal participation in the killing with sufficient specificity; and that the Trial Chamber erred in its assessment of the evidence in a number of respects. The Appeals Chamber will consider each of these contentions in turn.

37. The Appeals Chamber notes that in paragraphs 293 and 295 of the Judgement, the Trial Chamber stated that it was convicting the Appellant for genocide under Articles 2 (3) (a) and 2 (3) (b) of the Statute. The Appeals Chamber considers that this was evidently a mistaken reference on the Trial Chamber's part. The Trial Chamber could not have intended to convict the Appellant of conspiracy to commit genocide, which is the crime listed under Article 2 (3) (b) of the Statute; just a few paragraphs earlier, it had correctly noted that conspiracy to commit genocide was not charged in the Indictment and thus declined to make any findings in respect of it.[96] The Trial Chamber's references in paragraphs 293 and 295 should therefore have been to Articles 2 (2) (a) and 2 (2) (b) of the Statute, which specify underlying acts of genocide. The Appellant was charged under Count 1 of the Indictment with genocide through "killing or causing serious bodily or mental harm to members of the Tutsi population", a reference to Articles 2 (2) (a) and 2 (2) (b) of the Statute, and the Trial Chamber plainly intended to convict him under both of these provisions.[97] The Appellant has not raised this point in his appeal. The Appeals Chamber corrects the error *proprio motu*, but considers that it did not affect the verdict.

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[90] See, e.g., *Bizimungu et al*. Decision on Mugiraneza Interlocutory Appeal, para. 21 (noting that "the exercise of the discretion of different Trial Chambers in relation to different cases is an unhelpful comparison to make").
[91] The Appellant merely states without further elaboration that Mr. Ndengejeho "is said to have strongly challenged the testimony of" Prosecution expert Alison Des Forges. Gacumbitsi Appeal Brief, para. 107.
[92] Gacumbitsi Appeal Brief, paras. 110-112.
[93] Decision of 11 November 2003, para. 7.
[94] Moreover, contrary to the Appellant's contentions (See Gacumbitsi Appeal Brief, paras. 72-75, 79, 80, 92), the appearance at trial of his experts was not "acquired" during the meetings of 28 August 2003 and 22 October 2003.
[95] Trial Judgement, para. 288.
[96] See Trial Judgement, para. 289 (incorrectly referring, however, to Article 2 (3) (c) of the Statute).
[97] See Trial Judgement, paras. 261-290 (concerning killing); *ibid*., paras. 291-293 (concerning bodily harm).

1. Legal Characterization of the Mens Rea Element of the Crime of Genocide

38. The Appellant challenges the Trial Chamber's assessment of the question of *mens rea* for genocide.[98] He observes that the Trial Chamber held that genocidal intent can sometimes, as here, be inferred from the accused's acts and their factual context.[99] The Appellant suggests that the inferential approach is inconsistent with the notion of *dolus specialis* or specific intent because it removes from the Prosecution the burden of proving that the offender sought to destroy, in whole or in part, a protected group as such.[100] The Prosecution responds that the Trial Chamber's inferential approach was consistent with well established legal principles and amply supported by the evidence and factual findings in this case, including those connecting the Appellant to other perpetrators of the genocide.[101]

39. The Appeals Chamber finds that the Trial Chamber correctly recognized that genocide is a crime requiring "specific intent".[102] The Prosecution is required, under Article 2 (2) of the Statute, to prove that the accused possessed the specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

40. The Tribunal's jurisprudence conclusively establishes that genocidal intent can be proven through inference from the facts and circumstances of a case. By its nature, intent is not usually susceptible to direct proof. Only the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own genocidal intent. Intent thus must usually be inferred. Here, the Trial Chamber stated:

> It is possible to infer the genocidal intent inherent in a particular act charged from the perpetrator's deeds and utterances considered together, as well as from the general context of the perpetration of other culpable acts systematically directed against that same group, notwithstanding that the said acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership in a particular group, while excluding members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.[...] Evidence of genocidal intent can be inferred from "the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing."[103]

41. This approach is consistent with the Appeals Chamber's previous holdings. For instance, the *Rutaganda* Appeal Judgement states:

> The Appeals Chamber concurs with the Appellant that in order to find a person guilty of genocide, it must be established that such a person was personally possessed of the specific intent to commit the crime at the time he did so. Nonetheless, as stated by the Appeals Chamber in *Kayishema/Ruzindana*, "explicit manifestations of criminal intent are [...] often rare in the context of criminal trials". In the absence of explicit, direct proof, the *dolus specialis* may therefore be inferred from relevant facts and circumstances. Such an approach prevents perpetrators from escaping convictions simply because such manifestations are absent.[104]

Specifically, relevant facts and circumstances could include

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[98] Gacumbitsi Appeal Brief, paras. 120-128.
[99] Gacumbitsi Appeal Brief, para. 122.
[100] Gacumbitsi Appeal Brief, paras. 123-126.
[101] Prosecution Response, paras. 99-114.
[102] Trial Judgement, para. 250.
[103] Trial Judgement, paras. 252, 253.
[104] *Rutaganda* Appeal Judgement, para. 525 (internal citations omitted).

> "the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts."[105]

The Appeals Chamber emphasizes that the inferential approach does not relieve the Prosecution of its burden to prove each element of its case, including genocidal intent, beyond reasonable doubt. Rather, it is simply a different means of satisfying that burden.

42. In this case, in support of its finding that the Appellant possessed the requisite genocidal intent, the Trial Chamber cited the Appellant's urging of the *conseillers de secteur* in his *commune*, at a meeting on 9 April 1994, "to incite the Hutu to kill the Tutsi"; the Appellant's similar statements made directly to the Hutu population on three separate occasions on 13 and 14 April 1994; his instigation of the rape of Tutsi women and girls on 17 April 1994; and his personal killing of a Tutsi named Murefu on 15 April 1994, which signalled "the beginning of the attack at Nyarubuye Parish".[106] The Trial Chamber also referred to its earlier findings of fact. For instance, it found that at the 9 April 1994 meeting, the Appellant instructed the *conseillers* to return to their *secteurs* and organize meetings at which they were to instruct the Hutu "to separate themselves from the Tutsi" and then "to kill all the Tutsi, so that the *Inkotanyi* would no longer have any accomplices."[107] It also found that on 14 April 1994, at Rwanteru commercial centre, the Appellant "addressed about one hundred people and incited them to arm themselves with machetes and to participate in the fight against the enemy, specifying that they had to hunt down all the Tutsi."[108] And it found that later that same day, at Gisenyi trading centre, the Appellant urged about forty people "to kill all the Tutsi and throw their bodies into the River Akagera."[109]

43. The Appellant raises certain challenges to these and other findings, which will be discussed below. But he submits no serious contention that the Trial Chamber's findings of fact, if valid, were nonetheless insufficient as a matter of law to support an inference of genocidal intent. The Appellant offers no reasonable alternative explanation for the above-described actions and utterances. His repeated exhortations to crowds of people that they should kill all the Tutsis, even considered apart from his other actions, leave room for no other reasonable inference.

44. The Appellant further argues that the Trial Chamber improperly relied on the "acts of other perpetrators" to prove the Appellant's genocidal intent without establishing a nexus between those perpetrators and the Appellant.[110] This contention is without merit. In establishing the Appellant's mental state the Trial Chamber relied principally on the Appellant's own actions and utterances – which, as detailed above, provided ample evidence of his mindset – and not those of others. The only aspect of the Trial Chamber's analysis that relates to the actions of others is its reference to "the scale of the massacres", which the Trial Chamber cited in support of its finding that the Appellant "acted with intent to destroy a substantial part of the targeted group."[111] In the Appeals Chamber's view, it is appropriate and consistent with the Tribunal's jurisprudence to consider, in determining whether the Appellant meant to target a sufficiently substantial part of the Tutsi population to amount to genocide, that the Appellant's actions took place within the context of other culpable acts systematically directed against the Tutsi population.[112] The Trial Chamber's findings discussed above clearly establish that the Appellant was an active participant in those culpable acts.

45. For these reasons, the Appeals Chamber dismisses this sub-ground of appeal.

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[105] *Jelisić* Appeal Judgement, para. 47; See *Rutaganda* Appeal Judgement, para. 525. See also, e.g., *Krstić* Appeal Judgement, paras. 27, 34, 35.
[106] Trial Judgement, para. 259.
[107] Trial Judgement, paras. 101, 93.
[108] Trial Judgement, para. 98.
[109] Trial Judgement, para. 99.
[110] Gacumbitsi Appeal Brief, para. 127.
[111] Trial Judgement, para. 258.
[112] See *Rutaganda* Appeal Judgement, paras. 526-530; See also *Jelisić* Appeal Judgement, para. 47 (referring to "the general context, the perpetration of other culpable acts systematically directed against the same group, [and] the scale of atrocities committed").

2. Specificity of the Indictment in Respect of the Murder of Mr. Murefu

46. The Appellant's second legal challenge to his conviction for genocide pertains to the Trial Chamber's finding that he personally killed a Tutsi civilian, Mr. Murefu. The Appellant argues that this killing was not alleged in the Indictment and, as such, should not have been the basis of a conviction. He observes that the Trial Chamber recognized this when it acquitted him of the crime of murder, and suggests that it should also have done so in the context of genocide.[113]

47. As a threshold matter, the Appellant's argument concerning the omission of the killing of Mr. Murefu from the Indictment does not appear to be specifically set forth in his Notice of Appeal. The Prosecution did not, however, object on this basis to the inclusion of the argument in the Appellant's Appeal Brief, and it has fully responded to it. Under these circumstances, the Appeals Chamber will consider the Appellant's argument despite the inadequacy of the Notice of Appeal.

48. The Prosecution does not dispute that the killing was not specifically alleged in the Indictment, although it observes that Count 1 of the Indictment alleges as a general matter "that he was responsible for killings of members of the Tutsi population".[114] It concedes that "the better practice" would have been for the specific killing of Mr. Murefu to be pleaded as a material fact.[115] It contends, however, that any pleading defect with regard to this killing could not have affected the outcome of the trial because it was only one fact among many supporting the Appellant's genocide conviction.[116]

49. The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in the Indictment so as to provide notice to the accused. The Appeals Chamber has held that

> "criminal acts that were physically committed by the accused personally must be set forth in the indictment specifically, including where feasible 'the identity of the victim, the time and place of the events and the means by which the acts were committed.'"[117]

An indictment lacking this precision may, however, be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charge.[118] When an appellant raises a defect in the indictment for the first time on appeal, then he bears the burden of showing that his ability to prepare his defence was materially impaired.[119] In cases where an accused has raised the issue of lack of notice before the Trial Chamber, in contrast, the burden rests on the Prosecution to demonstrate that the accused's ability to prepare a defence was not materially impaired.[120]

50. The Indictment, taken alone, does not allege the killing of Mr. Murefu. In the Statement of Facts ("Statement") related to the genocide count, it states that "Sylvestre Gacumbitsi killed persons by his own hand", but provides no further details.[121] The Statement goes on to describe the massacre at Nyarubuye Parish, but does not mention Mr. Murefu and does not suggest that the Appellant participated personally in the killing there.[122] Count 4 of the Indictment (Murder) does allege that the Appellant killed a number of individuals in several separate incidents, but Mr. Murefu is not among them. The Appellant could not reasonably have known, on the basis of the Indictment alone, that he was being charged with the killing of Mr. Murefu. While in certain cases, "the sheer scale of the alleged crimes 'makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes'",[123] this is not such a case. The Prosecution should have expressly pleaded the killing of Mr.

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[113] Gacumbitsi Appeal Brief, paras. 257-259, 213-220. See Trial Judgement, para. 176.
[114] Prosecution Response, para. 152.
[115] Prosecution Response, para. 154.
[116] Prosecution Response, para. 155.
[117] *Ntakirutimana* Appeal Judgement, para. 32, quoting *Kupreškić et al*. Appeal Judgement, para. 89.
[118] *Ntakirutimana* Appeal Judgement, para. 27, referring to *Kupreškić et al*. Appeal Judgement, para. 114.
[119] *Niyitegeka* Appeal Judgement, para. 200; *Kvočka et al*. Appeal Judgement, para. 35.
[120] *Niyitegeka* Appeal Judgement, para. 200; *Kvočka et al*. Appeal Judgement, para. 35.
[121] Indictment, para. 4.
[122] Indictment, paras. 15-19.
[123] *Kupreškić et al*. Appeal Judgement, para. 89, referring to *Kvočka* Decision, para. 17.

Murefu, particularly as it had this information in its possession before the Indictment was filed.[124] The Appeals Chamber thus finds by majority, Judge Shahabuddeen and Judge Schomburg dissenting, that the Indictment was defective in this respect.

51. The Prosecution further contends, however, that the Appellant waived any objection on grounds of vagueness by failing to object at trial to the testimony concerning the killing of Mr. Murefu.[125] Whether an accused raised a timely objection at trial affects the burden of proof on appeal concerning the prejudice caused by a defective indictment. As the Appeals Chamber stated in the *Niyitegeka* case:

> In general, "a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial, and to raise it only in the event of an adverse finding against that party." Failure to object in the Trial Chamber will usually result in the Appeals Chamber disregarding the argument on grounds of waiver. In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also choose to file a timely motion to strike the evidence or to seek an adjournment to conduct further investigations in order to respond to the unpleaded allegation.[...]
>
> The importance of the accused's right to be informed of the charges against him under Article 20 (4) (a) of the Statute and the possibility of serious prejudice to the accused if material facts crucial to the Prosecution are communicated for the first time at trial suggest that the waiver doctrine should not entirely foreclose an accused from raising an indictment defect for the first time on appeal. Where, in such circumstances, there is a resulting defect in the indictment, an accused person who fails to object at trial has the burden of proving on appeal that his ability to prepare his case was materially impaired. Where, however, the accused person objected at trial, the burden is on the Prosecution to prove on appeal that the accused's ability to prepare his defence was not materially impaired. All of this is of course subject to the inherent jurisdiction of the Appeals Chamber to do justice in the case.[126]

52. In this case, the transcripts of the testimony of Witnesses TAQ and TAO, who testified as to Mr. Murefu's killing, indeed show no record of a Defence objection at the relevant time.[127] However, the omission of the killing from the Indictment was brought to the Trial Chamber's attention on multiple other occasions. First, in its Rule 98 *bis* motion for acquittal on certain charges (including murder, but not genocide) filed at the close of the Prosecution's case, the Defence addressed the sufficiency of the evidence concerning the killing of Mr. Murefu in the context of the murder charge.[128] The Prosecution responded by stating that the killing had not been pleaded in the Indictment, and stated that it did "not seek a conviction for murder based on these facts.[...] At the close of trial the Prosecutor will be relying on these murders as evidence in support of other charges, and as evidence of a similar pattern of conduct pursuant to Rule 93 of the Rules."[129] It did not specify which of the "other charges" the murders would be used to support, nor did it suggest that the lack of a Defence objection at trial entitled it to rely on incidents not charged in the Indictment. In its reply, the Defence addressed the issue of lack of notice, and specifically argued that the Prosecution should not be given the opportunity at the close of the trial to fill in the gaps in the Indictment by relying on the evidence in support of other charges.[130]

53. Subsequently, in his Final Trial Brief, the Appellant argued that the Indictment had not mentioned the killing of Mr. Murefu, that the allegation of his murder had emerged for the first time at trial, and that the

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[124] Indeed, the Prosecution had in its possession since 29 November 2000 a statement of Witness TAQ which described the killing of Mr. Murefu by the Appellant.
[125] Prosecution Response, para. 153.
[126] *Niyitegeka* Appeal Judgement, paras. 199, 200 (internal citations omitted).
[127] See T. 29 July 2003 pp. 52, 53 (Witness TAQ); T. 30 July 2003 pp. 53, 54, 61, 62 (Witness TAO).
[128] Sylvestre Gacumbitsi's Motion for Judgement of Acquittal in Respect of One or More Counts Charged in the Indictment Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence, filed confidentially on 2 September 2003, paras. 27-33.
[129] Prosecutor's Response to the Defence Motion for a Judgment of Acquittal pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence, filed on 8 September 2003, paras. 38, 39.
[130] Réplique de la Défense à la réponse du Procureur aux fins d'acquittement sur un ou plusieurs chefs d'accusation; Article 98 bis du Règlement de procédure et de preuve, filed on 15 September 2003, paras. 8, 44-48.

Appellant should not be convicted for this uncharged offence.[131] The Trial Chamber was clearly aware of the Appellant's argument – and the Prosecution's concession – that Mr. Murefu's killing had not been alleged in the Indictment. It expressly relied on this omission in declining to base a murder conviction on that killing.[132]

54. Although the *Niyitegeka* Appeal Judgement referred to the accused's obligation to interpose a timely objection to a pleading defect when evidence is introduced at trial, it did so in the context of deciding whether and under what conditions it was appropriate for an appellant to challenge such a defect for the first time on appeal. This case presents a different situation. The Appellant repeatedly brought the issue to the Trial Chamber's attention in its briefing, and the Prosecution never suggested that he had waived his objection by not raising it earlier. And the Trial Chamber actually decided the issue, albeit in the context of murder alone and not genocide. In *Ntakirutimana*, the Appeals Chamber recognized that where the Trial Chamber has treated a challenge to an indictment as being adequately raised, the Appeals Chamber should not invoke the waiver doctrine.[133] In light of these circumstances, the Appeals Chamber holds that the Appellant did not waive his objection to the pleading defect. It therefore remains the Prosecution's burden to prove that the Appellant's defence was not materially impaired by the defect.

55. The question remains whether the vagueness of the Indictment was cured by the Prosecution's other filings. As the ICTY Appeals Chamber explained in *Kupreškić*:

> [I]n some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category.[134]

Here, the Prosecution contends that the vagueness was cured by the witness statement of Witness TAQ, which provided the date and place of the killing as well as the name of the victim,[135] and by a summary of the anticipated testimony of Witness TAQ that was appended to the Prosecution Pre-Trial Brief.[136] The Appellant argues that the Indictment should have been amended accordingly but was not.[137]

56. In advance of the trial, the Prosecution disclosed to the Appellant the witness statement of Witness TAQ, which set forth, *inter alia*, the date and place of the killing as well as the name of one victim, Mr. Murefu. That statement was also included in summary form in the chart of witnesses, appended to the Prosecution Pre-Trial Brief. The summary of the anticipated testimony of Witness TAQ reads:

> On or around 15 April 1994, Karamage arrived at Nyarabuye church with a large group of Hutu attackers armed with sticks. Not long after, Sylvestre Gacumbitsi arrived with a pick-up truck full of machetes. He was accompanied by a vehicle full of *Interahamwe* armed with firearms and grenades. At first, the refugees rejoiced when they saw Gacumbitsi, but he warned them: "If any Hutu has made the mistake of entering that church, let them come out immediately." Gacumbitsi then instructed the Hutus and the *Interahamwe*: "Get machetes! Start killing and surround the church so that no one escapes." An elderly Tutsi teacher named Murefu rose up and asked Gacumbitsi what the Tutsis had done to deserve that fate. Gacumbitsi grabbed a machete and slashed his neck, killing him instantly. Within moments, grenades were being tossed into the church, and shots were fired.[138]

That statement is included in a chart that shows the charges to which each witness's testimony was expected to correspond. The chart makes clear that Witness TAQ's anticipated testimony related to the charge of genocide, specifically referring to paragraphs 4, 15, 16, 17, 18, 21, 22, and 23 of the Indictment.[139]

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[131] Gacumbitsi Closing Brief, pp. 11, 12, 88, 89.
[132] Trial Judgement, para. 176.
[133] See *Ntakirutimana* Appeal Judgement, para. 23.
[134] *Kupreškić et al*. Appeal Judgement, para. 114.
[135] Prosecution Response, para. 152.
[136] T. 9 February 2006 p. 28.
[137] T. 9 February 2006 p. 78.
[138] See Prosecution Pre-Trial Brief, Appendix 3, p. 11 (emphasis added).
[139] See Prosecution Pre-Trial Brief, Appendix 3, p. 10.

Paragraph 4 of the Indictment, which was part of the "Concise Statement of Facts for Counts 1 and 2", indicates that the Appellant personally participated in killings.[140]

57. The ICTY Appeals Chamber was recently confronted with similar circumstances in the *Naletilić and Martinović* case: the material facts concerning a particular incident were not pleaded in the indictment, but were included in a chart of witnesses that set forth the facts to which each witness would testify and clearly identified the charges in the indictment to which those facts corresponded. The Appeals Chamber held that this "rather detailed information [...] was sufficient to put Martinović on notice of what specific incident was being alleged", and thus cured the defect in the indictment.[141] And it did not, contrary to the Appellant's suggestion here, hold that the Prosecution was obligated to formally amend the indictment to correspond with the clarifying information it subsequently provided. Likewise, in *Ntakirutimana*, the Appeals Chamber held that a witness statement, when taken together with "unambiguous information" contained in a Pre-Trial Brief and its annexes, was sufficient to cure a defect in an indictment.[142]

58. By majority, the Appeals Chamber holds, Judge Liu and Judge Meron dissenting, that the circumstances in this case are materially indistinguishable from those in *Naletilić and Martinović*, and that the summary of Witness TAQ's testimony was sufficient to clarify the general statement, already included in the genocide section of the Indictment, that "Sylvestre Gacumbitsi killed persons by his own hand". The summary clearly alleged the killing of Mr. Murefu and connected it to the genocide, did not conflict with any other information that was provided to the Appellant, and was provided in advance of the trial. It therefore unambiguously constituted "timely, clear, and consistent information" sufficient to put the Appellant on notice that he was being charged with committing genocide through the killing of Mr. Murefu.[143]

59. In addition, by a differently composed majority, the Appeals Chamber holds, Judge Güney dissenting, that even if the killing of Mr. Murefu were to be set aside, the Trial Chamber's conclusion that the Appellant "committed" genocide would still be valid. The Trial Chamber convicted the Appellant of "ordering" and "instigating" genocide on the basis of findings of fact detailing certain conduct that, in the view of the Appeals Chamber, should be characterized not just as "ordering" and "instigating" genocide, but also as "committing" genocide.

60. As the Trial Chamber observed, the term "committed" in Article 6 (1) of the Statute has been held to refer "generally to the direct and physical perpetration of the crime by the offender himself."[144] In the context of genocide, however, "direct and physical perpetration" need not mean physical killing; other acts can constitute direct participation in the *actus reus* of the crime.[145] Here, the accused was physically present at the scene of the Nyarubuye Parish massacre, which he "directed" and "played a leading role in conducting and, especially, supervising".[146] It was he who personally directed the Tutsi and Hutu refugees to separate – and that action, which is not adequately described by any other mode of Article 6 (1) liability, was as much

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[140] "[...] Sylvestre GACUMBITSI killed persons by his own hand, ordered killings by subordinates, and led attacks under circumstances where he knew, or should have known, that civilians were, or would be, killed by persons acting under his authority."
[141] See *Naletilić and Martinović* Appeal Judgement, para. 45.
[142] *Ntakirutimana* Appeal Judgement, para. 48.
[143] In addition to his argument concerning the Indictment, the Appellant also challenges the evidentiary basis for the finding that he killed Mr. Murefu. His challenges to the credibility of Witness TAQ and the consistency of that witness's testimony with other testimony given at trial are considered elsewhere in this Judgement. His statement that the "Prosecutor failed to prove that [Mr. Murefu] existed" is a bare assertion that does not provide any reason to doubt the Trial Chamber's conclusion to the contrary; it merits no further discussion. See Gacumbitsi Appeal Brief, para. 217.
[144] Trial Judgement, para. 285; See *Kayishema and Ruzindana* Appeal Judgement, para. 187; *Tadić* Appeal Judgement, para. 188. The term also encompasses joint criminal enterprise, as discussed further below.
[145] For instance, it has been recognized that selection of prisoners for extermination played an integral role in the Nazi genocide. See, e.g., Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 30th September and 1st October, 1946, p. 63 (London: His Majesty's Stationary Office, 1946) (Reprinted Buffalo, New York: William S. Hein and Co., Inc., 2001) (describing the selection process at Auschwitz); *Att'y Gen. of Israel v. Adolf Eichmann*, 36 I.L.R. 5, p. 185 (Isr. D.C., Jerusalem, Dec. 12, 1961), aff'd, 36 I.L.R.277 (Isr. S. Ct., May 29, 1962) (same).
[146] See Trial Judgement, paras. 168, 169, 171, 172, 173, 261.

an integral part of the genocide as were the killings which it enabled.[147] Moreover, these findings of fact were based on allegations that were without question clearly pleaded in the Indictment.[148]

61. The Appeals Chamber is persuaded that in the circumstances of this case, the modes of liability used by the Trial Chamber to categorize this conduct – "ordering" and "instigating" – do not, taken alone, fully capture the Appellant's criminal responsibility. The Appellant did not simply "order" or "plan" genocide from a distance and leave it to others to ensure that his orders and plans were carried out; nor did he merely "instigate" the killings. Rather, he was present at the crime scene to supervise and direct the massacre, and participated in it actively by separating the Tutsi refugees so that they could be killed. The Appeals Chamber finds by majority, Judge Güney dissenting, that this constitutes "committing" genocide.

62. The Appeals Chamber unanimously dismisses this sub-ground of the Appellant's appeal.

3. Assessment of the Evidence Supporting the Genocide Conviction

63. The Appellant raises a number of challenges to the findings of fact underlying his conviction for genocide. The Appeals Chamber notes that in this part of his appeal, the Appellant repeatedly points to evidence he introduced at trial that contradicts the findings made by the Trial Chamber without attempting to demonstrate why the Trial Chamber's decision to instead credit the evidence introduced by the Prosecution was in error. In such instances, the Appeals Chamber will exercise its prerogative not to address the Appellant's submissions in detail.

(a) Alleged Errors Pertaining to Witness TAW

64. The Appellant raises various objections to the Trial Chamber's reliance on the testimony of Witness TAW, who testified as to the Appellant's actions between 7 and 13 April 1994. Other than describing him as "crucial" and alleging that several of his statements were uncorroborated by other witnesses, the Appellant does not explain in what way the Trial Chamber's findings concerning his liability for genocide would have differed absent reliance on Witness TAW's testimony.[149] Nonetheless, in light of the fact that the Trial Chamber did rely on this witness in several respects, the Appeals Chamber will briefly address the Appellant's arguments.

65. Several of the Appellant's contentions amount to no more than observations that Witness TAW's testimony contradicted evidence introduced by the Defence. First, Witness TAW testified that the Appellant met on several occasions with Major Ndekezi, commander of the Rwanteru military camp, and conspired with him to plan genocide; the Defence submitted that Major Ndekezi was at the time serving with UNAMIR in Kigali and therefore could not have met with the Appellant, and that it was implausible that Rwanteru camp would not have been headed by someone of a higher rank than major.[150] The Trial Chamber did not specifically address these Defence arguments. However, it is well established that the Trial Chamber is not obligated to "explain in its judgement every step of its reasoning."[151] Here, the Trial Chamber could reasonably have concluded that Witness TAW's testimony was credible on the point. The Appellant does not point to any evidence supporting his assertion that Major Ndekezi was located elsewhere other than a document dated 5 March 1994, which, even if it were accurate and referred to the correct Major Ndekezi, could not provide evidence of his location in April 1994.[152] The Appellant also cites no evidence in support of the assertion that a military camp could not be commanded by a major.

66. Witness TAW testified that the Appellant attended a meeting on 8 April 1994 with various officials and *Interahamwe* leaders. The Appellant does not deny this fact, but argues that the meeting concerned

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[147] Trial Judgement, para. 168.
[148] See Indictment, paras. 4, 13-21.
[149] Gacumbitsi Appeal Brief, paras. 157, 158.
[150] Gacumbitsi Appeal Brief, paras. 129-133.
[151] See *Kajelijeli* Appeal Judgement, para. 147.
[152] Gacumbitsi Appeal Brief, para. 132, citing *Situation officiers armée Rwandaise*, MINADEF, 5 March 1994.

security matters and that, contrary to what Witness TAW asserted, it was the prefect of Kibungo who chaired the meeting, not Colonel Rwagafirita.[153] The first point is consistent with the Trial Judgement and with Witness TAW's testimony. As to the second point, the Appellant has demonstrated no error. First, he merely offers a different account of the meeting without explaining why any reasonable trier of fact would have preferred it to that of Witness TAW. The Appellant does not point to any evidence in the record to support his further contention that there was no Colonel Rwagafirita in the Rwandan armed forces on 8 April 1994.[154] And even if Witness TAW incorrectly identified the person who chaired the meeting (which the Appeals Chamber need not decide), this point is irrelevant to the findings of liability and would not imply that a reasonable Trial Chamber would have rejected Witness TAW's evidence in its entirety.

67. The Appellant points to discrepancies between the testimonies of Witnesses TAW and TBH. The first noteworthy discrepancy concerns a meeting that took place on 9 April 1994, which Witness TAW did not attend himself; his testimony was based on what Witness TBH had told him. Witness TBH stated that the distribution of weapons was not discussed at this meeting, while Witness TAW stated that it was.[155] On this point, the Appeals Chamber interprets the Trial Judgement as being in agreement with the Appellant that Witness TBH's account should prevail. The English translation of the Trial Judgement reads:

> Since the evidence of Witness TAW, who did not attend the meeting, was not corroborated and contradicted the evidence of a direct witness, Witness TBH, the Chamber can only find that the issue of weapons distribution was discussed during the meeting of 9 April 1994.[156]

In light of the rationale expressed in the first part of this sentence, the Appeals Chamber notes that the conclusion appears illogical. However, this was not an error on the Trial Chamber's part. Rather, it is an error of translation. The original French version reads (emphasis added):

> Le témoignage de TAW, qui n'a pas assisté à la réunion, n'étant pas corroboré et s'opposant à celui d'un témoin direct, TBH, la Chambre ne peut conclure qu'une discussion sur la distribution d'armes a eu lieu lors de la réunion du 9 avril 1994.

The Appeals Chamber considers that the best interpretation of this language indicates that the Trial Chamber held that it could *not* find that weapons distribution was discussed, rather than that it could "only" so find. This interpretation is supported by the Trial Judgement's subsequent references to the 9 April 1994 meeting, which do not mention weapons distribution being discussed there.[157] And there is no indication that the Trial Chamber based any aspect of the genocide conviction on the discussion of weapons distribution at that meeting. Thus, the Trial Chamber's analysis is consistent with that urged by the Appellant, and is not in error.[158]

68. The Appellant maintains, however, that if Witness TAW's account of the discussion of weapons distribution at the 9 April 1994 meeting is discredited, his claim that weapons were thereafter distributed on 10 April 1994 cannot safely be relied upon.[159] This is because on 10 April 1994 at Kibungo military camp, Witness TAW only saw a large number of boxes being loaded onto several vehicles; he did not actually see what was in the boxes.[160] The witness deduced that the boxes contained weapons "on the basis of information received the previous day from a participant at the meeting held at the *commune* office".[161] The Appellant contends that that participant was Witness TBH, and that in any event, if contrary to Witness TAW's testimony the weapons distribution had not been discussed at the 9 April 1994 meeting, Witness TAW's inference concerning the contents of the boxes was insupportable.[162]

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[153] Gacumbitsi Appeal Brief, paras. 135-138.
[154] Paragraph 138 of the Gacumbitsi Appeal Brief refers to "Attachment N°40" of the Gacumbitsi Book of Appeal. However, that attachment does not refer to the issue at hand.
[155] Gacumbitsi Appeal Brief, paras. 143, 144.
[156] Trial Judgement, para. 94.
[157] Trial Judgement, paras. 101, 259, 271, 303.
[158] At paragraph 142 of his Appeal Brief, the Appellant notes a discrepancy concerning the starting time of the 9 April meeting. However, he does not explain why a discrepancy on this detail undermines the credibility of either witness.
[159] Gacumbitsi Appeal Brief, paras. 164-168.
[160] Gacumbitsi Appeal Brief, paras. 145, 153, 164.
[161] Trial Judgement, para. 57.
[162] Gacumbitsi Appeal Brief, paras. 164, 168.

69. The Appellant appears to misunderstand the basis of the Trial Chamber's holding that the boxes contained weapons. In addition to his statement concerning what he had learned from a participant in the previous day's meeting, Witness TAW *also* testified that he spoke to Mr. Léonidas Gacondo, the *cellule* official for Kavuzo, Kigina *secteur*, who was one of the recipients of the boxes. According to Witness TAW, Mr. Gacondo confided that the boxes contained weapons.[163] The Trial Chamber stated that the "circumstances of delivery, as well as the information collected by Witness TAW *from one of the consignees of the boxes*, lead the Chamber to find that they contained weapons, without being able to determine which type."[164] It thus cited what Witness TAW had learned from Mr. Gacondo, not what he had learned from a participant in the 9 April 1994 meeting. The Appellant does not challenge the reliability of this information. Nor does he dispute the Trial Chamber's holding that the "circumstances of delivery" – *viz*., the overall genocidal campaign then unfolding – also supported the inference that the boxes contained weapons. The Appeals Chamber holds that it was reasonable for the Trial Chamber to find beyond a reasonable doubt that the Appellant distributed weapons on 10 April 1994.

70. As a general matter, the mere existence of inconsistencies between the testimonies of Witnesses TBH and TAW does not necessarily undermine either witness's credibility. The Appeals Chamber defers to the Trial Chamber's judgements on issues of credibility, including its resolution of disparities among different witnesses' accounts, and will only find that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[165] Here, the Trial Chamber reasonably concluded that any inaccuracies in Witness TAW's account resulted from the fact that he was relying on what others had told him and did not fundamentally undermine his credibility. Notably, the witness was forthright in acknowledging the limits of his direct knowledge.[166]

71. The Appellant argues that Witness TAW is biased against the Appellant because he blames the Appellant for the death of his family members and the failure to protect his property.[167] The Trial Chamber declined to find that this allegation of bias affected the witness's credibility, citing his apparently truthful demeanour, and noting that he "refrained from exaggerating his account of events in order to hurt the Accused."[168] The Appeals Chamber finds that the Trial Chamber's assessment of credibility is reasonable and defers to it. It bears noting that the mere fact that a witness or his family was a victim of an accused does not necessarily imply a bias that discredits that witness's testimony. This Tribunal, like criminal courts everywhere, routinely relies on the testimony of victims of crime, who, one would assume, are as motivated as anyone to see that justice is done with accuracy. It is for the trier of fact to determine whether a particular witness may have an incentive to distort the truth, and here the Appellant has not demonstrated that the Trial Chamber's assessment was in error.

72. Finally, the Appellant submits that the Trial Chamber's reliance on Witness TAW in concluding, *inter alia*, that weapons were distributed was in error because the evidence was uncorroborated and circumstantial.[169] It is well established that a Trial Chamber has the discretion to rely on uncorroborated, but otherwise credible, witness testimony.[170] Moreover, it is also permissible to rely on circumstantial evidence to prove material facts.[171] The Appeals Chamber finds no error in the Trial Chamber's assessment of the evidence in this regard.

(b) Credibility of Witness TBH

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[163] See Trial Judgement, para. 58.
[164] Trial Judgement, para. 95 (emphasis added).
[165] See, *e.g*., *Rutaganda* Appeal Judgement, paras. 24, 442, 443.
[166] Trial Judgement, para. 84.
[167] Gacumbitsi Appeal Brief, paras. 169-171; See T. 21 August 2003 pp. 13-16.
[168] Trial Judgement, para. 84.
[169] Gacumbitsi Appeal Brief, paras. 201-208.
[170] See *Semanza* Appeal Judgement, para. 153.
[171] See, e.g., *Ntakirutimana* Appeal Judgement, para. 262.

73. In addition to the above-mentioned arguments concerning inconsistencies between the testimonies of Witnesses TAW and TBH, the Appellant contends that the Trial Chamber erred in crediting the testimony of Witness TBH. He maintains that the witness was personally biased because the Appellant had previously removed him from an official position. Furthermore, he claims that the witness also had an incentive to agree to testify against the Appellant because it allowed him to leave prison in Rwanda, where he had been serving a sentence for genocide, in order to stay in Arusha for approximately one month while preparing his testimony. The Appellant further states that Witness TBH's own testimony illustrates that he was coached by the Prosecution: the witness clarified and added to testimony he had given earlier, explaining that he had been advised in discussions with the Prosecution that his testimony had been incomplete. Last, the Appellant alleges that Witness TBH falsely testified that he had implicated the Appellant in the written record of his guilty plea in Rwanda.[172]

74. The Trial Chamber acknowledged Witness TBH's prior dismissal as well as his genocide conviction, and assessed his testimony with caution as a result:

> The Chamber recalls that Witness TBH is an alleged accomplice of the Accused. It also recalls that the Accused removed Witness TBH from an official position, as the witness acknowledged. Thus, the Chamber assessed his evidence with caution. Having carefully examined Witness TBH's evidence, the Chamber finds, however, that his account of the meeting of 9 April 1994 and of the subsequent events implicating the Accused is credible and reliable, and that his testimony does not appear to have been born of any resentment towards the Accused.[173]

To be sure, the Trial Chamber did not specifically address all of the Appellant's arguments.[174] But it can be assumed to have been aware of the arguments presented to it and was not obligated to discuss all of them.[175] Moreover, the Appellant has not shown that no reasonable Trial Chamber could have deemed the witness credible. He has provided no evidence, for instance, that Witness TBH's trip to Arusha was conditioned on the content of his testimony, and no reason to believe that the incentive of a single month's sojourn outside prison was so powerful as to make it unreasonable to conclude that he was telling the truth. The passage of Witness TBH's testimony concerning the alleged prosecutorial coaching demonstrates no impropriety.[176] It is not inappropriate *per se* for the parties to discuss the content of testimony and witness statements with their witnesses, unless they attempt to influence that content in ways that shade or distort the truth. And the Appellant does not explain why the alleged discrepancy between Witness TBH's trial testimony and his written plea statement in Rwanda discredits him. The Trial Chamber has broad discretion to determine the weight to be given to discrepancies between a witness's testimony and his prior statements.[177]

75. Moreover, even if the Trial Chamber had erred in crediting Witness TBH's testimony, the Appellant has not shown how relying on it caused a miscarriage of justice. The Trial Chamber relied on the largely corroboratory accounts of Witnesses TBH and TAW. As noted above, Witness TAW was credible and the Appellant does not establish that reliance on his testimony alone, absent corroboration, would have been unsafe or would have resulted in a different verdict.[178]

(c) Credibility of Witnesses TAS, TBI, TBJ, and TBK

76. The Appellant contends that the Trial Chamber committed a logical error when it found, on the basis of Witness TAS's and TAW's testimony, that the Appellant exhorted a crowd consisting of a Hutu majority

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[172] See Gacumbitsi Appeal Brief, paras. 173-183.
[173] Trial Judgement, para. 86.
[174] Gacumbitsi Closing Brief, pp. 46, 47.
[175] See *Rutaganda* Appeal Judgement, para. 536; *Kvočka et al*. Appeal Judgement, para. 23.
[176] The Appeals Chamber Sees no reason to doubt the Prosecution's statement that "the witness was involved in normal preparation to give evidence, and nothing more." Prosecution Response, para. 140.
[177] See *Kajelijeli* Appeal Judgement, para. 96.
[178] The Trial Chamber expressly relied on Witness TBH's testimony and not Witness TAW's with respect to the discussion of weapons distribution at the 9 April 1994 meeting. But as to that point, the Trial Chamber's reliance on Witness TBH's version of events favoured the Appellant.

at Nyakarambi market to "let no one escape". He reasons that some Tutsis must have been present, and yet there is no allegation that anyone was killed at Nyakarambi on that day.[179] This is a *non sequitur*. The Trial Chamber did not hold that the Appellant was giving instructions for immediate killings, but rather that he was seeking "to prepare the Hutu population for the elimination of the Tutsi."[180]

77. The Appellant further notes that the Witnesses TBI, TBJ, and TBK have all been arrested and/or sentenced in Rwanda for genocide.[181] He does not explain the implications of this observation for the witnesses' credibility or for the Trial Judgement. As noted above, the Trial Chamber explained with respect to Witness TBH that his genocide conviction did not preclude reliance on his testimony; the Appellant does not explain why a similar conclusion would not have been reasonable with respect to the other three witnesses. In light of the Appellant's failure to demonstrate an error meriting reversal, no further discussion is warranted.[182]

(d) Alleged Factual Errors Concerning the Attacks at Nyarubuye Parish

78. Finally, the Appellant challenges the Trial Chamber's assessment of the testimony of Prosecution Witnesses TAO, TAQ, and TAX concerning the attacks at Nyarubuye Parish from 15 through 17 April 1994.[183] These attacks were the central facts underlying the Appellant's genocide conviction. The Trial Chamber found that he had planned, instigated, ordered, committed, and aided and abetted the killings of thousands of Tutsi refugees, who had fled various surrounding areas and sought shelter at Nyarubuye, in multiple massacres over the course of those three days.[184]

79. First, the Appellant points to various minor variations among the testimonies of different witnesses, such as whether the Appellant spoke "aloud" or "through a megaphone", and whether the *Interahamwe* chanted "Let's exterminate them" or "Let's massacre them".[185] He also notes that Witness TAO first stated that he "saw" the Appellant and six police officers arrive at the parish, but then clarified on cross-examination that he in fact heard the car arrive, and shortly thereafter saw the Appellant and the officers.[186] In the Appeals Chamber's view, these discrepancies are minor, and the Trial Chamber was certainly reasonable in deeming the witnesses credible despite them. As the Trial Chamber noted, their testimonies largely corroborated one another and "[n]o major inconsistency or discrepancy was noted in their evidence. The discrepancies noted can be explained by the time that has elapsed since the massacres, the fact that they witnessed the massacres from different locations and at different times, and the considerable stress they were subjected to."[187]

80. The Appellant also points to disparities in what the various Prosecution witnesses observed.[188] For instance, on 16 April 1994, Witness TAQ did not see the Appellant at Nyarubuye Parish, while Witness TAO did. On 17 April 1994, Witness TAX heard the Appellant exhort the *Interahamwe* to kill the few surviving Tutsi refugees, using a metaphor of "striking at a snake". Witnesses TAQ and TAO did not hear these remarks. Some witnesses did not mention looting following the massacre, while others did. The Appeals Chamber finds that these contrasts do not amount to inconsistencies, but simply reflect the fact that

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[179] Gacumbitsi Appeal Brief, paras. 184, 185.
[180] Trial Judgement, para. 97.
[181] Gacumbitsi Appeal Brief, paras. 191, 193, 194.
[182] The Appellant's other observations in this subsection are also without merit. He asserts that Witness TAS was "coached and sent by *IBUKA*", but provides no further explanation or evidence. He contends that one witness testified that he did not find the Appellant in Kigarama; it is unclear which witness he means, and several witnesses testified that the Appellant did lead a crowd to Kigarama. The Appellant's contentions concerning the interlocutory decision of 1 August 2003 are considered in section II.A.
[183] Gacumbitsi Appeal Brief, paras. 209-256.
[184] Trial Judgement, para. 288. The issue of defects in the Indictment was considered in section II.B.2 above.
[185] Gacumbitsi Appeal Brief, paras. 227-229.
[186] Gacumbitsi Appeal Brief, para. 231.
[187] Trial Judgement, para. 145.
[188] See, e.g., Gacumbitsi Appeal Brief, paras. 233, 234, 243, 244, 255.

different people in different vantage points saw and heard different things.[189] The Trial Chamber so found, and the Appellant has not demonstrated that its conclusions were unreasonable.[190]

81. Finally, the Appellant states that the Trial Chamber's findings of fact were contradicted by evidence introduced by the Defence, including the Appellant's own diary from 1994, which does not detail his participation in the massacres.[191] The Appellant does not show that the Trial Chamber improperly ignored any of this evidence. Rather, the Trial Chamber simply concluded that to the extent the evidence presented by the Defence and that presented by the Prosecution conflicted, the latter was more credible.[192] When faced with competing versions of events, it is the prerogative of the trier of fact to determine which is more credible.[193] The Appellant has not demonstrated that the Trial Chamber made an error.

(e) Conclusion

82. For the foregoing reasons the Appeals Chamber dismisses this sub-ground of appeal.

C. CRIMES AGAINST HUMANITY: EXTERMINATION (GROUND OF APPEAL 3)

83. The Trial Chamber convicted the Appellant of planning, instigating, ordering, and aiding and abetting extermination as a crime against humanity.[194] It referred to its earlier factual findings on the Appellant's role in the massacre at Nyarubuye Parish,[195] and found that the Appellant had the requisite *mens rea* for extermination in that he intended to participate in that massacre and had knowledge of the widespread and systematic attack against Tutsi civilians in Rusumo in April 1994.[196] The Appellant challenges this conviction.[197]

1. The Requisite Intent for the Crime of Extermination

84. The Appellant first appears to submit that the Trial Chamber applied an incorrect legal standard on the requisite intent for crimes against humanity.[198] In the Appellant's view, "[t]he mental element must be proved by the existence of a widespread practice, which implies planning and tolerance of such act by the State."[199] The Appeals Chamber rejects this contention. As stressed by the Trial Chamber,[200] the existence of a policy or plan can be evidentially relevant, but it is not a separate legal element of a crime against humanity.[201] In particular, the ICTY Appeals Chamber has emphasized that proof of a plan or policy is not a prerequisite to a conviction for extermination.[202] The same can be said of "tolerance of such act by the State."

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[189] See *Niyitegeka* Appeal Judgement, para. 142.
[190] See Trial Judgement, paras. 149, 159, 163.
[191] Gacumbitsi Appeal Brief, paras. 236-242, 250-253.
[192] See, e.g., Trial Judgement, paras. 153, 160.
[193] See *Rutaganda* Appeal Judgement, para. 29.
[194] Trial Judgement, paras. 314-316. Paragraph 314 of the English version of the Trial Judgement refers to "inciting" extermination whereas Article 6 (1) of the Statute employs the term "instigated". Paragraph 314 of the authoritative French version of the Trial Judgement uses the term "*incité*", which is also the term employed in the French version of Article 6 (1) of the Statute. The Appeals Chamber has already noted that "[t]here is a glaring disparity between the English text and the French text" of Article 6 (1) of the Statute and held that, for the purposes of Article 6 (1) of the Statute, "instigated" (in the English version) and "*incite*" (in the French version) are synonymous (*Akayesu* Appeal Judgement, para. 478).
[195] Trial Judgement, para. 308.
[196] Trial Judgement, paras. 311, 312.
[197] Although the Gacumbitsi Notice of Appeal (para. 40) is vague in setting forth the errors alleged, the Prosecution does not object to it, and the Appeals Chamber will therefore consider the errors as elucidated in the Appeal Brief.
[198] Gacumbitsi Appeal Brief, paras. 313, 314.
[199] Gacumbitsi Appeal Brief, para. 314 (no reference provided).
[200] Trial Judgement, paras. 297-301.
[201] *Semanza* Appeal Judgement, para. 269. See also *Kunarac et al*. Appeal Judgement, para. 98; *Krstić* Appeal Judgement, para. 225; *Blaškić* Appeal Judgement, para. 120.
[202] *Krstić* Appeal Judgement, para. 225.

85. The Appellant further submits that the Trial Chamber erred in fact in finding that he had the requisite intent for the crime of extermination.[203] He avers that the Prosecution has not shown that he took any action to plan the extermination of Tutsis.[204] In particular, he contends that the meetings of 8 and 9 April 1994 only dealt with security issues and that Witness TBH (who testified as to the meeting of 9 April 1994) was manipulated by the Prosecution.[205] The Appellant also argues that he refuted the existence of the weapons allegedly distributed.[206] He alleges that he could not have planned the extermination of Tutsis at the same time as he was arresting the people harming the Tutsis and their property,[207] and that if he had planned to exterminate the Tutsis "he would not have waited for seven days" to do so when he had the capacity to do so earlier.[208]

86. The Appeals Chamber holds that the Trial Chamber applied the correct *mens rea* requirement for the crime of extermination. In accordance with the case-law of the Tribunal,[209] the Trial Chamber explained that for crimes against humanity

> "the accused must have acted with knowledge of the broader context of the attack, and with knowledge that his act formed part of the widespread and systematic attack against the civilian population."[210]

While the Trial Chamber did not expressly outline the *mens rea* requirement specific to the crime of extermination, it implicitly applied the correct requirement by finding that the actions of the Appellant revealed his "intention to participate in a large scale massacre in Nyarubuye."[211] As the Appeals Chamber recently explained:

> the crime of extermination requires proof that the accused participated in a widespread or systematic killing or in subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death, *and that the accused intended by his acts or omissions this result*.[212]

87. Moreover, the Appellant's argument is premised on a misinterpretation of the facts. The Trial Chamber did find that the Appellant took steps to plan the genocide and extermination of Tutsis in Rusumo *Commune*,[213] a conclusion that was reasonable, as discussed earlier.[214]

88. The actions of the Appellant in planning the extermination of Tutsis from 8 through 15 April 1994, as well as his subsequent actions from 15 through 17 April 1994, show that the Appellant had the intent to massacre a large number of individuals, and that he knew that his acts furthered a widespread and systematic attack against the Tutsis. Therefore, the Appeals Chamber finds that the Trial Chamber did not err in assessing the Appellant's *mens rea*.[215]

2. Victims Named in the Indictment

89. The Appellant argues that the Trial Chamber should not have convicted him for extermination because the Prosecution had failed to prove that the individuals specifically mentioned in paragraph 28 of the

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[203] Gacumbitsi Appeal Brief, para. 315.
[204] Gacumbitsi Appeal Brief, para. 317, referring to the arguments made under Ground 2 (Genocide).
[205] Gacumbitsi Appeal Brief, paras. 318, 319, referring only to Exhibit 7 tendered at trial.
[206] Gacumbitsi Appeal Brief, para. 320 (no reference provided).
[207] Gacumbitsi Appeal Brief, para. 324, referring to the testimonies of Defence Witnesses UH3 (T. 6 October 2003 p. 23), ZEZ (T. 6 October 2003 p. 52), and MQ1 (T. 21 October 2003 pp. 68, 69).
[208] Gacumbitsi Appeal Brief, para. 323.
[209] See *Akayesu* Appeal Judgement, para. 467; *Ntakirutimana* Trial Judgement, para. 803; *Semanza* Trial Judgement, para. 332; *Cyangugu* Trial Judgement, para. 698. See also, e.g., *Kordić and Čerkez* Appeal Judgement, para. 99.
[210] Trial Judgement, para. 302.
[211] Trial Judgement, para. 311 ("[…] the Chamber does not doubt the Accused's intention to participate in a large scale massacre in Nyarubuye.").
[212] *Ntakirutimana* Appeal Judgement, para. 522 (emphasis added). See also *Stakić* Appeal Judgement, paras. 259, 260.
[213] See Trial Judgement, paras. 278, 311, 314.
[214] See *supra* section II.B.
[215] See Trial Judgement, paras. 311, 312.

Indictment were killed at Nyarubuye Parish.[216] The Appeals Chamber disagrees; such a showing was not required for an extermination conviction. Paragraph 28 of the Indictment reads:

> As direct consequences of orders or instructions from Sylvestre Gacumbitsi at Nyarabuye *paroisse,* there were numerous killings of family members and entire families, including Uwiragiye, Mugiraneza and Tuyiringire, three children. The identity of each victim and the proximate number of fatalities and the exact circumstances of each death cannot be detailed exhaustively due to the overwhelming devastation of the massacres.

Although this paragraph lists certain specific victims, this is only by way of example. The Appellant was not convicted of personally "committing" extermination. The material fact for his conviction for planning, instigating, ordering, and aiding and abetting that crime was the fact that many refugees were killed as a consequence of the Appellant's orders or instructions. And, indeed, the Trial Chamber found "that many Tutsi who found refuge at Nyarubuye Parish were killed there between 15 and 17 April 1994."[217] The Appellant has not shown that this finding was unreasonable.

90. Next, the Appellant claims that the Trial Chamber should not have relied on the killing of Mr. Murefu and two others for the conviction as those individuals were not mentioned in the Indictment. The Appeals Chamber has considered this argument above in the context of the genocide charge.[218] In any event, however, any pleading failure with respect to the killing of Mr. Murefu would not affect the conviction for extermination. Because, as noted, the Appellant was not convicted for "committing" extermination, his conviction does not depend on the individual killing of Mr. Murefu or any other specific person. Accordingly, this sub-ground of appeal is dismissed.

3. Factual Basis for the Conviction

91. The Appellant contends that the Trial Chamber erred in fact and in law in relying on the evidence of several Prosecution witnesses (TAQ, TAX, TAO, Fergal Keane, and Alison Des Forges) and in discrediting that of several Defence witnesses (UHT, NG2, ZHZ, ZIZ).[219]

92. First, the Appellant submits that Witness TAQ was not credible.[220] He reiterates some of the arguments already raised under Ground 2 of his appeal,[221] and adds that Witness TAQ contradicted herself as to whether she heard the Appellant ask Hutus to separate themselves from the Tutsis refugees[222] and that Witness TAX heard no such request.[223] The Appeals Chamber finds that the supposed contradictions are in fact simply references to different events taking place on different dates. Witness TAQ testified that, after Mr. Murefu was killed on 15 April 1994, she ran to hide nearby and, once there, heard the Appellant ask the Hutus to separate themselves from the other refugees.[224] The other excerpt of her testimony cited by the Appellant concerns the witness's flight from Nyarutunga on 14 April 1994.[225] Likewise, discrepancies between what Witnesses TAQ and TAX heard are of no importance; the two were not similarly situated at the relevant time (Witness TAQ was outside,[226] while Witness TAX was in the convent[227]). Finally, the Appellant's further assertion that Witness TAQ held a grudge against him is unexplained and unsupported, and merits no further discussion.[228]

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[216] Gacumbitsi Appeal Brief, para. 321. See also *ibid*., paras. 213-220. At the Appeal Hearing, the Appellant made a similar argument with respect to paragraph 12 of the Indictment (relating to Counts 1 and 2). See T. 8 February 2006 pp. 27-31. However, since the Trial Chamber found that the allegations contained in paragraph 12 of the Indictment had not been proved, it is not necessary to examine this question. See Trial Judgement, para. 40.
[217] Trial Judgement, para. 174.
[218] See section II.B.
[219] Gacumbitsi Appeal Brief, paras. 262-265, 298-308.
[220] Gacumbitsi Appeal Brief, paras. 266-276.
[221] See Gacumbitsi Appeal Brief, para. 273 (See *supra* section II.B.3(d)).
[222] Gacumbitsi Appeal Brief, paras. 269, 270.
[223] Gacumbitsi Appeal Brief, para. 274.
[224] T. 29 July 2003 p. 53.
[225] T. 30 July 2003 pp. 11, 12.
[226] T. 29 July 2003 p. 53.
[227] T. 31 July 2003 p. 32.
[228] Gacumbitsi Appeal Brief, para. 272 (no reference to the record provided).

93. The Appellant next contends that Witness TAO's testimony concerning what the Appellant stated when he arrived at Nyarubuye Parish on 15 April 1994 contradicts an alleged prior statement.[229] The Appeals Chamber finds that it was reasonable for the Trial Chamber to accept Witness TAO's testimony despite some inconsistencies with his prior statement, of which the Trial Chamber was aware.[230] As noted above, the Trial Chamber has wide discretion to determine whether discrepancies discredit a witness's testimony.[231] In this case, Witness TAO was asked about the inconsistencies in his statements, and responded that his answers to the questions of the investigators had been transcribed by many persons and that now that he was before the Trial Chamber, he could answer questions directly.[232] Likewise, the Appeals Chamber sees no significance in the Appellant's further argument that while Witness TAO said that he saw the Appellant with a person named Rubaguka, Witness TAQ saw only Rubaguka.[233] The Trial Chamber reasonably concluded that this alleged "discrepancy may be explained by the fact that the two witnesses witnessed the event at different times from different locations."[234]

94. As to Witness TAX, the Appellant submits that she was eleven years old at the time of the events in 1994 and that she lied about the number of days she hid among the corpses before being saved by the RPF.[235] The Appeals Chamber finds that it was reasonable for the Trial Chamber to accept Witness TAX's testimony despite her young age at the time of the events. There is no rule requiring a Trial Chamber to reject *per se* the testimony of a witness who was a child at the time of the events in question, and the Appellant did not demonstrate that Witness TAX was not reliable or credible. Further, uncertainty as to the number of days Witness TAX hid among the corpses before being saved by the RPF does not affect the relevant aspects of her testimony.

95. With respect to both Fergal Keane and Alison Des Forges, the Appellant argues that their estimates of the number of people killed at Nyarubuye Parish were inflated because the RPF had brought more corpses to Nyarubuye Parish before the documentary was filmed.[236] But even if this were true (which the Appeals Chamber need not decide), this would not cast doubt on the occurrence of the attacks to which both Prosecution and Defence witnesses testified. Nor does the Appellant demonstrate that the difference in the estimates would have affected the Judgement in any other way.

96. The Appellant next contends that the Trial Chamber exhibited bias in finding Defence Witness UHT not credible on the basis of vagueness and contradictions while excusing similar variations in the accounts of the Prosecution witnesses.[237] The Appeals Chamber disagrees. The Trial Chamber's conclusion that Witness UHT was not credible was reasonable,[238] as was its assessment of the credibility of the Prosecution witnesses. The Appellant has not shown that the Trial Chamber applied differing standards in the assessment of the evidence.

97. The Appellant also submits that the Trial Chamber erred in rejecting the testimony of Defence Witnesses NG2, ZHZ, and ZIZ that the Appellant was not at Nyarubuye on 15 April 1994, especially since

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[229] Gacumbitsi Appeal Brief, paras. 279-281. According to the Appellant, Witness TAO recognized that, in a prior statement, he said that the Appellant tried to reassure the refugees before the police opened fire (the Appellant refers to T. 31 July 2003 pp. 14, 15), whereas at trial Witness TAO said that the Appellant told the refugees to not advance further because the Tutsi's hour had come (the Appellant refers to T. 30 July 2003 p. 54).
[230] Trial Judgement, paras. 123, 145.
[231] See *supra* section II.B.3. See also, e.g., *Rutaganda* Appeal Judgement, paras. 442, 443.
[232] See T. 31 July 2003 p. 14.
[233] Gacumbitsi Appeal Brief, para. 285 (no reference to the record provided).
[234] Trial Judgement, para. 159.
[235] Gacumbitsi Appeal Brief, paras. 288, 289. The Appellant also asserts that Fergal Keane used her to make publicity for a documentary, but does not explain why this would impugn her credibility.
[236] Gacumbitsi Appeal Brief, paras. 291-297. The Appellant further asserts that Fergal Keane was an agent for the RPF; this claim is unsubstantiated and does not suffice to impugn his testimony.
[237] Gacumbitsi Appeal Brief, paras. 308 (referring to Trial Judgement, para. 160), 309, 310.
[238] See Trial Judgement, para. 160. The Trial Chamber found Witness UHT "not very credible" because: 1) while he "testified that during the six hours he spent with the attackers at the parish on 16 April 1994, amongst corpses and survivors, he did not take part in finishing off the wounded […] he could not testify as to what he did, apart from staying with his brother-in-law, being shocked and frightened"; and 2) Witness UHT was unclear as to the second vehicle that he saw at the parish. *Ibid*.

the Trial Chamber had not disputed the credibility of these witnesses.[239] But as the Trial Chamber stated, it was "quite aware" of these witnesses' testimonies.[240] It simply found that, in light of the "consistent and specific" evidence placing the Appellant at Nyarubuye Parish on 15 April 1994, the Defence evidence did not raise a reasonable doubt as to his participation in the massacre.[241] The Appellant has not shown that this was unreasonable.

98. For the foregoing reasons, this sub-ground of appeal is dismissed and the appeal under this ground is dismissed in its entirety.

D. CRIMES AGAINST HUMANITY: RAPE (GROUND OF APPEAL 4)

99. The Trial Chamber found that, on 17 April 1994, the Appellant publicly instigated the rape of Tutsi girls, declaring that sticks should be inserted into their genitals if they resisted.[242] It then found that the rapes of Witness TAQ and seven other Tutsi women were a direct consequence of the Appellant's instigation, and convicted the Appellant for those rapes.[243] The Appellant challenges his conviction for rape as a crime against humanity.[244]

1. Were the Rapes Part of a Widespread or Systematic Attack?

100. The Appellant submits that the Trial Chamber erred in law in convicting him of rape as a crime against humanity because the rapes in question were not committed in the course of a widespread and systematic attack. He submits that "systematic attack within the meaning of Article 3 (g) of the Statute implies a deliberate act or plan" and that this element was not established here because the Prosecution did not prove the existence of preparatory meetings.[245]

101. The Trial Chamber stated:

> The attack must be widespread or systematic. The concept of "widespread" attack refers to the scale of the attack and multiplicity of victims. The attack must be "massive or large scale, involving many victims". The concept of "systematic" attack, within the meaning of Article 3 of the Statute, refers to a deliberate pattern of conduct, but does not necessarily include the idea of a plan. The existence of a policy or plan may be evidentially relevant, in that it may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic. However, the existence of such a policy or plan is not a separate legal element of the crime.[246]

This elucidation of the "widespread or systematic" requirement is in accordance with the case law of this Tribunal and that of the ICTY, and the Appeals Chamber sees no error in it.[247]

102. The Appellant also argues that Article 3 (g) of the Statute is directed at crimes of a collective nature, whereas the evidence in this case established, at most, individual or isolated acts.[248] At the outset, it bears noting that it is not rape *per se* that must be shown to be widespread or systematic, but rather the attack

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[239] Gacumbitsi Appeal Brief, paras. 298-306. The Appeals Chamber notes that the witnesses did not testify as to the events of 16 and 17 April 1994.
[240] See Trial Judgement, para. 153; See also *ibid*., paras. 127, 130, 131.
[241] See Trial Judgement, para. 153.
[242] Trial Judgement, para. 224.
[243] Trial Judgement, paras. 224, 327, 328, 330. The Trial Chamber also found that the rapes recounted by Prosecution Witnesses TAO, TAS, and TAP had been established, but it acquitted the Appellant of them because it was not convinced that they were sufficiently connected to the Appellant's instigation. Trial Judgement, paras. 226, 227, 329. In particular, it found that, although Witness TAS testified that an attacker told her that he was acting in accordance with the Appellant's instructions, that hearsay evidence was not sufficiently reliable. See Trial Judgement, paras. 227, 327, 329.
[244] Gacumbitsi Notice of Appeal, paras. 41-46.
[245] Gacumbitsi Appeal Brief, para. 363; See also Gacumbitsi Reply, para. 85.
[246] Trial Judgement, para. 299 (internal citations omitted).
[247] ICTR: *Akayesu* Trial Judgement, paras. 579, 580; *Ntakirutimana* Trial Judgement, para. 804; *Semanza* Trial Judgement, paras. 328, 329; *Niyitegeka* Trial Judgement, para. 439. ICTY: *Kunarac et al*. Appeal Judgement, paras. 93-96; *Blaškić* Appeal Judgement, paras. 100, 101; *Kordić and Čerkez* Appeal Judgement, paras. 93, 94.
[248] Gacumbitsi Appeal Brief, paras. 368-372.

itself (of which the rapes formed part).[249] In the case at hand, the Trial Chamber reasonably concluded that there was a widespread and systematic attack against Tutsis in Rusumo *Commune*.[250] Its further conclusion that the rapes formed part of this attack[251] was also reasonable in light of the finding that

> "the victims of rape were chosen because of their Tutsi ethnic origin, or because of their relationship with a person of the Tutsi ethnic group".[252]

103. The Appellant specifically contends that the rape of Witness TAQ was isolated because she had known her attacker previously.[253] But this fact does not mean that her rape was isolated from the widespread and systematic attack. Indeed, the genocide and extermination campaign in Rwanda was characterized in significant part by neighbours killing and raping neighbours.[254] Moreover, as the ICTY Appeals Chamber has recognized, even in the event that

> "personal motivations can be identified in the defendant's carrying out of an act, it does not necessarily follow that the required nexus with the attack on a civilian population must also inevitably be lacking."[255]

Whether or not the perpetrator and victim are acquainted, the question is simply whether the totality of the evidence proves a nexus between the act and the widespread or systematic attack. The Appellant has not shown that the Trial Chamber erred in holding that this requirement was satisfied here.

104. Accordingly, this sub-ground of appeal is rejected.

2. Assessment of the Evidence

105. The Appellant submits that the Prosecution witnesses who testified as to rapes were not credible.[256] As the Trial Chamber acquitted the Appellant in relation to the rapes recounted by Witnesses TAO, TAS, and TAP, it is not necessary to discuss the contentions of the Appellant with respect to these witnesses. As to Witness TAQ, the Appellant refers to his arguments under his third ground of appeal, which have already been dismissed.[257] He adds that the witness did not see him on 17 April 1994, but only heard his voice through a megaphone, which causes vocal distortion; moreover, this difficulty was compounded by the fact that there were three persons talking at the same time.[258] Finally, he reiterates that Witness TAQ knew her assailant, which, he suggests, means that her rape was not triggered by the Appellant's instigation.[259] In his Reply, the Appellant adds that the Trial Chamber erred in finding a causal link between his statements and the rapes, and that no reasonable trier of fact would have relied only on Witness TAQ's testimony to prove such a link with respect to the rape of seven other women.[260]

106. With respect to the Appellant's argument concerning vocal distortion, the Trial Chamber concluded that "the witness knew the Accused sufficiently well, because of their relationship, to be able to recognize his voice over the megaphone without seeing him."[261] The Appellant has not shown that this conclusion was unreasonable, nor has he shown that the fact that there were other individuals also speaking made it unreasonable to rely on Witness TAQ's testimony. Moreover, there is no cogent reason why the Trial

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[249] *Kunarac et al*. Appeal Judgement, para. 96; *Blaškić* Appeal Judgement, para. 101; *Kordić and Čerkez* Appeal Judgement, para. 94.
[250] Trial Judgement, paras. 303, 305, 306, 322, 323.
[251] Trial Judgement, para. 225.
[252] Trial Judgement, para. 324.
[253] Gacumbitsi Appeal Brief, para. 372.
[254] For instance, paragraph 4 of the Indictment in this case described the events in Rusumo Commune as follows: "The campaign consisted in public incitement of Hutu civilians to separate themselves from their Tutsi neighbours and to kill them". See also Trial Judgement, para. 107. The Appellant has not challenged this basic account of the genocide, although he disputes his role in it.
[255] *Tadić* Appeal Judgement, para. 252.
[256] Gacumbitsi Appeal Brief, paras. 329, 330-339 (Witness TAP), 340-344 (Witness TAQ), 345-350 (Witness TAS), 351-359 (Witness TAO).
[257] Gacumbitsi Appeal Brief, para. 328. See *supra* section II.C.
[258] Gacumbitsi Appeal Brief, paras. 342, 343.
[259] Gacumbitsi Appeal Brief, para. 344, referring to T. 30 July 2003 p. 35.
[260] Gacumbitsi Reply, paras. 89, 90, 93.
[261] Trial Judgement, para. 213 (internal citation omitted).

Chamber should only have accepted Witness TAQ's account of her own rape and not that of the rapes she witnessed. As noted above, the Trial Chamber reasonably concluded that Witness TAQ was credible.

107. As noted above, the acquaintance between Witness TAQ and her assailant does not mean that her rape cannot constitute a crime against humanity. Likewise, it does not demonstrate that the Appellant could not have instigated the attack. The critical question is whether the Appellant's words substantially contributed to the commission of the rape. As to that question, the Trial Chamber found:

> on 16 April 1994, around 9 a.m., the Accused, who was driving around in Rubare *cellule*, Nyarubuye *secteur*, using a megaphone, asked that Hutu young men whom […] girls had refused to marry should be looked for so that they should have sex with the young girls, adding that "in the event [that] they [the young girls] resisted, they had to be killed in an atrocious manner". Placed in context, and considering the attendant audience, such an utterance from the Accused constituted an incitement, directed at this group of attackers on which the *bourgmestre* had influence, to rape Tutsi women. That is why, immediately after the utterance, a group of attackers attacked Witness TAQ and seven other Tutsi women and girls with whom she was hiding, and raped them.[262]

Given these factual findings, which have not been shown to be unreasonable, it was reasonable for the Trial Chamber to conclude that the Appellant's words substantially contributed to the rapes of Witness TAQ, as well as that of the seven other Tutsis.[263]

108. Accordingly, this ground of appeal is dismissed in its entirety.

E. SENTENCING (GROUND OF APPEAL 5)

109. The Appellant submits that his sentence should be reduced to fifteen years, in the event that the Appeals Chamber does not quash his convictions.[264] Pointing to the Trial Chamber's reliance on his position as *bourgmestre* as an aggravating factor, he claims that he was convicted only because of that position, and that his responsibility for the crimes was never proven.[265] As to mitigating circumstances, the Appellant contends that, on 11 and 12 April 1994, he used his authority as *bourgmestre* to have the perpetrators arrested and incarcerated.[266] The Appellant also asserts that he helped some persons to escape the massacres,[267] and that he was himself a victim as he had been threatened and had to go into hiding on 13 April 1994.[268] Finally, he contends that the sentence should be reduced in light of his advanced age and the normal life expectancy in Africa.[269]

110. The Prosecution responds that the Appellant did not demonstrate how the Trial Chamber failed to follow the applicable law or abused its discretion in imposing a sentence.[270] In reply, the Appellant states that "[i]t is dumbfounding to think that when the Accused requests a reduction in his sentence, he is formulating a ground of appeal" and that "the heading 'Sentence' is not at all a ground of appeal. The proof is that the Defence has nowhere made mention of any error."[271] Rather, the Appellant requests that the Appeals Chamber, "[c]onforming to the humanist idea of countries like France where the famous prisoner Maurice PAPON, was admitted to spend his last days in his home because of his advanced age," reduce his sentence to fifteen years.[272]

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[262] Trial Judgement, para. 215 (internal citation omitted).
[263] See Trial Judgement, para. 328.
[264] Gacumbitsi Notice of Appeal, paras. 52-57, 60; Gacumbitsi Appeal Brief, para. 390.
[265] Gacumbitsi Appeal Brief, paras. 378-382, 385.
[266] Gacumbitsi Appeal Brief, paras. 382, 384.
[267] Gacumbitsi Appeal Brief, para. 386.
[268] Gacumbitsi Appeal Brief, para. 387.
[269] Gacumbitsi Appeal Brief, para. 389. See also Gacumbitsi Notice of Appeal, paras. 54-56.
[270] Prosecution Response, paras. 210-224.
[271] Gacumbitsi Reply, paras. 148, 152.
[272] Gacumbitsi Reply, para. 153.

111. Given that, as the Appellant expressly concedes in his Reply Brief, he has not raised any error of the Trial Chamber in relation to the sentence imposed,[273] the Appeals Chamber rejects the request to reduce the sentence. It is well established that the Appeals Chamber will not substitute its own sentence for that imposed by the Trial Chamber absent a showing that the Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow applicable law.[274]

III. The appeal of the prosecution

A. Murder as a Crime against Humanity (Ground of Appeal 2)

112. The Prosecution challenges the Appellant's acquittal for murder as a crime against humanity, with which he was charged pursuant to Articles 3 (a), 6 (1), and 6 (3) of the Statute.[275] The Trial Chamber found that, on 13 April 1994, the Appellant expelled two of his Tutsi tenants, Marie and Béatrice, from their home, and that they were killed later that night.[276] However, the Trial Chamber considered these findings insufficient to establish the Appellant's responsibility for these killings.[277] The Prosecution contends, first, that the Trial Chamber erred in law and in fact by failing to conclude that the Appellant ordered these killings; and, second, that it erred in law by failing to consider the alternative theory that the Appellant aided and abetted the killings.[278]

1. Alleged Errors in Not Finding that the Appellant Ordered the Murder of Marie and Béatrice

113. At trial, Prosecution Witness TAS testified that, during the evening of 13 April 1994, she had heard a policeman named Kazoba tell someone that by noon the next day there would no longer be any Tutsi alive because the Appellant had ordered that all Tutsis be killed, starting with Marie and Béatrice.[279] She had seen Kazoba in the Appellant's company earlier that day.[280] The Trial Chamber found that this evidence was uncorroborated hearsay and declined to rely on it to establish that the Appellant had, indeed, ordered the murders.

114. On appeal, the Prosecution argues that the Trial Chamber erred in failing to take into account evidence establishing the wider genocidal campaign to which the Appellant contributed in a number of ways: meeting with and instructing *conseillers*, arranging for weapons distribution, and inciting violence through his public speeches.[281] The Prosecution maintains that this circumstantial evidence, as well as the evidence that the Appellant expelled his tenants notwithstanding the grave danger they faced, corroborates Witness TAS's hearsay testimony.[282] It contends that, in light of this combination of evidence, any reasonable Trial Chamber would have entered a conviction, and adds that the Trial Chamber failed to specify a standard by which the sufficiency of corroborative evidence was to be assessed.[283] The Prosecution characterizes the alleged error as legal as well as factual, claiming that the Trial Chamber misunderstood the requirements for corroboration.[284]

115. It is well established that, as a matter of law, it is permissible to base a conviction on circumstantial evidence and/or hearsay evidence.[285] The Appeals Chamber recalls that, even if the law does not require evidence to be corroborated, a Trial Chamber, as the trier of fact, can decide that under particular

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[273] Even absent the admission in the reply, the result would be the same: the Gacumbitsi Appeal Brief does not attempt to show that the Trial Chamber committed any error that would require intervention of the Appeals Chamber.
[274] See *Kajelijeli* Appeal Judgement, para. 291; *Semanza* Appeal Judgement, para. 392.
[275] Indictment, Count 4.
[276] Trial Judgement, paras. 195, 196.
[277] Trial Judgement, paras. 196, 319.
[278] Prosecution Appeal Brief, paras. 59-116.
[279] See Trial Judgement, para. 180.
[280] See Trial Judgement, para. 67.
[281] Prosecution Appeal Brief, paras. 77-83.
[282] Prosecution Appeal Brief, para. 94.
[283] Prosecution Appeal Brief, paras. 93, 94.
[284] See Prosecution Appeal Brief, paras. 75, 104.
[285] *Kamuhanda* Appeal Judgement, para. 241; *Kupreškić et al.* Appeal Judgement, para. 303.

circumstances corroboration is necessary.[286] Accordingly, the Trial Chamber made a factual finding specific to the evidence in this case:

> "the hearsay evidence of Witness TAS is insufficient, failing corroboration, to establish that the Accused ordered the murder of Marie and Béatrice."[287]

Moreover, the Trial Chamber evidently did not ignore the evidence alleged by the Prosecution as corroborative of Witness TAS's hearsay evidence; it relied on this evidence to convict the Appellant of genocide and extermination.[288] Although the Trial Chamber did not specifically discuss this evidence in the context of the murder count, it was not obligated to set forth every step of its reasoning or to cite every piece of evidence that it considered.[289]

116. Moreover, it was reasonable for the Trial Chamber to conclude – taking into account the hearsay testimony of Witness TAS as well as the circumstantial evidence – that it was not established beyond reasonable doubt that the Appellant *ordered* the murders of Marie and Béatrice. The Appellant's involvement in various aspects of the genocidal campaign might reasonably be taken as support for the credibility of the hearsay testimony that he ordered these particular murders, as might the fact that he expelled Marie and Béatrice with little regard for the obvious danger to their lives. But none of this evidence provides such unambiguous proof that he issued such an order that a reasonable Trial Chamber would have *had* to convict him on that basis.

117. This sub-ground of appeal is dismissed.

2. Alleged Failure to Consider Other Modes of Liability

118. As an alternative to its ordering theory, the Prosecution argues that the Appellant should have been convicted for aiding and abetting the murders of Marie and Béatrice.[290] It maintains that the Trial Chamber's findings that the Appellant expelled his tenants in full knowledge of the risk that they would be killed, and that they were then in fact killed, are sufficient to establish that he aided and abetted the murders.[291] The Prosecution also claims that the Appellant should have been held responsible under this count pursuant to a joint criminal enterprise theory, an argument considered below in Section III.D.[292]

119. The Trial Chamber did not expressly discuss the possibility that the Appellant was liable for the murders of Marie and Béatrice as an aider and abetter. The Appellant suggests, however, that this is because the Prosecution had failed to plead or argue this mode of liability.[293]

120. The preamble to Count 4 of the Indictment (Murder) states that the Appellant is charged under Article 6 (1) of the Statute "by virtue of his affirmative acts in planning, instigating, ordering, committing, or otherwise aiding and abetting the planning, preparation or execution of the crime charged".[294] Subsequent paragraphs under that count detail the specific allegations. Paragraph 36 of the Indictment is relevant to the killing of Marie and Béatrice; it reads as follows:

> On a date uncertain during April - June 1994, Sylvestre Gacumbitsi personally ordered the tenants in one of his homes to vacate the premises. After announcing that his home was not CND, a reference to the cantonment of RPF soldiers in Kigali, Sylvestre Gacumbitsi ordered the killing of his former tenants.

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[286] *Bagilishema* Appeal Judgement, para. 79.
[287] Trial Judgement, para. 196.
[288] See, e.g., Trial Judgement, para. 237 (the Appellant's misuse of influence); 92-99 (meetings and public incitement); 194-196 (eviction of tenants and their death).
[289] See, e.g., *Kajelijeli* Appeal Judgement, para. 59.
[290] Prosecution Appeal Brief, paras. 59, 95.
[291] Prosecution Appeal Brief, para. 102, referring to Trial Judgement, paras. 194, 197.
[292] Prosecution Appeal Brief, para. 103.
[293] See Gacumbitsi Response, para. 137.
[294] Indictment, Count 4.

121. The Prosecution contends that the Appellant would suffer no prejudice if the Appeals Chamber were to consider liability for aiding and abetting, as this mode of liability and all relevant material facts were pleaded in the Indictment, all the witnesses who testified to those facts were cross-examined by the Defence, and the Defence would not have altered its cross-examination or called any additional evidence.[295] The Prosecution further argues that the Trial and Appeals Chambers have a duty to consider all of the implications of the evidence presented, and to render judgment based on all theories of culpability disclosed in the pleadings and on the evidence.[296]

122. The question for the Appeals Chamber is whether the allegations in the Indictment were sufficient to give the Appellant clear and timely notice that he was being charged with the killings of Marie and Béatrice for aiding and abetting. As recently noted by the Appeals Chamber:

> it has long been the practice of the Prosecution to merely quote the provisions of Article 6 (1) of the Statute in the charges, leaving it to the Trial Chamber to determine the appropriate form of participation under Article 6 (1) of the Statute. The Appeals Chamber reiterates that, to avoid any possible ambiguity, it would be advisable to indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged. Nevertheless, even if an individual count of the indictment does not indicate precisely the form of responsibility pleaded, an accused might have received clear and timely notice of the form of responsibility pleaded, for instance in other paragraphs of the indictment.[297]

123. In considering whether the Appellant received clear and timely notice, the Indictment must therefore be considered as a whole. In this case, the Appeals Chamber finds, by majority, Judge Güney and Judge Meron dissenting, that the reference to aiding and abetting in the preamble to Count 4, taken in combination with the allegations of material facts sufficient to support a conviction under that mode of liability, was sufficient to put the Appellant on notice that he was charged with aiding and abetting the murders of Marie and Béatrice. Specifically, paragraph 36 of the Indictment states that the Appellant ordered his tenants to leave their home and made an announcement that, in the context of the ongoing genocide, made clear that he was doing so because he did not want the home to serve as a refuge for Tutsi. Other paragraphs of the Indictment detail the context of the genocidal campaign, which ensured that in expelling the tenants under these circumstances, the Appellant was exposing them to a high probability of death.[298] Taken together – and independently of the allegation at the end of paragraph 36 that the Appellant subsequently ordered the tenants' murder, which pleads the alternative "ordering" theory – these paragraphs allege the necessary material facts in support of a conclusion that the Appellant aided and abetted their murder.

124. Thus, the Trial Chamber erred in failing to consider whether the Appellant aided and abetted the murder of Marie and Béatrice. Although the Trial Chamber therefore entered no conviction for aiding and abetting murder, it did enter findings of fact sufficient to support such a conviction. It detailed the expulsion of the tenants, the statements of the Accused, the context of the genocidal campaign and the Appellant's involvement therein, and the killing of the tenants, and concluded that

> "the Accused expelled his tenants, Tutsi women, knowing that by so doing he was exposing them to the risk of being targeted by Hutu attackers on grounds of their ethnic origin."[299]

On the basis of these findings of fact, the Appeals Chamber will enter a new conviction for aiding and abetting murder.

125. For the foregoing reasons, this sub-ground of appeal is upheld.

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[295] Prosecution Appeal Brief, para. 97.
[296] Prosecution Appeal Brief, para. 99, referring to *Krnojelac* Appeal Judgement, para. 172 (citing *Rutaganda* Appeal Judgement, para. 580).
[297] *Semanza* Appeal Judgement, para. 259, referring to *Ntakirutimana* Appeal Judgement, para. 473; *Aleksovski* Appeal Judgement, n. 319.
[298] Indictment, paras. 3-25.
[299] See Trial Judgement, paras. 194-197. Paragraph 197 makes reference to findings elsewhere in the Judgement detailing the context of the genocide and the Appellant's involvement. These findings have been discussed elsewhere in the Judgement of the Appeals Chamber and need not be further detailed.

B. RESPONSIBILITY FOR RAPES COMMITTED IN RUSUMO *COMMUNE* (GROUND OF APPEAL 3)

126. Although the Appellant was convicted of eight rapes under Count 5 of the Indictment, the Trial Chamber acquitted him of certain other rapes that had been recounted by Prosecution Witnesses TAO, TAS, and TAP. The Trial Chamber found that these rapes had taken place, but that the Prosecution had not proven that the Appellant had instigated them.[300] On appeal, the Prosecution argues that the Trial Chamber should have convicted the Appellant for these rapes, either for instigation or under other modes of Article 6 (1) or Article 6 (3) liability.[301]

1. Instigation

(a) Legal Requirements for Instigation

127. The Prosecution argues that the Trial Chamber erred in law by requiring it to establish that the Appellant's instigation was a condition *sine qua non* of the commission of the rapes.[302] Instead, it contends that to establish culpability for instigation, it suffices to show that the accused's instigation "substantially contributed" to the commission of the crime – that is, that he "set in motion a chain of events that were the foreseeable consequence of his instigation of the crime."[303] The Prosecution concludes that the totality of the evidence in this case establishes beyond reasonable doubt that this standard was satisfied.[304]

128. The Trial Chamber held that conviction for instigation requires proof "of a causal connection between the instigation and the *actus reus* of the crime."[305] It found "no evidence of a link" between the Appellant's words and the rapes recounted by Witnesses TAS, TAO, and TAP.[306]

129. As the *Kordić and Čerkez* Appeal Judgement established, "it is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused"; rather,

> "it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime."[307]

Thus, the Prosecution has correctly stated the causation requirement for instigation. However, there is no indication that the Trial Chamber misunderstood this requirement. Its reference to a "causal connection between the instigation and the *actus reus* of the crime"[308] does not specify what kind of causation must be proven, and without more it cannot be inferred that the Trial Chamber required that the instigation be the *sine qua non* of the rapes.

130. While the Trial Chamber did not use the phrase "substantially contributing", its language made clear that it found that this standard was not satisfied. Specifically, it found "no evidence establishing a link" – substantial or otherwise – between the Appellant's words and the rapes recounted by Witnesses TAS, TAO, and TAP.[309] Accordingly, the Trial Chamber did not err in law, and this sub-ground of appeal is dismissed.

(b) Evidence Supporting Instigation

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[300] Trial Judgement, paras. 226, 227, 329.
[301] Prosecution Appeal Brief, para. 117.
[302] Prosecution Appeal Brief, para. 120.
[303] Prosecution Appeal Brief, paras. 120-122, referring to *Kayishema and Ruzindana* Appeal Judgement, para. 198.
[304] Prosecution Appeal Brief, para. 121.
[305] Trial Judgement, para. 279.
[306] Trial Judgement, para. 329.
[307] *Kordić and Čerkez* Appeal Judgement, para. 27.
[308] Trial Judgement, para. 279.
[309] Trial Judgement, para. 329.

131. In the alternative, the Prosecution argues that the Trial Chamber erred by failing to draw the only reasonable conclusion supported by the totality of the evidence and by its own factual findings: that the Appellant was responsible for instigating all the rapes established.[310] For instance, the Prosecution notes, the Trial Chamber found that on or about 17 April 1994,[311] the Appellant drove around Nyarubuye *secteur* with a megaphone inciting Hutu men to rape Tutsis and to kill atrociously those who resisted. Such rapes were then carried out, including by inserting sticks in the victims' genitals, and some victims died.[312] The specific rapes recounted by Witnesses TAO, TAS, and TAP were perpetrated around mid-April 1994 in Rusumo *Commune*; some of them were perpetrated within Nyarubuye *secteur*, including by the Nyarubuye *conseiller*.[313] The Prosecution points to the findings concerning the Appellant's knowledge of the rapes, his authority as *bourgmestre*, and his role in the genocide, and cites the testimony of Witness TAS that those who raped her told her that the Appellant had ordered the rape and killing of Tutsi women and girls.[314]

(i) The Rape of Witness TAS

132. Witness TAS, a Hutu woman married to a Tutsi man, testified that, on an unspecified date, she was raped by two Hutu men, one of whom told her that the Appellant had authorized the rape of Tutsis but that no decision had yet been taken concerning Hutu women who were married to Tutsis.[315] The Trial Chamber concluded that the rape of Witness TAS had been established,[316] but found that her uncorroborated hearsay testimony concerning the Appellant's instructions was insufficient to prove that he had instigated the rape.[317]

133. There is no evidence that the rape of Witness TAS took place after the Appellant's statements instigating rapes on 17 April 1994, and no direct evidence that, prior to that date, the Appellant had instigated rape.[318] The only evidence to the latter effect was Witness TAS's account of her attacker's statement, which the Trial Chamber did not find reliable.[319] No error has been shown in this finding. Although the Trial Chamber is not precluded as a matter of law from relying on uncorroborated hearsay testimony to establish an element of a crime, it is not obligated to do so.[320] Accordingly, the Trial Chamber did not err in declining to find that the Appellant instigated the rape of Witness TAS.

(ii) The Rapes of Witness TAP and her Mother

134. Witness TAP testified that one day in April 1994, after the President died, she heard loud noises, gunfire, buildings collapsing, and explosions coming from Nyarubuye Parish.[321] She explained that the following day,[322] a group of thirty unidentified attackers sexually assaulted and killed her mother, and

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[310] Prosecution Appeal Brief, paras. 123-135.
[311] Although paragraph 215 of the Trial Judgement puts the instigation on 16 April 1994, the Trial Chamber relied on the testimony of Witness TAQ, who in fact testified that the Appellant made the relevant statements on 17 April 1994. See T. 29 July 2003 pp. 61, 62. Paragraph 227 of the Trial Judgement refers to the correct date, 17 April 1994.
[312] See Trial Judgement, para. 215; Prosecution Appeal Brief, para. 124.
[313] See Trial Judgement, paras. 205, 215, 226; Prosecution Appeal Brief, para. 124.
[314] Prosecution Appeal Brief, para. 124; but See Trial Judgement, para. 327 (finding this testimony inadequate to establish the Appellant's involvement).
[315] T. 5 August 2003 pp. 22, 23, 51, summarized in Trial Judgement, para. 209.
[316] Trial Judgement, para. 226.
[317] Trial Judgement, paras. 227, 327.
[318] Although paragraph 215 of the Trial Judgement puts the instigation on 16 April 1994, the Trial Chamber relied on the testimony of Witness TAQ, who in fact testified that the Appellant made the relevant statements on 17 April 1994. See T. 29 July 2003 pp. 61, 62. Paragraph 227 of the Trial Judgement refers to the correct date, 17 April 1994.
[319] Trial Judgement, para. 227.
[320] See, e.g., *Rutaganda* Appeal Judgement, para. 34 (noting that "[t]he Trial Chamber has the discretion to cautiously consider" hearsay evidence).
[321] T. 6 August 2003 pp. 7, 8.
[322] T. 6 August 2003 p. 8. See also Trial Judgement, para. 207 (internal citation omitted): "Le témoin précise que cette attaque s'est produite le lendemain du jour où, en avril 1994, après la mort du Président, elle avait entendu des bruits importants qui lui indiquaient que quelque chose de spécial se passait à la paroisse de Nyarubuye." The English translation of this paragraph is inaccurate: "The witness explained that the attack occurred the day after the President's death".

subsequently raped her.[323] The Trial Chamber accepted Witness TAP's account of the rapes,[324] but was not persuaded that there was a "sufficient nexus" between the Appellant's words on 17 April 1994 and those rapes to establish his responsibility for them.[325]

135. As with the rape of Witness TAS, there is no evidence that the rapes recounted by Witness TAP took place after 17 April 1994, the date of the Appellant's instigation. The Prosecution did not establish the date on which the rapes in question took place. Witness TAP situated the rapes temporally as the day after which she heard loud noises from Nyarubuye Parish. The Appeals Chamber notes that the principal attack at Nyarubuye Parish, a possible source of the sounds testified to by Witness TAP, took place on 15 April 1994.[326] This would mean that the rapes in question took place on 16 April 1994, one day before the Appellant's instigation of rapes.[327] As no other evidence shows that the Appellant's actions or words substantially contributed to the rapes of Witness TAP and her mother, the Trial Chamber did not err in finding that the Prosecution had not established beyond reasonable doubt that the Appellant instigated these rapes.

(iii) The Rapes Recounted by Witness TAO

136. Witness TAO, a Tutsi man, testified that at some point after the attack at Nyarubuye Parish on 15 April 1994 his wife was taken to the house of the *conseiller* of Nyarubuye Sector, Isaïe Karamage.[328] Witness TAO testified that his wife spent two or three days there, and that she told him afterward that the *conseiller* had raped her every night.[329] A few days later, Witness TAO witnessed the rape and killing of his wife by unknown attackers.[330]

137. The Trial Chamber noted that Witness TAO's testimony regarding the rapes of his wife by Mr. Karamage was hearsay,[331] but it nevertheless considered it reliable, "especially as other witnesses testified that there were similar incidents of rape at the same house, or at least, that women and girls gathered there".[332] The Trial Chamber also accepted that Witness TAO witnessed the rape and killing of his wife by unknown attackers.[333] However, the Trial Chamber found that the Prosecution had not proven a link between the Appellant's words on 17 April 1994 and the rapes recounted by Witness TAO,[334] and that the Appellant could not be convicted for them.[335]

138. Although at least some of the rapes in question appear to have been committed after the Appellant instigated rape, there is no evidence that the Appellant's instigation substantially contributed to them. The Prosecution did not establish that Mr. Karamage and the other attackers were aware of the Appellant's statements of 17 April 1994. The Prosecution's suggestion that

> "[i]t is only reasonable to conclude that, even if some perpetrators of the other rapes did not directly hear the [Appellant]'s instigation, they were told by others about it, or were inspired by the actions of others who had heard it"[336]

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[323] T. 6 August 2003 pp. 8-11. See also Trial Judgement, paras. 207, 208.
[324] Trial Judgement, paras. 219, 226.
[325] Trial Judgement, paras. 227, 329.
[326] Trial Judgement, paras. 152, 167, 174.
[327] See *supra* footnote 317.
[328] T. 30 July 2003 p. 58; T. 31 July 2003 pp. 20, 21.
[329] T. 30 July 2003 p. 58; T. 31 July 2003 p. 21.
[330] T. 30 July 2003 pp. 59, 60.
[331] Trial Judgement, para. 216.
[332] Trial Judgement, para. 217.
[333] Trial Judgement, para. 218.
[334] Trial Judgement, para. 227.
[335] Trial Judgement, para. 329.
[336] Prosecution Appeal Brief, para. 126.

is speculative and plainly does not establish that this was the *only* reasonable conclusion. Thus, the Prosecution has not shown an error in the Trial Chamber's conclusion that no nexus was proven between the instigation and the rapes.

2. Other Modes of Liability under Article 6 (1) of the Statute

139. The Prosecution also submits that the Trial Chamber erred in failing to convict the Appellant for planning, ordering, committing through a joint criminal enterprise, and aiding and abetting the rapes recounted by Witnesses TAO, TAS, and TAP.[337] It submits that the Appellant had the requisite *mens rea* for any of these modes of liability because he acted "with the full awareness of the substantial likelihood that indiscriminate rape of Tutsis would occur in Rusumo."[338] As to the *actus reus*, the Prosecution argues that the only reasonable conclusion is that the Appellant's public call for the indiscriminate rape of Tutsis, taken together with all the other proven facts, establishes that he aided and abetted the rapes in question.[339] The Prosecution makes no attempt to explain how the evidence establishes the *actus reus* of planning or ordering rape, and so the Appeals Chamber will not consider its assertion of error in this regard. Its submissions regarding joint criminal enterprise will be addressed in Section III.D below.

140. The Prosecution states that the causation standard for aiding and abetting "is that the acts have a substantial effect on the commission of the crime."[340] The Appeals Chamber agrees, but finds that the Prosecution has not established that this standard was satisfied. As discussed in the previous subsection, the evidence at trial was insufficient to prove beyond reasonable doubt that the Appellant's words on 17 April 1994 had any effect on the rapes in question. The Prosecution does not point to any other specific acts or omissions that support a conviction for aiding and abetting. Accordingly, this sub-ground of appeal is dismissed.

3. Article 6 (3) Liability

141. The Prosecution challenges the Trial Chamber's holding that the Appellant lacked superior authority over the *conseillers*, gendarmes, soldiers, and *Interahamwe* in Rusumo *Commune* at the time of the events.[341] It argues that the Trial Chamber erred in law by requiring proof that the Appellant was a superior in a formal administrative hierarchy rather than examining whether he exercised effective control.[342] It further claims that because overwhelming evidence established that the Appellant possessed such effective control, he should have been convicted for the rapes recounted by Witnesses TAO, TAP, and TAS under Article 6 (3) of the Statute.[343]

142. The Trial Chamber did not enter a formal legal finding concerning the Appellant's Article 6 (3) responsibility for rape, instead stating:

> Having found the Accused criminally liable under Article 6 (1) of the Statute for instigating others to commit rape in Rusumo *commune* in April 1994, the Chamber does not deem it necessary to *enquire* whether he is equally responsible pursuant to Article 6 (3) of the Statute, given the similarity of the acts charged and the lack [*sic*] [of] evidence of a superior-subordinate relationship between the Accused and the perpetrators of the rapes.[344]

As to the first part of this statement, it is true that convictions should not be entered under both Articles 6 (1) and 6 (3) of the Statute for the same crime based on the same conduct.[345] The Appellant's Article 6 (1) conviction for rape only extended to some of the rapes alleged, however. The Trial Chamber therefore had to

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[337] Prosecution Appeal Brief, paras. 117, 136, 137.
[338] Prosecution Appeal Brief, para. 142.
[339] Prosecution Appeal Brief, para. 143.
[340] Prosecution Appeal Brief, para. 143.
[341] Prosecution Appeal Brief, paras. 147, 148, referring to Trial Judgement, para. 243.
[342] Prosecution Appeal Brief, paras. 148-150.
[343] Prosecution Appeal Brief, paras. 150-152.
[344] Trial Judgement, para. 332 (emphasis in original).
[345] See *Kajelijeli* Appeal Judgement, para. 81.

consider whether the Appellant was responsible for the other rapes under Article 6 (3) of the Statute, that is those recounted by Witnesses TAO, TAP, and TAS. It in fact implicitly did so, concluding that there was no evidence of a superior-subordinate relationship. Its holding on this point was further elaborated in its factual findings:

> On the evidence tendered, the Chamber cannot find that the Accused had superior authority over the *conseillers*, *gendarmes*, soldiers and *Interahamwe* that were in his *commune* at the time of the events under consideration. The law did not, *per se*, place him in such a position. Although his responsibilities regarding the maintenance of law and order afforded him the power to take legal measures that would be binding on everyone in the *commune*, the Prosecution has not adduced any evidence that such power placed him, *ipso facto*, in the position of a superior within a formal administrative hierarchy vis-à-vis each category of persons mentioned above.[346]

143. This analysis focuses on the Appellant's *de jure* authority – specifically, whether the "law" placed him in power and whether he was "a superior within a formal administrative hierarchy". The Trial Chamber does not appear to have considered the Appellant's *de facto* authority. This was an error. A superior

> "possesses power or authority over subordinates either *de jure* or *de facto*; it is not necessary for that power or authority to arise from official appointment."[347]

To establish liability under Article 6 (3) of the Statute, the following must be shown:

- A crime over which the Tribunal has jurisdiction was committed;
- The accused had effective control over the perpetrators of the crime (*i.e.*, the material ability to prevent or punish the commission of crimes);
- The accused knew or had reason to know that the crime was going to be committed or had been committed; and
- The accused did not take necessary and reasonable measures to prevent or punish the commission of the crime by a subordinate.[348]

144. The Trial Chamber found that the Appellant knew or had reason to know of the rapes recounted by Witnesses TAO, TAS, and TAP.[349] The key question is whether the Appellant had effective control over the perpetrators. Attempting to show effective control, the Prosecution, in its Appeal Brief, points to Trial Chamber findings concerning the Appellant's general authority as *bourgmestre* to impose law and order in the *commune*, as well as his leading role in the genocidal campaign.[350] Yet it cannot be extrapolated from these findings that he exercised effective control over every person who was present in the *commune* during the time in question. The Prosecution advances no arguments specifically addressing the relationship between the Appellant and the perpetrators of the particular rapes described by Witnesses TAO, TAS, and TAP.

145. The Appeals Chamber therefore cannot conclude that the Prosecution met its burden of proving beyond a reasonable doubt that the Appellant had effective control over the perpetrators of the rapes recounted by Witnesses TAO, TAS, and TAP. Accordingly, the Appeals Chamber affirms the Trial Chamber's finding that the Appellant cannot be convicted under Article 6 (3) of the Statute for these rapes.

146. This sub-ground of appeal is dismissed, and the appeal under this ground is dismissed in its entirety.

C. Elements of Rape as a Crime against Humanity (Ground of Appeal 4)

147. The Prosecution's fourth ground of appeal seeks a clarification of the law relating to rape as a crime against humanity or as an act of genocide.[351] The Prosecution argues that non-consent of the victim and the

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[346] Trial Judgement, para. 243.
[347] *Kajelijeli* Appeal Judgement, para. 85.
[348] For the leading cases, See *Čelebići Case* Appeal Judgement, paras. 182-314; *Bagilishema* Appeal Judgement, paras. 24-62; *Blaškić* Appeal Judgement, paras. 53-85.
[349] Trial Judgement, para. 228.
[350] Prosecution Appeal Brief, para. 152.
[351] Prosecution Notice of Appeal, para. 16.

perpetrator's knowledge thereof should not be considered elements of the offence that must be proved by the Prosecution; rather, subject to the limitations of Rule 96 of the Rules, consent should be considered an affirmative defence.[352]

148. The Prosecution argues that the crime of rape only comes within the Tribunal's jurisdiction when it occurs in the context of genocide, armed conflict, or a widespread or systematic attack against a civilian population – circumstances in which genuine consent is impossible. In support, it quotes a report by a Special Rapporteur to the UN Commission on Human Rights:

> The manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negate the need for the Prosecution to establish lack of consent as an element of the crime.[353]

149. The Prosecution posits that rape should be viewed in the same way as other violations of international criminal law, such as torture or enslavement, for which the Prosecution is not required to establish absence of consent.[354] Further, it contends that Rule 96 (ii) of the Rules presumes that consent is a defence that must be supported by credible evidence introduced by the accused.[355]

150. The Trial Chamber found that the circumstances in this case were so coercive as to negate any possibility of consent.[356] The Prosecution therefore does not allege an error invalidating the verdict. However, it maintains, and the Appeals Chamber agrees, that the matter should be considered as one of "general significance" for the Tribunal's jurisprudence.[357]

151. In the *Kunarac* case, the ICTY Appeals Chamber defined rape as follows:

> the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.[358]

However, it immediately emphasized that

> "the circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible."[359]

152. The Appeals Chamber adopts and seeks to further elucidate the position expressed by the ICTY Appeals Chamber in the *Kunarac et al*. Appeal Judgement. Two distinct questions are posed. First, are non-consent and the knowledge thereof elements of the crime of rape, or is consent instead an affirmative defence? Second, if they are elements, how may they be proved?

153. With respect to the first question, *Kunarac* establishes that non-consent and knowledge thereof are elements of rape as a crime against humanity. The import of this is that the Prosecution bears the burden of

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[352] Prosecution Appeal Brief, paras. 155, 156.
[353] Prosecution Appeal Brief, para. 157, citing Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery, and Slavery-Like Practices during Armed Conflict, Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur to the Economic and Social Council: Commission on Human Rights, E/CN.4/Sub.2/1998/13 (22 June 1998), para. 25. See also *ibid*., para. 158, quoting Report of the Preparatory Commission for the International Criminal Court – Adendum: Part II – Finalized Draft Text of the Elements of Crimes, PCNICC/2001/1/Add.2 (2 November 2000), arts. 7 (1) (g), 8 (2) (b) (xxii), 8 (2) (e) (vi).
[354] Prosecution Appeal Brief, paras. 159, 182.
[355] Prosecution Appeal Brief, para. 160.
[356] Prosecution Appeal Brief, paras. 163, 164.
[357] *Akayesu* Appeal Judgement, para. 19. See also *Tadić* Appeal Judgement, paras. 247, 281; *Čelebići Case* Appeal Judgement, paras. 218, 221.
[358] *Kunarac et al*. Appeal Judgement, para. 127 (internal citation omitted).
[359] *Kunarac et al*. Appeal Judgement, para. 130.

proving these elements beyond reasonable doubt. If the affirmative defence approach were taken, the accused would bear, at least, the burden of production, that is, the burden to introduce evidence providing *prima facie* support for the defence.

154. As the Prosecution points out, Rule 96 of the Rules does refer to consent as a "defence". The Rules of Procedure and Evidence do not, however, redefine the elements of the crimes over which the Tribunal has jurisdiction, which are defined by the Statute and by international law.[360] The Appeals Chamber agrees, moreover, with the analysis of the Trial Chamber in the *Kunarac* case:

> The reference in the Rule [96] to consent as a "defence" is not entirely consistent with traditional legal understandings of the concept of consent in rape. Where consent is an aspect of the definition of rape in national jurisdictions, it is generally understood […] to be *absence of consent* which is an *element* of the crime. The use of the word "defence", which in its technical sense carries an implication of the shifting of the burden of proof to the accused, is inconsistent with this understanding. The Trial Chamber does not understand the reference to consent as a "defence" in Rule 96 to have been used in this technical way.[361]

Rather than changing the definition of the crime by turning an element into a defence, Rule 96 of the Rules must be read simply to define the circumstances under which evidence of consent will be admissible.[362] Thus, it speaks to the second part of the present inquiry: how may non-consent be proven?

155. The answers both Tribunals have given to this second question resolve as a practical matter the objections raised by the Prosecution with respect to the elements approach. The Prosecution can prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible. As with every element of any offence, the Trial Chamber will consider all of the relevant and admissible evidence in determining whether, under the circumstances of the case, it is appropriate to conclude that non-consent is proven beyond reasonable doubt. But it is not necessary, as a legal matter, for the Prosecution to introduce evidence concerning the words or conduct of the victim or the victim's relationship to the perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim.[363] Indeed, the Trial Chamber did so in this case.

156. Under certain circumstances, the accused might raise reasonable doubt by introducing evidence that the victim specifically consented. However, pursuant to Rule 96 (ii) of the Rules, such evidence is inadmissible if the victim:

> (a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or
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> (b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear.

Additionally, even if it admits such evidence, a Trial Chamber is free to disregard it if it concludes that under the circumstances the consent given was not genuinely voluntary.

157. As to the accused's knowledge of the absence of consent of the victim, which as *Kunarac* establishes is also an element of the offence of rape, similar reasoning applies. Knowledge of non-consent may be proven, for instance, if the Prosecution establishes beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent.

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[360] See *Tadić* Judgement on Allegations of Contempt, para. 25, n. 26.
[361] *Kunarac et al*. Trial Judgement, para. 463 (emphasis in original).
[362] *Kunarac et al*. Trial Judgement, para. 464.
[363] See *Kunarac et al*. Appeal Judgement, paras. 131, 132 (holding that voluntary consent is impossible in a coercive detention environment); *Akayesu* Trial Judgement, para. 688 ("The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of *Interahamwe* among refugee Tutsi women at the *bureau communal*.").

D. JOINT CRIMINAL ENTERPRISE (GROUND OF APPEAL 5)

158. The Appeals Chamber, following ICTY precedent, has recognized that an accused before this Tribunal may be found individually responsible for "committing" a crime within the meaning of Article 6 (1) of the Statute under one of three categories of "joint criminal enterprise" ("JCE") liability.[364] The present ground of appeal concerns the Appellant's liability for murder, genocide, extermination and rape under the first and third categories.[365] The first (or "basic") category encompasses cases in which "all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention" to commit the crime that is charged.[366] The third (or "extended") category concerns cases in which the crime charged, "while outside the common purpose, is nevertheless a natural and foreseeable consequence of executing that common purpose."[367]

159. At paragraph 289 of the Trial Judgement, the Trial Chamber stated:

> The Prosecution seems to allege that the Accused participated in a joint criminal enterprise. However, the Chamber cannot make a finding on such allegation since it was not pleaded clearly enough to allow the Accused to defend himself adequately.

160. The Prosecution submits that this holding was in error.[368] It observes that the Indictment charged that the Appellant acted "in concert with" others in pursuit of a "common scheme, strategy, or plan". The Prosecution argues that this language is the functional equivalent of "joint criminal enterprise" and sufficed to put the Appellant on notice, particularly in conjunction with the factual allegations in the Indictment and the "collective" nature of the crimes charged.[369] The Prosecution further contends that any vagueness in the Indictment was cured by its Pre-Trial Brief[370] and asserts that it consistently advanced the JCE theory at trial.[371] It argues that the Appellant should have been convicted on this theory for committing murder, genocide, extermination, and rape.[372]

1. Applicable Law Concerning the Pleading of Joint Criminal Enterprise

161. The relevant law concerning specificity of indictments as a general matter is set forth in Section II.B above. This Tribunal's leading precedent on pleading practice with respect to JCE is the *Ntakirutimana* Appeal Judgement, which invokes this passage from the *Krnojelac* Appeal Judgement:

> With respect to the nature of the liability incurred, the Appeals Chamber holds that it is vital for the indictment to specify at least on what legal basis of the Statute an individual is being charged (Article 7 (1) and/or 7 (3)). Since Article 7(1) allows for several forms of direct criminal responsibility, a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity. The Appeals Chamber considers that such ambiguity should be avoided and holds therefore that, where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial. Likewise, when the Prosecution charges the "commission" of one of the crimes under the Statute within the meaning of Article 7 (1), it must specify whether the term is to be understood as meaning physical commission by the accused or participation in a joint criminal enterprise, or both. The Appeals Chamber also considers that it is preferable for an indictment alleging the accused's responsibility as a participant in a joint criminal enterprise also to refer to the particular form (basic or extended) of joint criminal enterprise envisaged. However, this does not, in principle, prevent the Prosecution from

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[364] *Ntakirutimana* Appeal Judgement, paras. 463, 468. See also *Rwamakuba* Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide.
[365] See Prosecution Appeal Brief, paras. 184, 205-208.
[366] *Ntakirutimana* Appeal Judgement, para. 463.
[367] *Ntakirutimana* Appeal Judgement, para. 465.
[368] Prosecution Appeal Brief, para. 184.
[369] Prosecution Appeal Brief, para. 191.
[370] Prosecution Appeal Brief, paras. 197-199.
[371] Prosecution Appeal Brief, paras. 200-203.
[372] Prosecution Appeal Brief, paras. 184, 210.

pleading elsewhere than in the indictment – for instance in a pre-trial brief – the legal theory which it believes best demonstrates that the crime or crimes alleged are imputable to the accused in law in the light of the facts alleged. This option is, however, limited by the need to guarantee the accused a fair trial.[373]

162. More recently, the ICTY Appeals Chamber elaborated in *The Prosecutor v. Kvočka et al.*:

> An indictment which merely lists the charges against the accused without pleading the material facts does not constitute adequate notice because it lacks "enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence". Whether or not a fact is considered material depends on the nature of the Prosecution's case. The Prosecution's characterization of the alleged criminal conduct and the proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice.[...] *If the Prosecution relies on a theory of joint criminal enterprise, then the Prosecutor must plead the purpose of the enterprise, the identity of the participants, and the nature of the accused's participation in the enterprise*. Therefore, in order for an accused charged with joint criminal enterprise to fully understand which acts he is allegedly responsible for, the indictment should clearly indicate which form of joint criminal enterprise is being alleged.
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> […]
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> The Appeals Chamber also considers that *the Indictment is defective because it fails to make any specific mention of joint criminal enterprise*, although the Prosecution's case relied on this mode of responsibility. As explained above, joint criminal enterprise responsibility must be specifically pleaded. *Although joint criminal enterprise is a means of "committing", it is insufficient for an indictment to merely make broad reference to Article 7 (1) of the Statute*. Such reference does not provide sufficient notice to the Defence or to the Trial Chamber that the Prosecution is intending to rely on joint criminal enterprise responsibility. *Moreover, in the Indictment the Prosecution has failed to plead the category of joint criminal enterprise or the material facts of the joint criminal enterprise*, such as the purpose of the enterprise, the identity of the participants, and the nature of the accused's participation in the enterprise.[374]

Thus, *Kvočka* unambiguously established that failure to plead a JCE theory, including the category of JCE and the material facts supporting the theory, constitutes a defect in the indictment. It held,

163. The Appeals Chamber adopts the holding and rationale of the ICTY Appeals Chamber in *Kvočka*. The mode of liability under Article 6 (1) (including the JCE theory) must be pleaded in the indictment, or the indictment is defective. As *Krnojelac* makes clear, however, such defects may be cured by the provision of timely, clear, and consistent information – for example, in a pre-trial brief.[375] This approach is consistent with the Appeals Chamber's approach to all other pleading failures.[376]

164. The Appeals Chamber will now consider whether the Indictment gave proper notice of the Prosecution's intent to rely on a JCE theory. The Prosecution does not argue that the Appellant has waived any objection to the vagueness of the Indictment in this respect. Thus, if it finds that the Indictment is defective, the Appeals Chamber will have to consider whether the Prosecution has proven that the defect was cured by the provision of timely, clear, and consistent information.

2. Allegations in the Indictment

165. The words "joint criminal enterprise" are not contained in the Indictment. This absence does not in and of itself indicate a defect. As the Appeals Chamber noted in *Ntakirutimana*, the *Tadić* Appeal Judgement used interchangeably the expressions "joint criminal enterprise", "common purpose", and "criminal

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[373] *Krnojelac* Appeal Judgement, para. 138. See also *Ntakirutimana* Appeal Judgement, para. 475.
[374] *Kvočka et al*. Appeal Judgement, paras. 28, 42 (emphases added, internal citations omitted).
[375] *Krnojelac* Appeal Judgement, para. 138.
[376] See *supra* section II.B.2.

enterprise".[377] It is possible that other phrasings might effectively convey the same concept.[378] The question is not whether particular words have been used, but whether an accused has been meaningfully "informed of the nature of the charges" so as to be able to prepare an effective defence.[379]

166. In this regard, two of the Prosecution's contentions are readily dismissed. First, the Appellant plainly could not have been expected to infer the Prosecution's reliance on a JCE theory from the mere fact that the Indictment "explicitly charged the [Appellant] with collective crimes: genocide, complicity in genocide, extermination, murder and rape in connection with the massacres that took place at various locations".[380] "Collective crimes" in this sense, *i.e.* crimes that involve multiple responsible parties or that take place in the context of mass violence, are alleged in every case before this Tribunal. But the Statute and Tribunal's jurisprudence indicate that an individual can participate in such crimes in various ways involving different kinds of interactions with other people – for instance, ordering, aiding and abetting, "committing" through JCE, "committing" through direct physical perpetration, and so forth. As the *Kvočka* Appeal Judgement makes clear, an accused cannot be expected to infer the mode of liability; it must be charged.

167. Second, the Prosecution's assertion that the allegations in the Indictment that the Appellant was responsible for "committing" crimes should be read to encompass a JCE theory[381] is similarly untenable and inconsistent with *Kvočka*, as the Prosecution in fact conceded at oral argument. It is not enough for the generic language of an indictment to "encompass" the possibility that JCE is being charged. Rather, JCE must be pleaded specifically.[382] Otherwise, an accused could reasonably infer that references to "committing" crimes are meant to refer to acts that he personally perpetrated.

168. The Prosecution's other argument is based on paragraphs 22 and 25 of the Indictment, which read as follows:

> 22. From those first days of April 1994 through 30 April 1994, Sylvestre GACUMBITSI ordered, directed or acted in concert with local administrative official in Kibungo *préfecture,* including *bourgmestres* and *conseillers de secteur,* to deny protection to civilian Tutsi refugees and to facilitate attacks upon them by communal police, *Interahamwe,* civilian militias and local residents.
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> […]
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> 25. Sylvestre Gacumbitsi, in his position of authority and acting in concert with others, participated in the planning, preparation or execution of a common scheme, strategy or plan to exterminate the Tutsi, by his own affirmative acts or through persons he assisted or by his subordinates with his knowledge and consent. [Emphases added]

169. The Appellant and his trial counsel have, however, used French throughout the proceedings. Although the Indictment was written in English, it is the French translation that is critical to determining whether the Appellant received proper notice of the charges against him, to the extent that any distinctions in phrasing are relevant. Paragraphs 22 and 25 of the translation read:

> 22. De ces premiers jours d'avril 1994 jusqu'au 30 avril de la même année, Sylvestre Gacumbitsi a ordonné ou dirigé les autorités administratives locales de la préfecture de Kibungo, y compris les bourgmestres et conseillers de secteur, de refuser toute protection aux réfugiés civils Tutsis et de faciliter les attaques de la police communale, des Interahamwe, des milices civiles et des résidents locaux contre ces réfugiés ou a agi de concert avec ces autorités en cela.
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> […]

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[377] *Ntakirutimana* Appeal Judgement, n. 783.
[378] See *Ntakirutimana* Appeal Judgement, n. 783.
[379] *Ntakirutimana* Appeal Judgement, para. 470. The Appeals Chamber notes, however, that because today ICTY and ICTR cases routinely employ the phrase "joint criminal enterprise", that phrase should for the sake of maximum clarity preferably be included in future indictments where JCE is being charged.
[380] Prosecution Appeal Brief, para. 191.
[381] Prosecution Appeal Brief, para. 192.
[382] *Kvočka et al*. Appeal Judgement, para. 42.

25. Sylvestre Gacumbitsi, de par sa position d'autorité, et agissant de concert avec d'autres, a participé à la planification, la préparation ou l'exécution d'un plan, d'une stratégie ou d'un dessein communs visant à exterminer les Tutsis, par ses propres actes positifs ou par le biais de personnes qu'il a aidé ou par ses subordonnés dont il connaissait et approuvait les agissements.[Emphases added]

170. As a threshold matter, these paragraphs are found in a portion of the Indictment alleging material facts in support of the genocide and complicity in genocide counts only. They are not incorporated elsewhere in the Indictment and, therefore, cannot support the Prosecution's reliance on a JCE theory with respect to the murder, extermination, and rape counts.[383]

171. With respect to the genocide count, the Appeals Chamber finds, by majority, Judge Shahabuddeen and Judge Schomburg dissenting, that the paragraphs relied upon by the Prosecution were not sufficient to provide notice to the Appellant that he was being charged with participation in a joint criminal enterprise. First, taken alone, the words "acted in concert with" ("*a agi de concert avec*"), as used in paragraph 22 of the Indictment, do not suffice to meet the pleading requirements outlined above.[384]

172. Paragraph 25 of the Indictment comes closer to providing the necessary notice, as it clearly refers to concerted action among a plurality of persons in support of "a common scheme, strategy or plan to exterminate the Tutsi" ("*d'un plan, d'une stratégie ou d'un dessein communs visant à exterminer les Tutsis*"). This language is similar to that employed in *Tadić* and seems to encompass the critical elements of a JCE charge. However, in then proceeding to state that the accused participated in the common scheme "by his own affirmative acts or through persons he assisted or by his subordinates with his knowledge and consent", the Indictment could be read to invoke three established modes of liability other than JCE: "committing" through direct, personal perpetration, aiding and abetting, and Article 6 (3) superior responsibility. The Appellant could have interpreted the paragraph, taken as a whole, to refer only to those modes of liability and not to JCE, and he cannot therefore be said to have received clear notice of the JCE theory. This is especially so because, at the time of the Indictment, JCE was still an unfamiliar mode of liability in this Tribunal, although it had been employed at the ICTY.

173. As noted, the Prosecution also argues that the material facts set forth in the Indictment were sufficient to provide notice of the JCE theory. Specifically, the Prosecution states that the Indictment identified (i) the nature or essence of the JCE; (ii) the period over which it existed; (iii) the identity of its participants; and (iv) the nature of the accused's participation.[385] But even assuming the Indictment can be

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[383] Prosecution Appeal Brief, para. 184.

[384] The practice of the ICTY contains instances where the phrase "acting in concert" has been considered insufficient to imply, without more, an allegation of joint criminal enterprise. The Pre-Trial Chamber in the *Brdanin and Talić* case held that the use of the words "[acting] individually and in concert" in that indictment was ambiguous and that if the Prosecution sought to rely on the Article 7 (1) liability of "acting in concert as part of a common purpose or design, or as part of a common criminal enterprise […] then this should be made clear". *Brdanin and Talić* Decision on Objections, para. 12. This decision was followed by an amendment to the indictment to specifically state that the accused in that case "participated in a criminal enterprise". *The Prosecutor v. Brdanin and Talić*, Case N°IT-99-36-PT, Further Amended Indictment, 12 March 2001, para. 27 ("the common purpose of which was the permanent removal of the majority of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state"). When it addressed the accused's objection to the indictment, the Pre-Trial Chamber in the *Deronjić* case stated that "the [i]ndictment for example does not plead a case of common purpose or common criminal enterprise liability against the accused, unless the vague reference to the accused acting 'in concert with others who share his intent' is meant to include such a case, *in which event it is not pleaded with sufficient particularity*." *Deronjić* Decision on Form of the Indictment, para. 30 (emphasis added). The Prosecution consequently filed an amended indictment in that case where it explicitly used the expression "joint criminal enterprise". *The Prosecutor v. Miroslav Deronjić*, Case N°IT-02-61-PT, Amended Indictment, 29 November 2002, paras. 2-8. Furthermore, "acting in concert" has also been used in several indictments where the Prosecution did not intend to rely on joint criminal enterprise for its case. In the *Strugar* case, while the indictment contained the expression "acting […] in concert with [others]", the Prosecution explicitly stated during a pre-trial hearing and in a pre-trial filing that it was not pleading joint criminal enterprise. *The Prosecutor v. Pavle Strugar*, Case N°IT-01-42-PT, Indictment, 23 February 2001, para. 18. *Strugar* Decision Concerning the Form of the Indictment, para. 21, referring to transcript of hearing of 12 March 2002 p. 108 and to *The Prosecutor v. Pavle Strugar*, Case N°IT-01-42-PT, Prosecution's Response to the Defence Preliminary Motion, 21 February 2002, para. 13. Similarly, in the *Miodrag Jokić* case, while the indictment stated that the accused had acted "individually or in concert with others," the Prosecution charged him for aiding and abetting crimes pursuant to Article 7 (1) of the Statute, to which he eventually pled guilty. *The Prosecutor v. Miodrag Jokić*, Case N°IT-01-42/1-PT, Second Amended Indictment, 27 August 2003, paras. 15, 22. *Jokić* Sentencing Judgement, paras. 9, 21. See also *Jokić* Sentencing Appeal Judgement, paras. 14, 16.

[385] See Prosecution Appeal Brief, paras. 193, 194.

construed as containing all the material facts necessary to support a JCE theory, these facts were not clearly identified as being intended to plead such a theory. The mere inclusion in an indictment of scattered facts that might relate to a mode of liability does not suffice to put an accused on notice that the mode of liability is being alleged.

174. For these reasons, the Appeals Chamber finds, by majority, Judge Shahabuddeen and Judge Schomburg dissenting, that the Trial Chamber did not err in finding the Indictment defective.

3. Whether Defects in the Indictment were Cured

175. The sole post-Indictment submission to which the Prosecution points in support of its contention that any defects in the Indictment were cured is its Pre-Trial Brief. However, that brief did not provide any clear indication to the Appellant that he was being charged as a JCE participant. It nowhere referred to a joint criminal enterprise, a common criminal purpose, or any other synonym. Part II of the Pre-Trial Brief (Factual Allegations) was divided into chapters including "Planning", "Preparing", and "Executing" (sub-divided into "Instigating", "Ordering, Leading and Supervising", and "Killing").[386] As to "Executing", the Pre-Trial Brief explained:

> During the month of April 1994, Sylvestre Gacumbitsi used his position as the *Bourgmestre* of Rusumo *Commune* and as an influential member of the MRND political party to execute the campaign of looting, raping and killing of the Tutsi civilians. Sylvestre Gacumbitsi ordered his subordinates from the local administration, communal policemen, members of the *Interahamwe* and Hutu civilians to attack and destroy the Tutsi civilian population. He instigated, led and supervised some of these attacks. Sylvestre Gacumbitsi, by his own hands, killed Tutsi civilians.[387]

This description does not give any indication that the Prosecution was pursuing a JCE theory. Nor is any such indication to be found in Part III of the Prosecution Pre-Trial Brief (Legal Issues). In fact, when discussing modes of liability in relation to each count, the Pre-Trial Brief does not even refer to "acting in concert with others" or to "a common scheme, strategy or plan" (in contrast to paragraphs 22 and 25 of the Indictment). It simply states that "the accused Sylvester [*sic*] Gacumbitsi, by virtue of the acts attributed to him, planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of" genocide,[388] or that "[t]he accused planned, instigated, ordered, committed, or aided and abetted in" the extermination, murder, and rape.[389] Thus, if anything, the Pre-Trial Brief is less clear than the Indictment with respect to joint criminal enterprise, and cannot be found to have cured the Indictment's defects.

176. The Prosecution also mentions certain submissions during the trial, although it concedes that these are "not relevant to the question whether the Respondent was unfairly prejudiced in the conduct of his defence" by defects in the Indictment.[390]

177. The Appeals Chamber has previously stated that "in some instances, information contained in an Opening Statement of the Prosecution may cure a defective indictment."[391] The Appeals Chamber need not decide now whether and under what circumstances such a statement might be sufficient to plead the mode of liability, however, because no assistance is provided to the Prosecution by its Opening Statement in this case. The Prosecution points to the following statement made during its opening address:

> Today, Your Honours, Gacumbitsi stands charged with 5 counts: The count of genocide, or complicity in genocide in the alternative.

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[386] See Prosecution Pre-Trial Brief, pp. 11-16.
[387] Prosecution Pre-Trial Brief, para. 2.16.
[388] Prosecution Pre-Trial Brief, para. 3.35c. See also *ibid*., para. 3.37c, in relation to complicity in genocide ("the accused Sylvester [*sic*] Gacumbitsi, by virtue of the acts attributed to him, knowingly aided and abetted in the planning, preparation or execution […]").
[389] Prosecution Pre-Trial Brief, paras. 3.39a, 3.41a, 3.43a.
[390] Prosecution Appeal Brief, para. 200.
[391] See, e.g., *Kordić and Čerkez* Appeal Judgement, para. 169.

> He is also charged Your Honours with extermination, murder and rape, as crimes against humanity, all arising from culpable acts we allege he committed in concert with others as part of the common scheme whose singular objective was the total destruction of the Tutsi ethnic group.[392]

Even had it been timely, this statement was not, on its own, sufficient to correct the defect in the Indictment and the Pre-Trial Brief. It was not further developed; the Prosecution did not connect it, for instance, to specific factual allegations that supported the JCE claim. Nor did it specify to which category of JCE it meant to allude. The indictment places an accused on notice of the charges he faces. For a subsequent submission to be understood to clarify vagueness in an indictment, the implications of that submission must be clearer than the Prosecution's statement was here.

178. Only in its Closing Brief did the Prosecution provide further details on its JCE theory, and that submission obviously came too late. Thus, the defect in the Indictment was not cured by the provision of timely, clear, and consistent information, and the Trial Chamber did not err in refusing to consider the JCE theory.

179. Accordingly, this ground of appeal is dismissed in its entirety.

E. AUTHORITY FOR ORDERING (GROUND OF APPEAL 6)

180. The Trial Chamber found that the Appellant ordered crimes committed by the communal policemen, but did not find that he ordered crimes committed by the *conseillers,* gendarmes, soldiers, and *Interahamwe* who were in his *commune* at the time of the events under consideration. The Prosecution challenges this. First, it argues that the Trial Chamber erred in law by requiring proof of a formal superior-subordinate relationship in order to find that the Appellant had the authority or power to order.[393] Second, it contends that the Trial Chamber failed to draw the only reasonable conclusion on the evidence: that the Appellant was a superior to, and possessed the capacity to order, not only the communal policemen, but also the other perpetrators of the crimes.[394] The Appellant responds that the Trial Chamber correctly stated the law and that the factual findings and evidence cited by the Prosecution do not show when or how he gave orders to the other assailants.[395]

1. Alleged Error of Law

181. The Appeals Chamber agrees with the Prosecution that ordering does not require the existence of a formal superior-subordinate relationship. But the Trial Chamber did not misapprehend the law in this respect. It held:

> The Trial Chamber is of the opinion that the issue must be determined in light of the circumstances of the case. The authority of an influential person can derive from his social, economic, political or administrative standing, or from his abiding moral principles. Such authority may also be *de jure* or *de facto*. When people are confronted with an emergency or danger, they can naturally turn to such influential person, expecting him to provide a solution, assistance or take measures to deal with the crisis. When he speaks, everyone listens to him with keen interest; his advice commands overriding respect over all others and the people could easily see his actions as an encouragement. Such words and actions are not necessarily culpable, but can, where appropriate, amount to forms of participation in crime, such as "incitement" and "aiding and abetting" provided for in Article 6 (1) of the Statute. In certain circumstances, the authority of an influential person is enhanced by a lawful or unlawful element of coercion, such as declaring a state of emergency, the *de facto* exercise of an administrative function, or even the use of threat or unlawful force. The presence of a coercive element is such that it can determine the way the words of the influential person are perceived. Thus, mere words of exhortation or encouragement would be perceived as orders within the meaning of Article 6 (1) referred to above. *Such a situation does not, ipso facto, lead to the conclusion that a formal superior-*

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[392] Prosecutor's Opening Statement, T. 28 July 2003 p. 19. See also Prosecution Appeal Brief, para. 201.
[393] Prosecution Appeal Brief, paras. 213-218.
[394] Prosecution Appeal Brief, paras. 219-220.
[395] Gacumbitsi Response, paras. 316-327.

> *subordinate relationship exists between the person giving the order and the person executing it*. As a matter of fact, instructions given outside a purely informal context by a superior to his subordinate within a formal administrative hierarchy, be it *de jure* or *de facto*, would also be considered as an "order" within the meaning of Article 6 (1) of the Statute.
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> The Chamber recalls its factual finding that Sylvestre Gacumbitsi had superior authority only over the communal police. *The Prosecution failed to show that he also had superior authority over the conseillers,* Interahamwe*, gendarmes or any other persons who participated in the attacks. Moreover, the Prosecution failed to demonstrate that, in the absence of a formal superior-subordinate relationship between the Accused and the population and attackers, the circumstances of the case suggest that the Accused's words of incitement were perceived as orders within the meaning of Article 6 (1) of the Statute*.[396]

182. Thus, after finding that no formal superior-subordinate relationship existed, the Trial Chamber proceeded to consider whether, under the circumstances of the case, the Appellant's statements nevertheless were perceived as orders. This is in accordance with the most recent judgements of the Appeals Chamber. In the *Semanza* Appeal Judgement, the Appeals Chamber explained:

> As recently clarified by the ICTY Appeals Chamber in *Kordić and Čerkez*, the *actus reus* of "ordering" is that a person in a position of authority instruct another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator is required. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order.[397]

The Appeals Chamber notes that this element of "ordering" is distinct from that required for liability under Article 6 (3) of the Statute, which does require a superior-subordinate relationship (albeit not a formal one but rather one characterized by effective control).[398] Ordering requires no such relationship – it requires merely authority to order, a more subjective criterion that depends on the circumstances and the perceptions of the listener.

183. Accordingly, this sub-ground of appeal is dismissed.

2. Alleged Error of Fact

184. The Trial Chamber found that, as *bourgmestre*, the Appellant was the highest authority and most influential person in the *commune*, with the power to take legal measures binding all residents.[399] His role in the genocide demonstrated his authority: he convened meetings with the *conseillers*; asked them to organize meetings to tell people to kill Tutsis, and verified that these meetings had been held; and directly instructed *conseillers*, other leaders, and the Hutu population to kill and rape Tutsis.[400] The Trial Chamber pointed to several instances in which the Appellant "instructed", "ordered", or "directed" the attackers in general, not just the communal policemen:

- On 14 April 1994, after giving a speech telling people "to arm themselves with machetes and [...] to hunt down all the Tutsi", the Appellant led assailants to Kigarama, where they engaged in an attack on Tutsis "carried out under [the Appellant's] personal supervision".[401]
- At Nyarubuye Parish on 15 April 1994, the Appellant "*instructed* the communal police and the *Interahamwe* to attack the refugees and prevent them from escaping", which they did.[402]

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[396] Trial Judgement, paras. 282, 283 (emphasis added, internal citations omitted).
[397] *Semanza* Appeal Judgement, para. 361, referring to *Kordić and Čerkez* Appeal Judgement, para. 28. See also *Kamuhanda* Appeal Judgement, para. 75 ("To be held responsible under Article 6 (1) of the Statute for ordering a crime, on the contrary, it is sufficient that the accused have authority over the perpetrator of the crime, and that his order have a direct and substantial effect on the commission of the illegal act." (internal citations omitted)).
[398] See *supra* section III.B.3.
[399] Trial Judgement, paras. 241-243.
[400] Trial Judgement, paras. 101, 104.
[401] Trial Judgement, para. 98.
[402] Trial Judgement, paras. 152, 154 (emphasis added). See also *ibid.*, paras. 168, 172 (the Appellant "directed attacks" at Nyarubuye), 173 (the Appellant led the attacks at Nyarubuye "by instructing the attackers to kill the refugees").

- On 16 April 1994, the Appellant "directed" an attack at Nyarubuye Parish, during which the assailants "finished off" survivors and looted the parish building.[403]
- On 17 April 1994, the Appellant ordered a group of attackers to kill fifteen Tutsi survivors of previous attacks at Nyarubuye Parish, which they immediately did.[404]

185. These findings made clear that the Appellant had authority over the attackers in question and that his orders had a direct and substantial effect on the commission of these crimes. In view of these facts, no reasonable trier of fact could find that the Appellant's words were not perceived as orders by the attackers in general, not just the communal police, to commit these crimes.

186. In *Semanza*, the Appeals Chamber found that the Trial Chamber had unreasonably failed to conclude that Laurent Semanza was liable for ordering a massacre.[405] This conclusion was based on the facts that Mr. Semanza had "directed attackers, including soldiers and *Interahamwe*, to kill Tutsi refugees who had been separated from the Hutu refugees"[406] and that the refugees "were then executed on the directions" of Mr. Semanza.[407] The Appeals Chamber concluded as follows:

> On these facts, no reasonable trier of fact could hold otherwise than that the attackers to whom the Appellant gave directions regarded him as speaking with authority. That authority created a superior-subordinate relationship which was real, however informal or temporary, and sufficient to find the Appellant responsible for ordering under Article 6 (1) of the Statute.[408]

The Trial Chamber in the *Kamuhanda* case reached a similar conclusion under similar facts, and the Appeals Chamber affirmed it.[409] The present case is materially indistinguishable from these cases.

187. Accordingly, the Trial Chamber erred in fact by not convicting the Appellant for ordering the crimes committed by all attackers, not just the communal policemen, at Nyarubuye Parish on 15, 16, and 17 April 1994 and on 14 April 1994 at Kigarama. This sub-ground of appeal is upheld.

F. SENTENCING (GROUND OF APPEAL 1)

188. The Prosecution contends that the Trial Chamber considered irrelevant factors in mitigation of sentence, and that it failed to take sufficient account of the gravity of the crimes and the degree of the Appellant's criminal responsibility.[410] In the Prosecution's view, there were no mitigating factors in this case that would justify imposing less than the maximum sentence of life imprisonment.[411] In response, the Appellant asserts that this ground of the Prosecution's appeal must fail in its entirety.[412]

1. The Appellant's Use of the Communal Police

189. The Prosecution contends that the Appellant's

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[403] Trial Judgement, para. 171.
[404] Trial Judgement, para. 163.
[405] *Semanza* Appeal Judgement, paras. 363, 364.
[406] *Semanza* Appeal Judgement, para. 363.
[407] *Semanza* Appeal Judgement, para. 363, quoting *Semanza* Trial Judgement, paras. 178, 196.
[408] *Semanza* Appeal Judgement, para. 363.
[409] *Kamuhanda* Appeal Judgement, para. 76 (holding that "a reasonable trier of fact could conclude from the fact that the order to start the massacre was directly obeyed by the attackers that this order had direct and substantial effect on the crime, and that the Appellant had authority over the attackers, regardless of their origin").
[410] Prosecution Appeal Brief, para. 21. The Prosecution argues that even if there are mitigating circumstances, this does not automatically entitle the Appellant to a "credit" in sentencing; life imprisonment thus might still be appropriate. See *ibid*., para. 38, citing *Niyitegeka* Appeal Judgement, para. 267 and *Musema* Appeal Judgement, para. 396.
[411] Prosecution Appeal Brief, para. 21.
[412] Gacumbitsi Response, para. 100. Most of the Appellant's other arguments concerning sentencing (See *ibid*. paras. 35-47 and 96-98) are not responsive to the Prosecution's first ground of appeal and will not be considered here.

> "reliance on the police, armed, uniformed, and responsible for public security, to launch attacks during the widespread or systematic killings of Tutsi civilians, was a circumstance that should have been seen as extremely aggravating."[413]

190. The Trial Judgement does not expressly mention the Appellant's use of the police as an aggravating circumstance. However, it did not need to do so. It clearly described and gave weight to the Appellant's abuse of his powers as *bourgmestre*, of which his use of the police was merely a part.[414] The Trial Chamber stated:

> In the instant case, the Chamber finds that the status of the Accused in April 1994, as *bourgmestre* and the most important and influential personality of Rusumo *commune,* is an aggravating circumstance, insofar as the Accused participated in the crimes committed and was one of the ringleaders, in terms of planning the crimes, inciting their commission and sometimes driving attackers to the massacre sites. By so doing, he betrayed the trust that the people of his *commune* had placed in him. His active participation in the said crimes explains why he could not take measures to prevent or to punish the perpetrators, when he had the opportunity to do so. The seriousness of the crimes committed, particularly genocide, but also the particularly atrocious rapes that some victims suffered, further constitute aggravating circumstances.[415]

191. The Appeals Chamber finds no discernible error in the Trial Chamber's analysis.

2. The Appellant's Formal Status as a Superior

192. The Prosecution argues that the Trial Chamber erred in relying on the fact that the Appellant's formal status as a superior was confined to the communal police because this ignored the fact that the Appellant instigated and aided and abetted other participants in the attacks.[416] In response, the Appellant denies that he had any authority over the soldiers and gendarmes who participated in the attacks.[417]

193. In its conclusion on aggravating and mitigating circumstances, the Trial Chamber stated:

> […] the Chamber is not persuaded that the Accused had superior responsibility over the perpetrators of the crimes committed in Rusumo *commune* in April 1994, with the exception of the communal policemen of Rusumo. Accordingly, the Chamber cannot take into account the aggravating circumstances submitted by the Prosecution.[418]

The Appeals Chamber recalls its holding above that the Trial Chamber erred in not holding the Appellant liable for ordering the crimes committed not only by the police but also by the "other perpetrators".[419] This error will be taken into account in the Appeals Chamber's consideration of the gravity of the crime for the purpose of determining the Appellant's sentence. In light of this determination, the Appeals Chamber does not consider it necessary to determine whether, had the Trial Chamber's holdings concerning the Appellant's authority over the other attackers been correct, it should nonetheless have considered the Appellant's authority as an aggravating factor in sentencing.

3. The Appellant's Prior Good Character, Accomplishments, and Relationships with Tutsis

194. The Prosecution submits next that the Trial Chamber accorded undue weight in mitigation to the Appellant's prior good character and accomplishments.[420] It argues that, if anything, these are aggravating factors, since, as the Trial Chamber found, the Appellant abused the trust he had earned through his prior

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[413] Prosecution Appeal Brief, para. 27.
[414] The Prosecution had not, indeed, identified abuse of the police as a separate aggravating circumstance in its closing brief at trial. See Prosecution Closing Brief, paras. 435-450.
[415] Trial Judgement, para. 345.
[416] Prosecution Appeal Brief, para. 28.
[417] Gacumbitsi Response, paras. 83-85.
[418] Trial Judgement, para. 353.
[419] See *supra* section III.E.
[420] Prosecution Appeal Brief, para. 29.

good character and his position as *bourgmestre*.[421] Moreover, the Prosecution argues, the Trial Chamber erred in considering that the Appellant's good relationship with the Tutsis before April 1994 could serve as a mitigating factor in light of the horrific and discriminatory crimes the Appellant committed against the Tutsis between April and June 1994.[422]

195. The Appeals Chamber in the *Semanza* case considered similar arguments, as follows:

> 397. Trial Chambers of both International Tribunals have to a greater or lesser extent taken into account an accused's previous good character in mitigation, as well as accomplishments in functions previously held. For instance, in *Niyitegeka* the Trial Chamber considered in mitigation that the accused was a person of good character prior to the events "and that as a public figure and a member of the MDR, he advocated democracy and opposed ethnic discrimination." Similarly, in *Ntakirutimana*, the Trial Chamber found as a mitigating factor that Elizaphan Ntakirutimana was a "highly respected personality within the Seventh-Day Adventist Church of the West-Rwanda Field and beyond" and that he led an "exemplary life as a church leader." The Trial Chamber also noted Gérard Ntakirutimana's good character, and that he had testified that his return to Rwanda in 1993 was prompted by "his hope to contribute to development and to promote peace within his country." In the *Obrenović* Sentencing Judgement, the ICTY Trial Chamber held that "prior to the war Dragan Obrenović was a highly respected member of his community who did not discriminate against anybody."
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> 398. The Appeals Chamber is of the view that it was within the Trial Chamber's discretion to take into account as mitigation in sentencing the Appellant's previous good character and accomplishments as *bourgmestre*. Precedent does not support the Prosecution's position that "being a successful academic, politician or administrator is irrelevant" as a mitigating factor in crimes of genocide and crimes against humanity. Notwithstanding, the Appeals Chamber notes that in most cases the accused's previous good character is accorded little weight in the final determination of determining the sentence. However, in this case, the Trial Chamber does not indicate how much weight, if any, it attaches to the Appellant's previous character and accomplishments. Thus, it is not clear that these mitigating factors unduly affected the sentence, given the nature of the offences. Consequently the Appeals Chamber finds no discernible error on the part of the Trial Chamber.
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> 399. Finally, the Appeals Chamber finds no merit in the Prosecution's argument that there exists a contradiction in the Trial Chamber's reasoning that the Appellant's position of influence was an aggravating factor, whereas his previous accomplishments as *bourgmestre* were considered in mitigation.[423]

196. These findings are directly transposable to the case at hand. There is no indication that the Trial Chamber abused its discretion, and the Prosecution's arguments in this respect are dismissed.

4. Alleged Irrelevant Factors in Mitigation

197. The Prosecution submits that the Trial Chamber gave weight to irrelevant considerations, including the fact that the Appellant's family lives in Rwanda and has good relationships with its neighbors from all ethnic groups and the fact that the Appellant's active involvement in the events was of a short duration.[424] The Appellant responds that the fact that his family lives at peace with other groups in Rwanda shows that he did not commit any reprehensible act because, had he done so, his family would have been targeted in revenge.[425]

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[421] Prosecution Appeal Brief, paras. 29, 30.
[422] Prosecution Appeal Brief, para. 31. The Appellant responds that, to the contrary, the Trial Chamber erred by not giving sufficient weight to these mitigating circumstances. Gacumbitsi Response, para. 48. The Appeals Chamber notes its holding above that the Appellant has failed to allege any sentencing error in his own appeal, and will not consider these contentions here.
[423] *Semanza* Appeal Judgement, paras. 397-399 (internal citations omitted).
[424] Prosecution Appeal Brief, paras. 34-37.
[425] Gacumbitsi Response, paras. 77-79.

198. The Appeals Chamber finds that the Trial Chamber erred in considering that the good relationships of the Appellant's family with its neighbors constituted a factor in mitigation. While there is no exhaustive list of what constitutes a mitigating circumstance,[426] the fact that the Appellant's family has good relationships with its neighbors of all ethnic groups cannot be considered to constitute an "individual circumstance" of the Appellant and should not be considered in sentencing.[427] Nevertheless, it is unclear what weight, if any, the Trial Chamber gave to this factor. In these circumstances, the Appeals Chamber will not increase the Appellant's sentence as a result of the Trial Chamber's error.

199. The Prosecution also submits that it is "hardly a mitigating factor that the [Appellant's] active involvement in the events was of short duration."[428] The Trial Chamber, however, did not consider the short duration of the Appellant's involvement to be a mitigating factor. Rather, the Trial Chamber merely noted that the duration of the Appellant's involvement was not so long that it might constitute an aggravating factor.[429] The Appeals Chamber sees no error in this observation.

5. Gravity of the Crimes and Degree of Criminal Culpability

200. The Prosecution contends that the Trial Chamber committed an error by failing to impose a sentence reflecting the gravity of the crimes and of the Appellant's degree of criminal culpability.[430] It submits that the Trial Chamber should have considered the Appellant as one of the most serious offenders, deserving the highest penalty available at the Tribunal.[431]

201. The Trial Chamber properly stated the legal principles on which the Prosecution relies. After noting that the crimes committed were very serious,[432] it stated that "the penalty should, first and foremost, be commensurate with the gravity of the offence" and that "[s]econdary or indirect forms of participation are generally punished with a less severe sentence."[433]

202. The Prosecution argues, however, that the Trial Chamber failed to apply these principles properly because the sentence it imposed was inconsistent with those issued in comparable cases.[434] It contends that the correct sentence for extermination as a crime against humanity, especially when combined with other serious offences including rape, is life imprisonment.[435] And for genocide, it claims, the principle that the default punishment is life imprisonment is clearly established:

> In addition to the [Appellant], the ICTR has, to date, found eighteen people guilty of crimes under Article 2 of the Statute. Out of these eighteen, eleven have been sentenced to imprisonment for the remainder of their lives. In two of the remaining cases, *Ruzindana* and *Gérard Ntakirutimana*, the Tribunal passed a sentence of 25 years' imprisonment. In only five instances, where the accused was found guilty of genocide, have sentences of less than 25 years' imprisonment been imposed. These include the sentences of Semanza, who received 15 years for complicity in genocide, Imanishimwe, who was sentenced to 15 years' imprisonment for genocide, and Elizaphan Ntakirutimana, who was sentenced to 10 years' imprisonment for genocide. The other two cases are Omar Serushago, who

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[426] As recalled recently by the ICTY Appeals Chamber in the *Babić* Sentencing Appeal, para. 43.
[427] A "family circumstance" that could properly be considered in mitigation is, for instance, the fact that the convicted person is the parent of children of very young age (See *Kunarac et al*. Appeal Judgement, para. 362; *Erdemović* Sentencing Judgement, para. 16; *Tadić* Sentencing Judgement, para. 26).
[428] Prosecution Appeal Brief, para. 37.
[429] Trial Judgement, para. 353.
[430] Prosecution Appeal Brief, paras. 40-46.
[431] Prosecution Appeal Brief, para. 45.
[432] See Trial Judgement, para. 345 ("The seriousness of the crimes committed, particularly genocide, but also the particularly atrocious rapes that some victims suffered, further constitute aggravating circumstances."). It bears noting that the gravity of the offence is the core basis for sentencing, rather than an aggravating factor. Here, however, there is no indication either that the Trial Chamber failed to account adequately for this factor or that it impermissibly "double-counted" it. See *Deronjić* Sentencing Appeal, para. 106.
[433] Trial Judgement, para. 354.
[434] Prosecution Appeal Brief, para. 47, referring to *Češić* Sentencing Judgement, para. 26.
[435] Prosecution Appeal Brief, paras. 53-57, referring to *Stakić* Trial Judgement, paras. 936, 937.

received 15 years' imprisonment, and Ruggiu, who received 12 years' imprisonment for incitement to commit genocide, following their guilty pleas.[436]

It further notes that, contrary to the present case, exceptional circumstances in mitigation were found in the cases of Omar Serushago and Georges Ruggiu in that they both pleaded guilty, were found to have co-operated substantially with the Prosecutor, and had expressed genuine remorse for their participation in the offences.[437] Similarly, Élizaphan Ntakirutimana received only ten years of imprisonment because of mitigating factors including his advanced age and fragile health.[438]

203. In response, the Appellant refers to the Penal Code of Rwanda, which he submits provides that no sentence for a fixed term shall be longer than twenty years or thirty years in case of several offences.[439] The Appellant also refers to the *Semanza* Trial Judgement, where the Trial Chamber stated that it was not convinced that the accused in that case deserved life imprisonment.[440] The Appellant further argues that the comparative analysis engaged in by the Prosecution is not helpful because the differences between the various cases are more important than the similarities and because the sentence must be individualized.[441]

204. The Appeals Chamber is of the view that, although the Trial Chamber correctly noted that the sentence should first and foremost be commensurate with the gravity of the offences and the degree of liability of the convicted person, it then disregarded these principles in imposing a sentence of only thirty years' imprisonment on the Appellant. The Appeals Chamber recalls that the Appellant played a central role in planning, instigating, ordering, committing, and aiding and abetting genocide and extermination in his *commune* of Rusumo, where thousands of Tutsis were killed or seriously harmed.[442] The Trial Chamber also found the Appellant guilty of instigating rape as a crime against humanity,[443] noting that he had exhibited particular sadism in specifying that where victims resisted, they should be killed in an atrocious manner.[444] The Appellant was thus convicted of extremely serious offences. Moreover, unlike in most of the other cases in which those convicted for genocide have received less than a life sentence, there were no especially significant mitigating circumstances here.[445] Instead, the Appellant was a primary player, a leader in the *commune* who used his power to bring about the brutal massacre and rape of thousands.

205. The Appeals Chamber is, as noted above, fully cognizant of the margin of discretion to which Trial Chambers are entitled in sentencing. This discretion is not, however, unlimited. It is the Appeals Chamber's

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[436] Prosecution Appeal Brief, para. 50 (internal citations omitted). Since the Prosecution filed its Appeal Brief, the Appeals Chamber has rendered Judgements in the *Ntakirutimana*, *Semanza*, *Kajelijeli*, and *Kamuhanda* cases. It affirmed the sentences of both appellants in the *Ntakirutimana* case. *Ntakirutimana* Appeal Judgement, Disposition. In the *Semanza* Appeal Judgement (See Disposition), the Appeals Chamber, *inter alia*, entered a new conviction for genocide, and increased the sentence to a total of thirty-five years (twenty-five of which were for genocide); this sentence reflected a reduction the Appeals Chamber imposed for violations of Mr. Semanza's pre-trial rights. In the *Kajelijeli* Appeal Judgement (See para. 325), the Appeals Chamber maintained the convictions for genocide and extermination (except insofar as they were also based on superior responsibility), but reduced the sentence from life imprisonment to forty-five years' imprisonment because it found that Mr. Kajelijeli's fundamental rights were seriously violated during his arrest and detention. In the *Kamuhanda* Appeal Judgement (See para. 365), the Appeals Chamber, *inter alia*, affirmed the convictions for genocide and extermination and affirmed the life imprisonment sentences imposed by the Trial Chamber.

[437] Prosecution Appeal Brief, para. 55, referring to *Serushago* Sentencing Judgement, paras. 31-42; *Ruggiu* Sentencing Judgement, paras. 52-80.

[438] Prosecution Appeal Brief, para. 56, referring to *Ntakirutimana* Trial Judgement, para. 906.

[439] Gacumbitsi Response, paras. 89, 90.

[440] Gacumbitsi Response, para. 92, referring to *Semanza* Trial Judgement, para. 559. However, the Appellant does not explain the similarities between Semanza's case and his own.

[441] Gacumbitsi Response, paras. 93 (referring to *Čelebići* Case Appeal Judgement, paras. 717, 719), 94, 95.

[442] Trial Judgement, para. 174.

[443] Trial Judgement, paras. 321-333.

[444] Trial Judgement, paras. 224, 325.

[445] Although not every individual convicted of genocide or extermination has been sentenced to life imprisonment (for instance, a fixed term of imprisonment was imposed in cases where the convicted person had pleaded guilty (See *Serushago* Sentencing Judgement, upheld on appeal (*Serushago* Appeal Judgement); *Ruggiu* Sentencing Judgement) or where the pre-trial rights of the convicted person had been infringed (See *Semanza* Appeal Judgement, para. 389 and Disposition; *Kajelijeli* Appeal Judgement, paras. 324, 325) and in two other cases (*Kayishema and Ruzindana* Trial Judgement, Sentence, para. 28, upheld on appeal (*Kayishema and Ruzindana* Appeal Judgement, para. 372); *Ntakirutimana* Appeal Judgement, para. 564 and Disposition)), the Appeals Chamber considers that the Appellant's case is not comparable to these cases.

prerogative to substitute a new sentence when the one given by the Trial Chamber simply cannot be reconciled with the principles governing sentencing at the Tribunal. This is such a case. The Appeals Chamber concludes that in light of the massive nature of the crimes and the Appellant's leading role in them, as well as the relative insignificance of the purported mitigating factors, the Trial Chamber ventured outside its scope of discretion by imposing a sentence of only thirty years' imprisonment. The Appeals Chamber therefore upholds this sub-ground of the Prosecution's appeal.

6. Implications of the Appeals Chamber's Findings on the Sentence

206. Furthermore, the Appeals Chamber has held that the Appellant was responsible for ordering the acts of genocide, extermination, murder, and rape committed not only by the communal police, but also by the other perpetrators who participated in the attacks at Nyarubuye Parish and at Kigarama.[446] Additionally, the Appeals Chamber has found by majority, Judge Güney and Judge Meron dissenting, that the Appellant aided and abetted the murders of two of his Tutsi tenants, Marie and Béatrice, whom he expelled from their home and who were killed later that night. Consequently, it will enter a new conviction for murder as a crime against humanity under Count 4 of the Indictment.[447] The Appeals Chamber has also found that the Trial Chamber erred in failing to give proper weight to the gravity of the crimes committed by the Appellant and to his central role in those crimes. The Appeals Chamber considers that the maximum sentence is warranted in the Appellant's case and that there are no significant mitigating circumstances that would justify imposing a lesser sentence than imprisonment for the remainder of his life.

IV. Disposition

207. For the foregoing reasons, THE APPEALS CHAMBER,

PURSUANT to Article 24 of the Statute and Rule 118 of the Rules;

NOTING the written submissions of the parties and their oral arguments presented at the hearing on 8 and 9 February 2006;

SITTING in open session;

CORRECTS, *proprio motu*, the reference to Articles 2 (3) (a) and 2 (3) (b) of the Statute in paragraphs 293 and 295 of the Trial Judgement to Articles 2 (2) (a) and 2 (2) (b) of the Statute;

DISMISSES the Appellant's appeal in its entirety;

ALLOWS, in part, by majority, Judge Güney and Judge Meron dissenting, the Prosecution's second ground of appeal, FINDS that the Appellant aided and abetted the murder of his Tutsi tenants, Marie and Béatrice, and ENTERS a conviction for murder as a crime against humanity under Count 4 of the Indictment;

ALLOWS, in part, the Prosecution's sixth ground of appeal and HOLDS that the Appellant is responsible for ordering the crimes committed by all attackers at Nyarubuye Parish on 15, 16, and 17 April 1994 and on 14 April 1994 at Kigarama;

ALLOWS, in part, the Prosecution's first ground of appeal and QUASHES the sentence of thirty years' imprisonment imposed on the Appellant by the Trial Chamber;

DISMISSES the Prosecution's appeal in all other respects;

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[446] See *supra* section III.E.
[447] See *supra* section III.A.

ENTERS a sentence of imprisonment for the remainder of the Appellant's life, subject to credit being given under Rule 101 (D) of the Rules for the period already spent in detention from 20 June 2001;

RULES that this Judgement shall be enforced immediately pursuant to Rule 119 of the Rules;

ORDERS, in accordance with Rules 103 (B) and 107 of the Rules, that Sylvestre Gacumbitsi is to remain in the custody of the Tribunal pending his transfer to the State in which his sentence will be served.

Done in English and French, the English text being authoritative.

Presiding Judge Shahabuddeen appends a separate opinion.
Judge Liu and Judge Meron append a separate opinion.
Judge Schomburg appends a separate opinion.
Judge Güney appends a partially dissenting opinion.
Judge Meron appends a partially dissenting opinion.

Signed on the 28th day of June 2006 at The Hague, The Netherlands, and issued this 7th day of July 2006 at Arusha, Tanzania.

[Signed] : Mohamed Shahabuddeen ; Mehmet Güney; Liu Daqun ; Theodor Meron ; Wolfgang Schomburg

V. SEPARATE OPINION OF JUDGE SHAHABUDDEEN

A. Preliminary

1. Mr. Murefu was an old man; he was a teacher. He was also a Tutsi. At the beginning of these sad happenings, he found himself a refugee among fellow Tutsi refugees; they had hurried to a church in search of protection from a looming peril to life and limb. Mr. Murefu made a desperate attempt to avert the threatened calamity; he made a protest to the appellant, a Hutu holding high office in the community. Mr. Murefu asked why the Tutsis were being killed. The appellant said he had no answer to give, because "the Tutsi hour had come". He took a machete from an *Interahamwe* and slew Mr. Murefu, striking him on the neck.[1] Then events picked up speed; an attacking crowd was being led by the appellant; thousands of Tutsis were killed. But, citing only one of these killings, namely, that of Mr. Murefu, the Trial Chamber convicted the appellant of "committing" genocide.

2. The appellant appeals. The Appeals Chamber dismisses the appeal. It gives two grounds for its decision. First, it holds that, there being no mention in the indictment of the slaying by the appellant of Mr. Murefu, this circumstance constituted a defect in the indictment which precluded evidence of the slaying from being given. However, it also holds that the defect was cured by the prosecution's subsequent submissions. Evidence of the slaying could therefore be given; and such evidence established that the appellant "committed" genocide. Second, the Appeals Chamber holds that the appellant's other actions as pleaded in the indictment and proven at trial, including his personal supervision of the massacre of refugees sheltering at the church, constituted "committing" genocide, even apart from the killing of Mr. Murefu.

3. Though the dismissal of the appeal is unanimous, these two grounds for the dismissal are supported by different majorities. I form part of the majority in both cases. But, in part B I explain that I would hold, in the alternative, that the indictment was not defective with respect to the killing of Mr. Murefu and that there was therefore nothing to be cured. In part E, I argue that, in any event, the appellant should have been convicted

[1] Trial Judgement, para. 112, evidence of witness TAQ. The Trial Chamber found that the witness was credible. See *ibid*., para. 145.

for committing genocide through participation in a joint criminal enterprise. As to both of these points, the Appeals Chamber holds the indictment to be defective. In so doing, in my respectful view, it imposes too formulaic a set of pleading requirements on the prosecution.

4. Also, I propose to consider some other issues on which judicial opinion is divided. In part C, I shall deal with the correctness of the first holding mentioned above, concerning "curing", that is to say, assuming that it has to be dealt with. In part D, I shall deal with the correctness of the second holding mentioned above, concerning the appellant's other actions at the genocide. Turning to an appeal by the prosecution, I shall deal in part F with the correctness of a holding which the Appeals Chamber makes on aiding and abetting.

5. My examination of the foregoing leads me to support the conclusion reached by the Appeals Chamber. I disagree with some of its findings, but the disagreement in no way impairs that support. On the contrary, I consider that the judgement of the Appeals Chamber could be strengthened in the areas in which I disagree. Some repetition will be inevitable, but the endeavour will be to keep duplication to a minimum.

B. The indictment was not defective as it stood

6. The appellant did not raise any question that he did not understand that the indictment charged him with "committing" genocide; no such issue is before the court. The question before the court is whether, in proof of "committing" genocide, the prosecution is entitled to adduce evidence that the appellant killed Mr. Murefu,[2] regard being had to the circumstance that that killing is not mentioned in the indictment. The Appeals Chamber answers in the negative. I am of the opposite view.

7. With respect, it appears to me that the major difficulty with the Appeals Chamber's answer is that it does not adequately distinguish between admissibility of evidence of the killing of Mr. Murefu to prove murder and admissibility of that evidence to prove genocide. Although murder, as a crime against humanity, must be committed pursuant to an attack against a civilian population, it does not require proof of intent to destroy a protected group. It consists, fundamentally, of the killing of individuals. Accordingly, the deaths of the individual victims are elements of the crime and have to be referred to in the indictment. Because the killing of Mr. Murefu was not mentioned in the indictment for murder, evidence of it was correctly excluded by the Trial Chamber on the charge for that crime.[3]

8. By contrast, the essence of the crime of genocide is an intent to destroy a protected group.[4] The persons in the group may be legion. It is settled jurisprudence that, in the case of a mass killing, individual victims do not have to be specifically referred to in the indictment. If the indictment does refer to them, it is only by way of illustration of the crime; there may be hundreds of illustrations. The Appeals Chamber indeed embraces a similar logic when, examining the extermination count, it says that, "[a]though" the indictment "lists certain specific victims, this is only by way of example;"[5] failure to give evidence of their deaths did not invalidate the charge.

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[2] As to the question whether it is enough to rely on one killing to prove genocide, it has been suggested that "[t]he reference to 'members of the group' as victims of a genocidal act in paragraph (a) of Article 2 of the Genocide Convention means that the act itself must involve the killing of at least two members of the group." Khan, Dixon and Fulford (eds.), *Archbold: International Criminal Courts: Practice, Procedure and Evidence*, 2nd ed. (2005), p. 676, paras. 13-32. But that Seems at variance with the *Semanza* Trial Judgement, para 316, in which the Trial Chamber observed that "there is no numeric threshold of victims necessary to establish genocide". Schabas expresses the view that "from a grammatical standpoint, the phrase can just as easily apply to a single act of killing" and that "[c]learly, the quantitative dimension, that genocide involves the intentional destruction of a group 'in whole or in part,' belongs to the mental and not the material element…" William A. Schabas, *Genocide in International Law* (Cambridge, 2000), p. 158. The view that a single killing could suffice if the other conditions are met would Seem to accord with the thinking of the Appeals Chamber in this case.

[3] Trial Judgement, paras. 176, 317-320.

[4] See, *inter alia*, Statute, art. 2 (2) (referring to "intent to destroy" a "group, as such"); *ibid*. para. (a) (referring to "killing members of the group").

[5] Judgement of the Appeals Chamber, para. 89.

9. What must be borne in mind is the distinction between the material facts necessary to establish an offence and the evidence adduced to prove those material facts.[6] The material facts must be pleaded, the evidence need not.[7] When an indictment alleges genocide, proof of any one killing is not a *material fact* as it would be in a case of murder; it is *evidence* of a material fact, namely, that the intent of the accused was the destruction of a group, as a group. Each individual killing does not have to be specifically referred to in the indictment.

10. In sum, it was not necessary to mention the killing of Mr. Murefu in the count of the indictment relating to genocide as if the appellant was being charged in that count with murdering him. The Trial Chamber did not err in admitting the evidence of his death on the charge for genocide though excluding it on the charge for murder. The Appeals Chamber is of a different view.[8] I respectfully disagree with it.

C. If there was any defect in the indictment concerning Mr Murefu, it was cured so as to make evidence of his killing admissible

11. Thus far, I have proceeded on the basis that the killing of Mr Murefu was evidence, not a material fact, and accordingly was not required to be pleaded in the indictment under the normal rules which say that matters of evidence do not have to be pleaded. But there could be an argument that, though it related to evidence, the killing of Mr Murefu had to be referred to in the indictment. The argument is as follows:

12. Fairness is a wide and fundamental rule; it goes beyond the normal rules regulating the contents of an indictment; it requires that the accused be put in a position to investigate a specific incident from the beginning of the case even if it relates to evidence and not to a material fact. The killing of Mr Murefu was a specific incident; moreover, it was the foundation of the Trial Chamber's conclusion as to guilt. Therefore, even if the killing concerned evidence, it had to be referred to in the indictment. Not having been so referred to, the defence did not have due notice of it and accordingly the prosecution could not adduce evidence of it.

13. It is not necessary to express an opinion on the validity of that argument. Assuming that for any reason the indictment was defective for not mentioning the killing of Mr Murefu, any such defect was properly cured.

14. The prosecution gave the defence a copy of the written statement of witness TAQ[9], dated 29 November 2000; that statement, though otherwise redacted, mentioned the killing of Mr. Murefu by the appellant. The prosecution said that the redacted statement was given to the defence on 14 June 2001. That would have been six days before 20 June 2001 when the appellant was arrested. But there was no argument about the precise date, and at any rate no contention that it was not provided in advance of the trial, which began nearly two years later. Additionally, on the eve of the trial, a summary of the anticipated evidence of witness TAQ was annexed to the Pre-Trial Brief of the prosecution which was filed on 16 May 2003.[10] The summary specifically stated that it related to paragraphs of the indictment (4, 15, 16 and 17) which concerned genocide. And although it did not specify a mode of liability, the Appeals Chamber's cases do not suggest that it needed to do so, nor was there any lack of clarity in any event. It is obvious that to physically kill a man because he is Tutsi, in connection with an ongoing genocidal campaign, is to "commit" genocide; it is not mere instigation or evidence of *mens rea*.

15. Thus, witness TAQ was going to be asked to testify on the killing of Mr. Murefu as part of the case for the prosecution, *inter alia*, on genocide, and the accused was told that before 28 July 2003 when the case began. When the evidence was eventually given – by both witness TAQ and witness TAO – defence counsel naturally did not object on the ground that it exceeded the scope of the indictment in that it related to genocide. This lack of objection is significant because it must have been apparent to defence counsel that the

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[6] *Kupreskić* Appeal Judgment, para. 88.
[7] .Ibid.
[8] Judgement of the Appeals Chamber, para. 54.
[9] Judgement of the Appeals Chamber, para. 55.
[10] *Ibid*., paras. 55, 56.

evidence of the killing of Mr. Murefu was inextricably bound up with the evidence of the various actions which went to constitute genocide.[11]

16. The testimony of witness TAO included this statement by him:

> When they started to sing, Gacumbitsi said out aloud – he asked the Hutu that were there to move away from the Tutsi, because the Tutsis' hour had come, and the *Interahamwe* started to sing, "Let's exterminate them".[12]

This showed that evidence was being given in proof of an intent to commit genocide. Witness TAO also testified that, *inter alia,* the appellant "took a machete from the hands of someone standing next to him and cut – slashed at one of the elderly persons who was there, and another elderly person who was also cut up. And he told the policemen, 'Open fire,' and they opened fire. And those who had machetes started to slash and cut up their victims".[13] Other evidence of this kind was given.[14] The evidence of witness TAQ[15] showed that Mr. Murefu had asked the appellant: "What have the Tutsis done? Why are they being killed?"[16] Also, according to witness TAQ, three persons asked the appellant, "You as a *responsable*, the Tutsis are being killed. Why are they being treated in this manner? What did they do to deserve this?"[17] The Trial Chamber considered the evidence of witnesses TAQ and TAO to be credible.[18]

17. Defence counsel cross-examined witnesses TAQ and TAO extensively but did not object to the fact that their evidence (concerning the killing of Mr. Murefu, as so given) went outside of murder and covered matters relating to genocide.[19] An accused is expected to object at the time evidence exceeding the scope of the indictment is introduced at trial.[20] In a no-case submission, defence counsel objected to the admissibility of the evidence relating to the killing of Mr. Murefu but only in relation to murder. The answer of the prosecution was that it did "not seek a conviction for murder on these facts… At the close of trial the Prosecutor will be relying on these murders as evidence in support of other charges…". The Appeals Chamber correctly points out that, in his "briefing", the appellant "repeatedly" brought to the attention of the Trial Chamber the fact that Mr. Murefu's death had not been mentioned in the indictment, but, as the Appeals Chamber also recognises, this was "in the context of murder alone and not genocide".[21] The inference is warranted that the appellant did not object to admissibility of the evidence of the killing of Mr. Murefu in relation to genocide because he recognised that the defence had been given due notice that witness TAQ's evidence of Mr. Murefu's killing would be part of the evidence of genocide.

18. In his "Closing Arguments", dated 9 February 2004, the appellant contended that the evidence relating to the killing of Mr Murefu was "mentioned for the first time in court".[22] That concerned murder. If it concerned genocide, it did not tell the whole story; it was too weak to be worthy of serious consideration. The defence had advance notice that the evidence would be given, and that it concerned genocide.

19. The summary provided by the prosecution to the defence in this case was materially indistinguishable from the summary of witness testimony which was provided to the defence in *Naletilić and Martinović* and which the Appeals Chamber found sufficient to cure a defect in the indictment in that case.[23]

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[11] See T. 29 July 2003. pp. 52-53; T. 30 July 2003, pp. 52-54; T. 31 July 2003, pp. 15-16.
[12] T. 30 July 2003, p. 54.
[13] Ibid.
[14] See, e.g.,Trial Judgement, para. 113.
[15] See T. 29 July 2003, pp. 42-71, T. 30 July 2003, pp. 1-48.
[16] See T. 29 July 2003, p. 52.
[17] See T. 30 July 2003, p. 20.
[18]See Trial Judgement, para. 145.
[19] See witness TAQ's evidence in T. 29 July 2003, pp. 42-71 and T., 30 July 2003, pp. 1-48, and witness TAO's evidence in T. 30 July 2003, pp. 46-52, and T. 31 July 2003, pp. 1-19.
[20] Judgement of the Appeals Chamber, paras. 51, 52, 54.
[21] *Ibid*., para. 54.
[22] Defence Closing Brief, ICTR-2001-64-T, 9 February 2004, p. 12.
[23] *Naletilić and Martinović* Appeal Judgement, paras. 27, 45, 62-65. It bears noting that, while with respect to an incident involving the beating of a man called "the Professor", the information provided by the Chart of Witnesses in the *Naletilić and Martinović* case was complemented by a reference to that incident in the Prosecution's Opening Statement, this was not the case with respect to another incident involving the unlawful transfer of prisoners, described at paragraphs 62 through 65 of the Appeals Judgement in that

The holding in that case was correct, and the Appeals Chamber is right to follow it here. In my opinion, any vagueness in the indictment was sufficiently cured. Evidence that the appellant killed Mr Murefu was properly admitted on the genocide charge. I respectfully agree with the Appeals Chamber in concluding to this effect.

D. The Trial Chamber made other findings of fact which showed that the appellant committed genocide

20. I agree with the Appeals Chamber that the findings made by the Trial Chamber as to the appellant's other conduct showed that he "committed" genocide. Apart from the killing of Mr Murefu, it is useful to recall briefly just what the appellant did.

21. The Trial Chamber found, generally, that the appellant was not at any remove from the crime scene; he was physically present at the action. Specifically, it found that, being there, he "gave a signal for the massacres to commence"[24] and "ordered Hutu refugees to separate themselves from the Tutsi"[25] – a step indicating an intention to commit the genocide which immediately followed. Indeed, as the Trial Chamber found, he "directed"[26] the attacks, he "personally took part"[27] in them, he "led attacks against Tutsi civilians by example"[28], he "participated in the attack on Nyarubuye Parish on 15 and 16 April 1994"[29], and he "played a leading role in conducting and, especially, supervising the attack"[30].

22. A person who engaged in the attacks in those ways would plainly be guilty of "committing" genocide. Justice would not be served by holding that this view does not apply to the appellant as the principal actor; it would be a misunderstanding and misapplication of the law to say that, on those findings of fact made by the Trial Chamber, he was guilty of "ordering" or "instigating" but not of "committing" genocide. He not only "ordered" or "instigated" but actually participated in the "commission" of the crime. Those acts were before the Appeals Chamber and both sides addressed them.

23. Questions have been raised on the Trial Chamber's observation that "'[c]ommitting' refers generally to the direct and physical perpetration of the crime by the offender himself."[31] Two glosses may be put on the Trial Chamber's observation.

24. First, attention is invited to the word "generally" in the Trial Chamber's statement. It is accepted that the statement does not deny that there can be a "committing" where the accused acts through a joint criminal enterprise. However, there are not two rules, but one; it is not the position that non-JCE cases are governed by the "direct and physical perpetration" rule and JCE cases by another rule which, mysteriously, exempts them from the application of the "direct and physical perpetration" rule. The matter always turns on whether there is "direct and physical perpetration". What happens is that, in the circumstances of a case of JCE, there is a "direct and physical perpetration" even though the accused is not in personal contact with the victim: the JCE is his instrument. But I see no reason why the rationale of that view has to be limited to that situation. Why, for example, can there not be "direct and physical perpetration" where the accused perpetrates his crime through the instrumentality of another, even though no JCE is involved and even though there is no personal contact between the accused and the victim? To say that in such a case the proper charge is one of "ordering" and not one of "committing" imposes too great a strain on the legal apparatus. That may be

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case. With respect to the latter incident, the ICTY Appeals Chamber specifically held that the Opening Statement and other submissions did not provide information that remedied the defect in the indictment, and that it was therefore necessary to rely on "the information in the Prosecution Chart of Witnesses alone". *Ibid*., para. 63. Finally, I also note that the Chart of Witnesses in *Naletilić and Martinović* did not specify which mode of liability was being pleaded.

[24] Trial Judgement, para. 168.

[25] Ibid.

[26] *Ibid*., paras. 169, 171,172.

[27] *Ibid*., para. 172.

[28] *Ibid*., para. 173.

[29] *Ibid*., para. 261.

[30] Ibid.

[31] Trial Judgement, para. 285, footnote omitted; See *Kayishema and Ruzindana* Appeal Judgement, para. 187; *Tadić* Appeal Judgement, para. 188.

defensible in some circumstances but not in all; it depends on the immediacy of the relationship between the accused and the result of his action. In any event, it is to be observed that in this case the Trial Chamber found that the appellant "personally took part"[32] in the attacks and in other ways directly participated in them. Why that should give difficulty in finding that he engaged in the "direct and physical perpetration" of the crime of genocide resulting from the attacks is not clear to me.

25. Second, I agree with the Appeals Chamber that proof of personal killing is not required to show "the direct and physical perpetration of the crime by the offender himself."[33] To hold the contrary will be too narrow. Even in relation to a charge of genocide by "killing members of the group", the "direct and physical perpetration" test can be fulfilled even if it is not proved that the appellant himself killed anyone.

26. A more important question is whether the Appeals Chamber may (on the Trial Chamber's findings of the appellant's participation in respects other than the killing of Mr Murefu) make a determination that the appellant committed genocide in view of the fact that the Trial Chamber did not make a similar determination on those findings. In holding in paragraph 285 of its judgement that the appellant committed genocide, the Trial Chamber cited only the killing of Mr. Murefu, stating that the "Trial Chamber therefore finds that [the appellant] committed genocide…". But a microscopic reading of the Trial Chamber's judgement would not be appropriate. The Appeals Chamber has previously held that a conclusion of guilt would be upheld where other inferences sustaining guilt would reasonably have been drawn at trial.[34] In this case, the factual findings of the Trial Chamber require the Appeals Chamber to determine that the appellant was guilty of committing genocide.

27. The last question is this: if the Appeals Chamber were so to determine, would there be a breach of the requirement for the Trial Chamber to give reasons? The Trial Chamber gave only one reason for holding that the appellant committed genocide, namely, the killing of Mr Murefu. Can it be argued that an additional reason cannot now be given? It seems necessary to bear in mind that "[a]n appeal lies from the judgment, not the reasons for judgment".[35] True, the Trial Chamber did not give the additional reason. But, where the additional reason is apparent from the record, that it was not previously given is not relevant; reliance on it does not cause the appellant prejudice. Accordingly, the Appeals Chamber is right to affirm the Trial Chamber's judgement that the appellant committed genocide on the basis of his conduct other than in respect of the killing of Mr Murefu.

E. In any event, the appellant was responsible for genocide through group criminality

1. Joint Criminal Enterprise

28. Evidence of the appellant's responsibility for genocide under joint criminal enterprise ("JCE") was admissible if JCE was pleaded in the indictment so as to give the appellant fair notice of the basis on which he was charged. The Trial Chamber found that it "was not pleaded clearly enough to allow the Accused to defend himself adequately,"[36] and the Appeals Chamber has in substance upheld that finding.[37] I respectfully disagree.

29. JCE is not mentioned specifically in the indictment. However, I agree with the Appeals Chamber that the absence of the words "joint criminal enterprise" from the indictment "does not in and of itself indicate a defect. … It is possible that other phrasings might effectively convey the same concept. The question is not whether particular words have been used, but whether an accused has been meaningfully 'informed of the

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[32] Trial Judgement, para. 172.
[33] Judgement of the Appeals Chamber, para. 60.
[34] *Kordić and Čerkez*, Appeal Judgement, para. 288. And See the authorities cited by Judge Weinberg de Roca in footnote 9 of her separate opinion in *Kordić and Čerkez*, Appeal Judgment, pp. 301 *et seq*.
[35] *The Queen v. Sheppard*, 2002 SCC 26, Binnie J., para. 4.
[36] Trial Judgement, para. 289.
[37] Judgement of the Appeals Chamber, paras. 172, 174.

nature of the charges' so as to be able to prepare an effective defence."[38] To rely on JCE, an indictment need not plead the doctrine *ipsissima verba* if the intention is apparent.

30. In *Tadić*,[39] no special formulae were used; the indictment simply presented the facts necessary to make out a case under the theory. It was not complained that this was insufficient; in my view it was sufficient. An indictment corresponding in substance to the requirements of JCE would have been valid if filed before the elements of the doctrine were assembled by the Appeals Chamber in *Tadić* under the rubric "joint criminal enterprise"; such an indictment would be valid if filed thereafter even though the indictment made no reference to those terms.

31. So far as formulae are concerned, two phrases come to mind: "acting in concert with others" and "common purpose" (or its close equivalents, such as "common scheme, strategy, or plan"). As to "acting in concert with others", in *Brđanin and Talić*[40] the Trial Chamber pointed out that the problem in that case was that the accused were charged "individually or in concert in the operations relating to the conduct of the hostilities …".[41] In the opinion of the Trial Chamber, that phrase could mean "that each of the accused acted individually and *in concert with each other* ..."[42]. The Trial Chamber implied that a different consequence would have followed if the indictment had "pleaded that the two accused had acted 'in concert with others'".[43] In the instant case, paragraph 25 of the indictment expressly speaks of the appellant as "acting in concert with others".

32. As to "common purpose", for the reasons given, in *Brđanin and Talić* the Trial Chamber held that the phrase "individually or in concert" was ambiguous, but it stated that if "the prosecution seeks to rely upon the 'accomplice' liability of *acting in concert as part of a common purpose or design*, *or as part of a common criminal enterprise,* held by the Appeals Chamber to fall within Article 7 (1), then this should be made clear."[44] This shows that the Trial Chamber considered that the words "acting in concert *as part of a common purpose or design"*, as opposed to "acting in concert" only, would have been sufficiently clear.

33. I do not propose to go through the other cases *seriatim*. My conclusion from a review of them is that it is enough if the indictment alleges in substance that the accused was "acting in concert with others" in pursuit of a "common purpose". Both expressions, or their equivalents,[45] were used in this case. Nothing more would appear to be required to plead a joint criminal enterprise. If any cases are really to the contrary, they cannot be correct.

34. In fact, the Appeals Chamber acknowledges that the "language [used in paragraph 25 of the indictment in this case] is similar to that employed in *Tadić* and seems to encompass the critical elements of a JCE charge".[46] However, the Appeals Chamber finds that the meaning of that paragraph was rendered confusing by the later statement in that paragraph that the appellant participated in the action "by his own affirmative acts or through persons he assisted or by his subordinates with his knowledge and consent".[47]

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[38] *Ibid*., para. 165, footnotes omitted. Prosecuting counsel Ms Onsea obviously understood the jurisprudence to be requiring the indictment to "mention joint criminal enterprise as a term" when she said, "[W]e acknowledge that the indictment, as such, is vague in light of recent jurisprudence of the Appeals Chamber in that it does not plead JCE, as such…". See Transcript of the Appeals Chamber, Thursday 9 February 2006, p. 54.
[39] *Tadic* Appeal Judgement, 15 July 1999.
[40] *Brđanin and Talić*, Case N°IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001.
[41] *Ibid*., para. 12.
[42] Ibid.
[43] Ibid.
[44] *Ibid*. (emphasis added, citing *Tadić* Appeal Judgement, paras. 185-229).
[45] Rather than "common purpose", the actual expression used (in the French version of the indictment, which is the relevant one) is "*d'un plan, d'une stratégie ou d'un dessein communs*". These expressions, however, are functionally equivalent, as made evident by paragraph 188 of the *Tadić* Appeal Judgement, which uses the expression "*dessein commun*". See also *Prosecutor v. Krnojelac*, Case N°IT-95-25, *Décision relative à la forme du deuxième acte d'accusation modifié*, 11 May 2000, paras. 9, 10. (holding that the expression "*dessein commun*" is equivalent to "*entreprise criminelle commune*", and also using the phrase *plan commun* as a synonym).
[46] Judgement of the Appeals Chamber, para. 172.
[47] Ibid.

With respect, I do not find this statement confusing at all. It merely pleads, as required by the Appeals Chamber's jurisprudence, the "nature of [the appellant's] participation in the enterprise."[48] It does not obscure the plain meaning of the allegation in the indictment that the appellant acted "in concert with others" in support of a "common scheme, strategy or plan to exterminate the Tutsi".

35. As to the category of JCE on which the prosecution intended to rely, it is true that the indictment did not expressly indicate this as is seemingly required by the Appeals Chamber in *Kvočka*.[49] But that case does not exclude statements by implication, and I do not consider that this elementary rule is displaced by general propositions of the law applicable to indictments, as set out in that case. The test remains, as the Appeals Chamber says, "whether an accused has been meaningfully 'informed of the nature of the charges' so as to be able to prepare an effective defence."[50] Here the material facts presented in the indictment naturally indicated the basic or first category of JCE.[51] The prosecution sought to hold the appellant responsible for crimes perpetrated by a group of which he was a member, that crime being within a purpose common to all members of the group. The aim of the prosecution was fully within the first category of JCE. The prosecution did not seek to impose liability for crimes that, though foreseeable, were beyond the group's objective, as permitted by the third category of JCE; nor did the allegations fall into the second category of an ongoing "system" of ill-treatment. So it must have been apparent to the appellant that the first category was intended. In these circumstances, to assert that it was the duty of the prosecution to state the exact category into which the case fell looks procrustean in practice and excessive in law.

36. As to the necessary material facts to support the case being brought under the first category of JCE, the indictment included a reference to "the purpose of the enterprise, the identity of the participants, and the nature of the accused's participation in the enterprise".[52] All three of these matters were pleaded. First, the common criminal purpose is specified in paragraph 25 of the indictment as being to "exterminate the Tutsis".[53] Second, the other participants in the JCE are identified in paragraph 22 of the indictment as "local administrative official [*sic*] in Kibungo *préfecture,* including *bourgmestres* and *conseillers de secteur*".[54] Third, as noted above, paragraph 25 of the indictment states the nature of the appellant's participation; this was further detailed in a number of other paragraphs of the indictment.[55]

37. As to the state of the law in the ICTR, it is recognised that joint criminal enterprise was not applied in this Tribunal until after its elucidation by the ICTY Appeals Chamber. For some time now, however, the phrasing used in paragraphs 22 and 25 of the indictment has had a firm foundation in the jurisprudence of the ICTR.[56] It could not be argued that one of the central issues addressed in the *Tadić* Appeal Judgement – the first judgement of the ICTY Appeals Chamber on an appeal from a conviction – could have escaped the notice of reasonably diligent defence counsel in an ICTR case,[57] especially given that the two Appeals Chambers have the same judges.

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[48] See *Kvočka et al*. Appeal Judgement, para. 28.
[49] See *Kvočka et al*. Appeal Judgement, paras. 28, 42.
[50] Judgement of the Appeals Chamber, para. 165, footnotes omitted.
[51] See *Krnojelac* Appeal Judgement, para. 144 (affirming the Trial Chamber's decision not to consider an extended form of JCE liability because it had not been adequately pleaded).
[52] *Kvočka* Appeal Judgement, para. 28.
[53] See also Indictment, paras 3-4 (detailing the objectives of the genocide).
[54] See also Indictment, paras. 5-12 (detailing interactions between the appellant and these persons). Although not all of the members of the JCE are identified by name, such precision is not necessary. See *Cermac*, Decision on Ivan Cermak's and Mladen Markac's Motion on Form of Indictment, IT-03-73-PT, 8 March 2005, para. 27; *Krstić* Appeal Judgment, para. 143.
[55] See Indictment, paras. 4-24.
[56] See, e.g., *Ntakirutimana* Appeal Judgement, fn. 783 (noting that the terminology "common purpose" is interchangeable with "joint criminal enterprise") and para. 468; *André Rwamakuba v. Prosecutor*, Case N°ICTR-98-44-AR72-4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004, para. 6 and fn. 13 (referring to "common purpose" and "common design") and para. 31; *Joseph Nzirorera v. Prosecutor*, Case N°ICTR-98-44-AR72.3, Decision on Validity of Appeal of Joseph Nzirorera Regarding Joint Criminal Enterprise Pursuant to Rule 72 (E) of the Rules of Procedure and Evidence, 11 June 2004, paras. 9-10 (quoting an indictment that refers to a "common plan, strategy, or design" and subsequently refers back to that plan, strategy, or design as "such joint criminal enterprise").
[57] See Judgement of the Appeals Chamber, para. 172.

38. The findings of the Trial Chamber are sufficient to establish the appellant's liability under the first category of JCE. These findings have been discussed in other sections of the Appeals Chamber's judgement and need not be reiterated here. It suffices to say that the appellant clearly joined with others (including *conseillers* and other local officials) in a joint criminal enterprise to destroy the Tutsi population in Rusumo *Commune*; numerous atrocities, including mass killings and rapes, were perpetrated in pursuit of that common criminal purpose. Thousands died – that was the appellant's object.

39. In short, the indictment pleaded JCE. The Appeals Chamber incorrectly held that it did not. It was open to the Trial Chamber to find that, even if the appellant did not personally commit genocide, he did so through JCE. On the evidence, it would have found so.

40. Now for some concluding remarks. A suggestion that the doctrine of JCE was *created* by *Tadić* is not correct. In *Tadić* the Appeals Chamber was putting forward a judicial construct developed out of its analysis of scattered principles of law gathered together for the purpose of administering international criminal law. The expression "joint criminal enterprise" can be found in those principles;[58] the Appeals Chamber was not proposing any modification of those principles. Courts frequently carry out such an exercise for the better appreciation of what they are doing; especially may this be done where an international criminal court feels called upon to declare the basis on which it is proceeding in a relatively unexplored field of litigation.

41. Thus, the mission which the Appeals Chamber set itself in *Tadić* was to identify the elements of individual criminal responsibility for a crime collectively perpetrated, as they were to be gathered from existing law; the Chamber was careful to say that "[t]o identify these elements one must turn to customary international law,"[59] several cases being examined, including some from international criminal adjudication. The Appeals Chamber did not see its task as extending to the invention of a new head of liability: it is a misapprehension to suggest otherwise. What is in issue is not "JCE" as such, but the law on which it is based. It is understandable that there is a preference for another legal basis, but it is prudent to be wary of a "doctrinal disposition to come out differently"[60]. A preference for another doctrine is not the same as asserting that there is no legal basis for the doctrine on which the Tribunal now acts.

2. Co-perpetratorship

42. When another legal basis is suggested, it has however to be looked at carefully. Apart from JCE, there is at least one other theory of "commission". It is appropriate for an international criminal tribunal to take respectful notice of it if its judges, who are from various national jurisdictions, are to identify a jurisprudence which belongs to all. The theory[61] is that of co-perpetratorship (including indirect perpetratorship[62]). It is subscribed to by several countries. Attention to it has been invited by my distinguished colleague Judge Schomburg. Acknowledging my deficiencies in grasping its elements, the theory seems to be as follows.

43. In *Tadić,* the ICTY Appeals Chamber said that "the foundation of criminal responsibility is the principle of personal culpability."[63] In contemporary times, that seems to be a universally accepted principle. To respect the principle, it is necessary in every case to establish that the accused himself did the crime. The obvious difficulty in conforming to that requirement in the case of a group crime which the accused member of the group himself did not personally accomplish requires proof of a link between the accused and the

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[58] See, e.g., Smith and Hogan, *Criminal Law*, 10th ed. (London, 2002), p. 160, para. 8 (speaking of "a joint criminal enterprise").
[59] *Tadić* Appeal Judgement, para. 194.
[60] See *Lewis v. Attorney General of Jamaica and Another* [2001] 2 AC 50 at 90, Lord Hoffmann, dissenting.
[61] There is a somewhat magisterial proposition that one should not speak of "the theory of control". However, the term is used in chapter VII of *Videla and others*, National Appeals Court (Criminal Division) for the Federal District of Buenos Aires, Docket N°13, 9 December 1985.
[62] See the *Politbüro* case (BGHSt, 40, pp. 236ff, 26 July 1974), which concerned the criminal responsibility of East German high political officials for the killings of escaping citizens, and *Videla and others*, National Appeals Court (Criminal Division) for the Federal District of Buenos Aires, Docket N°13, 9 December 1985, which concerned the criminal responsibility of Argentine leaders for "disappearances". Both cases involved accused who were "behind the scenes".
[63] *Tadić* Appeal Judgement, para. 186.

perpetration of the crime so as to show that the crime could not have been committed without his participation.

44. However, "in general, there is no specific legal requirement that the accused make a substantial contribution to [a] joint criminal enterprise."[64] Exceptionally such a requirement may exist, but only "to determine whether [the accused] participated in the joint criminal enterprise."[65] It is therefore apparent that, in a JCE, "the Prosecutor need not demonstrate that the accused's participation is a *sine qua non*, without which the crimes could or would not have been committed."[66] In other words, the accused could "participate" in a JCE without bearing a substantial individual link to the perpetration of the actual crime. But to visit him with individual criminal responsibility in such a case is to *impute* to him the criminality of the member who in fact committed the crime. The culpability of the accused would be *derived*, not *personal*;[67] that is not the same as saying that he should only be culpable for what he himself has done, which is the leading principle of individual criminal responsibility.

45. The object of co-perpetratorship theory is to establish a juridical link which would make the accused liable for the crime on the basis that he had personally committed it. The link rests on the view that he would personally have "committed" the crime if it could only have been committed on fulfilment by him of his assigned role in the group; on that reasoning, it could be said that he was in "control" of the commission of the crime even though the actual crime was in fact perpetrated by another member or other members of the group. He could therefore be said to be personally linked to the commission of the crime.

46. The theory was considered by several jurists, including Claus Roxin. Speaking of "the bank robber with the gun or the perpetrator of the murder holding the victim", he said:

> The co-perpetrator can achieve nothing on his own: the intimidation of the bank employees and the seizing of the victim do not ensure success. The plan only "works" if the accomplice works with the other person. That other person is just as helpless however; if the bank employees are not fully controlled, he will be arrested; and if no one seizes the victim, he will defend himself or flee. Both are therefore in the same position: they can only realize their plan in so far as they act together, but each individually can ruin the whole plan if he does not carry out his part. To this extent he is in control of the act.[68]

Thus, by carrying out his part of the bargain, a party exercises "control" over the act visualised by the group plan. He could prevent the act, as planned, from being realised. This establishes a direct link between him and the actual commission of the crime; he could therefore be made personally culpable for it.

47. Comparing co-perpetratorship with JCE, I reached the conclusion two years ago that, in the case of the latter, the "focus is not on whether [the accused] had power to prevent [his colleagues] from acting as they did; the focus is on whether, even if he could not prevent them from acting as they did, he could have withheld his will and thereby prevented their act from being regarded as having been done pursuant to his own will also".[69] That is how the matter still appears to me: "control" is not an element of JCE, but it seems arguable that, apart from his participation in the work of the group, the will of the accused, which is highlighted in JCE, is ultimately involved in any imaginable system of law on the subject of individual responsibility for group criminality and can therefore serve as the lowest common denominator of the law adopted by the Tribunal. However, co-perpetratorship theory merits careful evaluation; there is much force in the logic of its underlying principles. If the matter were *res integra*, I would, for my part, give renewed consideration to it. But it seems to me that, as a matter of judicial discipline, the following reasons bar inquiry by this Tribunal.

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[64] *Kvocka* Appeal Judgement, para. 97, footnotes omitted.
[65] Ibid.
[66] *Ibid*., para. 98, footnotes omitted.
[67] G. P. Fletcher, *Rethinking Criminal Law* (Oxford, 2000), p. 642, and Andrew Ashworth, *Principles of Criminal Law,* 2nd ed. (Oxford, 1995), pp. 410, 415, 439 and 441.
[68] Claus Roxin, *Täterschaft und Tatherrschaft*, 6th ed. (Berlin and New York, 1994), p. 278.
[69] See *Vasiljević* Appeal Judgement, Separate and Dissenting Opinion, para. 32..

48. On 15 July 1999 the ICTY Appeals Chamber, in *Tadić*,[70] referred to "the notion of co-perpetratorship" but did not adopt it. The notion was not chosen in the recent case of *Stakić*[71] decided by the ICTY Appeals Chamber on 22 March 2006 – just four months ago. The ICTY Appeals Chamber then unanimously affirmed its preference for JCE over the co-perpetratorship mode of liability, finding that the former was "firmly established in customary international law",[72] as *Tadić* had found in 1999 after examining post-World War II cases. Many decisions have followed the *Tadić* holding; JCE is now well established in the ICTR's jurisprudence.[73] Moreover, the notion of co-perpetratorship (as a doctrine) was not referred to in the trial judgement in this case or in the appellate pleadings; the Appeals Chamber has not had the benefit of the arguments of the parties. The matter being one of intricacy,[74] it seems to me that, in the circumstances, this Appeals Chamber is not in a good position to reassess the standing case law.

49. In any case, both theories of liability show that the appellant "committed" genocide – that being the issue in this part of the case. There are differences in the workings of the two theories, but the differences are not relevant. For example, there could be guilt under the third category of JCE relating to extended liability when, under the co-perpetratorship theory (at least as understood in Germany[75]), there could not. However, there is no question of extended liability here so as to make that category relevant.

50. Two other problems remain. First, it is said that the question is one of harmonisation of theories and not election between them. That is attractive. But there could be a question as to whether harmonisation is possible. *Tadić* referred to co-perpetratorship but did not adopt it; presumably the case recognised that both theories could not be adopted at the same time. As has been noticed, the contribution of an accused to a JCE does not have to be a *sine qua non* of the commission of the crime. Indeed, the contribution does not have to be substantial, as it has to be in the case of aiding and abetting. By contrast, under the co-perpetratorship theory, since the non-fulfilment by a participant of his promised contribution would "ruin" the accomplishment of the enterprise as visualised, the making of his contribution would appear to be a *sine qua non*. Therefore, though the two theories overlap, they arrive at a point of incompatibility touching guilt or innocence: at that point one theory is wrong, the other right. This would seem to indicate that only one of the two theories can prevail in the same legal system.[76]

51. Second, the problem of harmonisation leads to another problem. Since several states adhere to one theory while several other states adhere to the other theory, it is possible that the required state practice and *opinio juris* do not exist so as to make either theory part of customary international law. That opens the risk of there being a *non liquet* on a matter of substance in international criminal law as applied by the Tribunal. That risk was sensed in *Erdemović*.[77] There too there was a clash between domestic legal systems. The majority in the Appeals Chamber was able to avoid the risk in that case only, *on one view*, by going outside of the normal principles of international criminal law. Whether the risk in this case can be avoided by taking a less adventurous course is best left for future inquiry.

52. For these reasons, I am of the view that the Appeals Chamber is not at this stage in a good position to pursue the co-perpetratorship theory.

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[70] *Tadić* Appeal Judgement, para. 201.
[71] *Stakić* Appeal Judgement, 22 March 2006, para. 62.
[72] *Ibid*., repeating the holding of the *Tadić* Appeal Judgement, para. 220.
[73] See *Kayishema and Ruzindana* Appeal Judgement, paras. 191-193; *Rwamakuba*, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, ICTR-98-44-AR72.4, 22 October 2004, para. 31; *Ntakirutimana*, Appeal Judgment, para. 468; and *Karemera*, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, ICTR-98-44-AR72.5 and ICTR-98-44-AR72.6, 12 April 2006, paras. 13, 16 and 17.
[74] See, e.g.. E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague, 2003), pp.61ff, dealing with "Different Models of Participation".
[75] See *Tadić*, Appeal Judgment, para. 224, footnote 283 (citing the German Federal Court in BGH GA 85, 270).
[76] *Electricity Company of Sofia and Bulgaria, P.C.I.J., Series A/B, N°77*, p. 90, dissenting opinion of Judge Anzilotti stating that it "is clear that, in the same legal system, there cannot at the same time exist two rules relating to the same facts and attaching to these facts contradictory consequences ... [E]ither the contradiction is only apparent ... or else one
[rule] prevails over the other ..."; and See, *ibid*., at p. 105 per Judge Urrutia, also dissenting. See also Judge Abi-Saab in *Prosecutor v. Tadić,* (1994-1995) 1 ICTY JR 529, where he took a position similar to that taken by Judge Anzilotti.
[77] *Erdemović,* IT-96-22-A, 7 October 1997, para. 57.

F. Aiding and abetting the murder of tenants

53. This part concerns an appeal by the prosecution. Count 4 of the indictment charged Mr Gacumbitsi ("appellant") with murder as a crime against humanity in that he "did kill persons, or cause persons to be killed, … as follows:

> *Pursuant to Article 6 (1) of the Statute:* by virtue of his affirmative acts in planning, instigating, ordering, committing, or otherwise *aiding and abetting*[78] the planning, preparation or execution of the crime charged …".

The question raised is whether these averments were enough to give the appellant notice that the indictment for murder included an allegation that he aided and abetted it.

54. The Appeals Chamber correctly notes that in "considering whether the Appellant received clear and timely notice, the Indictment must … be considered as a whole."[79] In other words, the indictment is not to be read as rigidly compartmentalised between the different counts. Read properly, it showed that, consequent on the death of President Habyarimana on 6 April 1994, there was to be a "fight" against "the Rwandese Patriotic Front (RPF), a predominantly Tutsi politico-military opposition group"[80]; that "fight" involved general genocide by Hutus against Tutsis. The indictment clearly indicated to the average reader that it was alleged that the appellant took part in that general genocidal campaign as a prominent local Hutu.[81]

55. It is against this background that the indictment relating to the deaths of the former tenants has to be seen. In ordering the two Tutsi sisters to vacate his home, according to the indictment, the appellant announced that "his home was not CND, a reference to the cantonment of RPF soldiers in Kigali".[82] Thus, the indictment may be reasonably understood to mean that the appellant knew, as the Trial Chamber found, that, by expelling them, "he was exposing them to the risk of being targeted by Hutu attackers on grounds of their ethnic origin".[83] In turn, the Appeals Chamber correctly understood the indictment that way, stating that its other "paragraphs … detail the context of the genocidal campaign, which ensured that in expelling the tenants under these circumstances, the Appellant was exposing them to a high probability of death".[84] Predictably, the two sisters were killed the night following their eviction earlier in the day. There was no acceptable proof that the appellant "ordered" that killing, and the indictment on this point was dismissed; but the indictment gave due notice that an allegation was that he did aid and abet the killing – by whomsoever the killing was ordered or done.

56. In another case, the Appeals Chamber said that it is "advisable"[85] for the prosecution to be specific,[86] and not simply to quote the charging provisions of the Statute. That advice is valuable. However, I would hesitate to elevate it to a universal procedural requirement, more particularly as the Appeals Chamber recognised that "it has long since been the practice of the Prosecution to merely quote the provisions of Article 6 (1) of the Statute in the charges, leaving it to the Trial Chamber to determine the appropriate form of participation under" that provision.[87] An existing practice of long standing is not terminated by an injunction as to what is "advisable".

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[78] Italics added.
[79] Judgement of the Appeals Chamber, para. 123.
[80] Indictment, para. 3.
[81] *Ibid*., para. 4.
[82] *Ibid*., para. 36.
[83] Trial Judgement, para. 197.
[84] Judgement of the Appeals Chamber, para. 123.
[85] *Semanza* Appeal Judgement, para. 259.
[86] See *Maxwell v. DPP for Northern Ireland* (1979) 68 Cr. App. R. 128 at 143, 147 and 151, HL.
[87] See Judgement of the Appeals Chamber, para. 122, citing *Semanza* Appeal Judgement, para. 259. The existing practice of merely citing the applicable charging provision is not entirely unsupported. "In Queensland it is sufficient to describe an offence in the words of the … statute … which defines the offence". John B. Bishop, *Criminal Procedure,* 2nd ed. (Sydney, 1998), p. 428. In Canada, a count in an indictment may be "in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence." Criminal Code of Canada, (R.S., 1985, c. C-46), s. 581 (2) (b).

57. In my view, the general reason for the practice is that, for the purpose of conviction, aiding and abetting is not a separate crime in itself, though it is often spoken of as if it were; it is merely a method of perpetrating the crime with which the article 6 (1) of the Statute is concerned;[88] it forms part of an indictment for that crime, in this case, murder – which was charged. In one jurisdiction, when "indicting a secondary party to an offence (i.e. an aider, abettor, counsellor or procurer), there is no need to indicate, either in the statement of offence or particulars, that such was his role."[89] In other words, a charge for the main crime includes a charge for aiding and abetting it. The position was criticised *obiter* in *Maxwell*,[90] but the indictment practice has not noticeably altered.[91] True, the practice in that jurisdiction has come about through a statute, but, for the foregoing reasons, it may be thought that the understanding which the statute evidences is applicable here.

58. In cases in which the accused may be misled by the terms of the indictment, specificity has been enjoined.[92] But each case turns on its own facts. In this case, the indictment expressly and distinctly mentioned "aiding and abetting" after charging that the appellant "did … cause persons to be killed." Also, the indictment pleaded material facts that supported a conviction for aiding and abetting the murder of the appellant's tenants. With knowledge of these things, the appellant failed to raise any question at the trial about sufficiency of notice that he was being charged with aiding and abetting their murder.

59. The case of the tenants concerns aiding and abetting *murder*. It is to be noticed that, so far as aiding and abetting *genocide* was concerned, virtually the same indictment formula was employed, the second paragraph of count 1 reading:

> *Pursuant to Article 6 (1) of the Statute:* by virtue of his affirmative acts in ordering, instigating, commanding, participating in and *aiding and abetting*[93] the preparation and execution of the crime charged [i.e., genocide]…

It was on the basis of this indictment that the Trial Chamber held that –

> Sylvestre Gacumbitsi aided or abetted in the perpetration of the massacres, thereby encouraging the commission of the crime of genocide in Rusumo *commune* in April 1994.[94]

60. The Trial Chamber's formal "Verdict" merely found that the appellant was guilty of "Genocide",[95] it being understood that this comprised its express finding, made elsewhere, that the appellant was "responsible for planning, instigating, ordering the communal police, committing and aiding and abetting in the killing of members of the Tutsi ethnic group, as part of a scheme to perpetrate the crime of genocide".[96] This conviction, which thus includes aiding and abetting genocide, is affirmed by the Appeals Chamber. I see no material basis for any procedural distinction so far as aiding and abetting the *murder* of the tenants was concerned.

61. In the circumstances of this case, it appears to me that, as the Appeals Chamber has found,[97] the appellant had adequate notice that the charge against him included an allegation that he aided and abetted the

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[88] Difficult issues have arisen on methods of participation in the commission of a crime. One question is whether (a) article 6 (1) of the Statute visualises the existence of only one crime which can be perpetrated by any or all of the stipulated modes; or (b) article 6(1) visualises the existence of several crimes each corresponding to one of the stipulated modes. In my view, at the level of *conviction*, (a) is correct. But (a) means that, in the case of a mode (such as aiding and abetting) which does not involve actual perpetration of the crime, the criminality of the perpetrator is being imputed to the accused. Because of this derived nature of the responsibility, a conviction for perpetrating the crime by aiding and abetting will, in sentencing, be regarded (save in exceptional circumstances) as being less serious than a conviction for actual perpetration of the crime. In other words, at the level of *sentencing*, aiding and abetting tends to be regarded as a separate crime: effectively, the accused is being sentenced for a crime constituted by his conduct in assisting another to commit a crime and not for the latter crime itself. Thus, at the level of sentencing, (b) is also involved.

[89] *Blackstone's Criminal Practice 2006* (Oxford, 2005), p. 1407, para. D10.12.

[90] See *Maxwell v. DPP for Northern Ireland* (1979) 68 Cr. App. R. 128 at 143, 147 and 151, HL.

[91] *Blackstone's Criminal Practice 2006* (Oxford, 2005), p. 1407, para. D10.12.

[92] *Maxwell v. DPP for Northern Ireland* (1979) 68 Cr. App. R. 128 at 143, 147 and 151, HL.

[93] Italics added.

[94] Trial Judgement, para. 286.

[95] *Ibid.,* para. 334.

[96] *Ibid.*, para. 288.

[97] Judgement of the Appeals Chamber, para. 123.

murder of his tenants. The Trial Chamber incorrectly failed to record an appropriate conviction. Its reasoning does not appear. Its silence falls to be construed as a judgement acquitting the appellant of aiding and abetting. The Appeals Chamber correctly sets aside that implied acquittal and enters a conviction in its place.

G. Conclusion

62. Throughout this case, as in others, there has been concern with fairness to the accused. That concern is of course proper: the liberty of the accused is important. As it was said, "the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time".[98] That remark, though made in a different context, is generally useful.

63. Thus, fairness to the accused has to be honoured, however inconvenient may be the consequences for the prosecution. The scope of a trial is fixed by the indictment; on a fair reading, the indictment, either original or as cured, must tell the accused exactly what he is charged with. A court must insist on that. Yet, it seems to me that it is the substance which matters: sophistication in applying the relevant standards cannot be extended to the point of rendering the task of the prosecution unreasonably hazardous.

64. At all material times, the appellant knew from the indictment that he was charged with having committed genocide (*inter alia* by killing Mr. Murefu) and aiding and abetting murder. I am confident that his right to a fair trial was in every way protected by the Trial Chamber. I respectfully support the judgement now handed down by the Appeals Chamber. If anything, I consider that it could be strengthened in the places to which I have referred.

Done in English and in French, the English text being authoritative.

Signed in The Hague 28 June 2006, and delivered in Arusha, Tanzania, 7 July 2006.

[Signed] : Mohamed Shahabuddeen

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[98] *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 141 (1937) (Sutherland, J., dissenting).

VI. JOINT SEPARATE OPINION OF JUDGES LIU AND MERON

1. We write separately to explain our disagreement with the Majority's conclusion that, though the killing of Mr. Murefu "was not specifically alleged in the Indictment",[1] the Trial Chamber could nonetheless have convicted Gacumbitsi of committing genocide solely on the basis of its finding that Gacumbitsi killed this individual.

2. The Appeals Chamber's Judgement does not dispute that, if the Prosecution intended this killing to be the basis of a finding that Gacumbitsi committed offences, the killing should have been mentioned in the indictment.[2] Indeed, this proposition is beyond dispute. "[C]riminal acts that were physically committed by the accused personally must be set forth in the indictment specifically, including where feasible 'the identity of the victim, the time and place of the events and the means by which the acts were committed.'"[3] The Majority, however, is willing to excuse the Prosecution's failure to comply with our pleading requirements because a vague chart-entry summarizing the anticipated testimony of one witness mentions, *inter alia*, the killing of Mr. Murefu and the fact that the witness's testimony "relate[s] to the charge of genocide."[4] In our view, serious flaws in the indictment are not so easily remedied.

3. We fully agree with the ICTY Appeals Chamber's holding in *Kupreškić* that "in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her."[5] This holding, however, had an important caveat: "in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category."[6] Indeed, in order to protect the accused's right to be fully aware of the charges he or she faces, and to ensure that each accused can defend against the Prosecution's charges, it is imperative to apply strictly the rule that only "timely, clear and consistent information" can remedy defects in an indictment. Recognizing this fact – even as it held that a particular defect in the indictment was cured by a witness statement taken together with "unambiguous information" contained in the Pre-Trial Brief and its annexes[7] – the Appeals Chamber made clear in *Ntakirutimana* that the Prosecution cannot be deemed to have charged an accused for every incident described in a document that it makes available to him.[8]

4. Here, in concluding that Gacumbitsi had "clear and consistent" notice that he was alleged to have committed genocide by killing Mr. Murefu, the Majority points to only one document, and indeed, just one small section of a document – namely, the entry on Witness TAQ's anticipated testimony in the Prosecution's Summary of Anticipated Witness Evidence.[9] Indeed, in this case, unlike in *Ntakirutimana*, the Prosecution never mentioned the killing of Mr. Murefu in the body of its Pre-Trial Brief. Nor did the Prosecution allege in its Opening Statement that Gacumbitsi killed Mr. Murefu.[10] Hence, as the Majority implicitly acknowledges, the key question is whether the chart-entry, taken alone, provided "clear and consistent" notice that Gacumbitsi was alleged to have committed genocide by killing Mr. Murefu.[11] It did not.

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[1] Judgement of the Appeals Chamber, para. 48.
[2] Judgement of the Appeals Chamber, para. 49.
[3] *Ntakirutimana* Appeal Judgement, para. 32 (quoting *Kupreškić et al*. Appeal Judgement, para. 89).
[4] Judgement of the Appeals Chamber, para. 56.
[5] *Kupreškić et al*. Appeal Judgement, para. 114. The indictment is the principal charging instrument at the Tribunal. We are therefore disturbed at frequency with which the Prosecution has recently sought to argue that defects in its indictments were cured by subsequently provided information. Clarity in the indictment is the best means of guaranteeing a fair and efficient trial.
[6] *Kupreškić et al*. Appeal Judgement, para. 114.
[7] *Ntakirutimana* Appeal Judgement, para. 48.
[8] See *Ntakirutimana* Appeal Judgement, para. 27 (citing *Prosecution v. Radoslav Brdanin and Momir Talić*, Case N°IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 62).
[9] Judgement of the Appeals Chamber, paras 56, 58.
[10] T. 28 July 2003 pp. 17-22.
[11] As the Majority points out, See Judgement of the Appeals Chamber, para. 55, the Prosecution Response notes that Gacumbitsi was also provided with the witness statement of Witness TAQ, and that this statement mentions the killing of Mr. Murefu, Prosecution Response, paras 149-157. The Prosecution Response, however, never suggests that this witness statement indicated the charge that the allegations about Mr. Murefu's death would be used to prove. Prosecution Response, paras 149-157. The majority is therefore

5. First, we question whether notice provided only once can ever be "consistent" notice. Not only does the term "consistent" suggest that there must not be deviation in the material terms of the notice, but "consistent" also could reasonably be read to suggest that there must be some repetition – arguably, a document or statement providing notice is only "consistent" if there is another relevant document or statement that it is consistent with.[12] Such a reading of the term "consistent" would be in accordance with the purposes of the "clear and consistent" notice requirement: safeguarding the accused's right to be clearly and unequivocally informed of the charges against him in a situation where material facts were omitted from the indictment, the place where the accused would expect to find them.

6. Regardless of whether notice provided only once can ever satisfy the "clear and consistent" standard, the notice provided in the chart-entry on Witness TAQ fails to meet this standard, as it was far from clear. The chart shows that Witness TAQ's testimony would relate to the charges of genocide, extermination, and rape.[13] Yet the chart-entry never mentions any mode of liability, let alone explains which aspects of Witness TAQ's testimony would support a conviction for any of the charges pursuant to a particular mode of liability.[14] This omission is all the more serious given how much ground the chart said that witness TAQ's testimony would cover.[15] According to the chart, Witness TAQ was to testify about a lengthy series of events in which Gacumbitsi took part over the course of several days. The killing of Mr. Murefu was just one small part of this series of events.[16] Given that – in relation to the genocide charge – the Prosecution pursued theories of responsibility based on Gacumbitsi's entire course of conduct during this period,[17] Gacumbitsi could reasonably have believed that the killing of Mr. Murefu was mentioned only as part of this course of conduct. Alternatively, as the Prosecution charged Gacumbitsi with instigating genocide, and as the chart-entry says that the killing of Mr. Murefu was immediately followed by a grenade attack on refugees gathered in the church that Mr. Murefu was killed in front of, Gacumbitsi could reasonably have believed that this killing would be used to argue that he instigated genocide. He might also have reasonably believed that the Prosecution viewed this incident only as evidence of his *mens rea* for genocide – evidence that could be rebutted with *mens rea* evidence unrelated to this particular killing. Any of the abovementioned inferences would have been logical ones for Gacumbitsi to have made – indeed, they were likely more logical than the inference that he was charged with committing genocide on the basis of this killing – given that "criminal acts that were physically committed by the accused personally must be set forth in the indictment specifically",[18] and given that the Murefu killing was never mentioned in the indictment.

7. Not surprisingly, the chart does not appear to have led Gacumbitsi to deduce that the Murefu killing was alleged as a basis for the charge that he committed genocide. Discussion of this killing in the Rule 98 *bis* filings makes clear that, even after the completion of the Prosecution's case at trial, the Appellant was still under the impression that the incident had been alleged with respect to the murder charge. Yet not even at this point in the proceedings did the Prosecution clarify that it felt Gacumbitsi should be convicted of committing genocide on the basis of this killing. In fact, the Prosecution waited until the close of the trial to finally make clear that it intended to rely upon the evidence of the killing to support a conviction for genocide. This is not timely notice. We cannot agree to the entry of a conviction on the basis of allegations that were only made clear at the end of trial.

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right not to assert that the witness statement of Witness TAQ might have helped to inform Gacumbitsi that he was alleged to have committed genocide by killing Mr. Murefu.

[12] The Oxford English Dictionary defines "consistent" as: "[a]greeing or according in substance or form; congruous, compatible". III The Oxford English Dictionary 773 (2d ed. 1989).

[13] Prosecution Pre-Trial Brief, Appendix 3, p. 10.

[14] Prosecution Pre-Trial Brief, Appendix 3, pp. 10-12.

[15] It bears noting that the block quote in paragraph 56 of the Judgement contains only one of the six paragraphs of text in the chart-entry on Witness TAQ.

[16] Prosecution Pre-Trial Brief, Appendix 3, pp. 10-12. In fact, the description of the killing covers just four lines in a chart-entry almost two pages long.

[17] See Indictment, count I and paras 1-25. See *also* Prosecution's Opening Statement, T. 28 July 2003 pp. 20-21(alleging that Gacumbitsi "executed" a genocidal plot through his course of conduct in Rusumo *Commune* in April 1994); Prosecution Pre-Trial Brief, para. 2.16 (stating, under the section heading "Executing", that "[d]uring the month of April 1994, Sylvestre Gacumbitsi used his position … to execute the campaign of looting, raping, and killing" and that he "instigated, led, and supervised … attacks" occurring as part of this campaign (emphasis omitted)).

[18] *Ntakirutimana* Appeal Judgement, para. 32, quoting *Kupreškić et al*. Appeal Judgement, para. 89.

8. According to the Majority, these circumstances "are materially indistinguishable from" [19] circumstances under which the ICTY Appeals Chamber recently found that the Prosecution had cured an indictment defect. We disagree. The Majority refers to the *Naletilić and Martinović* case, and in particular, the ICTY Appeals Chamber's finding that the Prosecution had cured the indictment's failure to provide information about the beating of an individual known as "the Professor". This finding rested in part on an entry in a similar chart of witnesses – although the chart-entry suggested that the witness at issue would be testifying to a few discrete incidents, and the chart-entry was far less lengthy than the one at issue in the present case. Yet the Appeals Chamber also rested its finding on the fact that the relevant "details were specifically reiterated by the Prosecution in its Opening Statement."[20] Indeed, the Prosecution's Opening Statement in *Naletilić and Martinović* not only mentions the beating of "the Professor",[21] it clearly states the counts in the indictment that the allegation relates to.[22] Hence, at the start of his trial, Martinović knew what the Prosecution was trying to prove with its allegations about "the Professor".[23] The value of this second piece of clear, detailed information about the Prosecution's allegation with regard to "the Professor" – like the value of the information in the Pre-Trial Brief that together with the chart of witnesses cured the indictment defect in *Ntakirutimana* – should not be underestimated. In the present case, where the indictment makes absolutely no mention of the killing of Mr. Murefu – it does not just omit some material facts related to the killing – it is particularly problematic that neither the Prosecution's Pre-Trial Brief nor its Opening Statement reiterated and clarified the information on the killing provided in the chart-entry on Witness TAQ.

9. In conclusion, because the provision of "timely, clear and consistent information" is necessary to cure defects in an indictment, we cannot agree that the Prosecution cured its failure to mention the killing of Mr. Murefu in the indictment, and we therefore cannot agree that Gacumbitsi could be convicted of committing genocide on the basis of this killing alone. Nonetheless, because we agree with the Judgement's conclusion that "[t]he Trial Chamber convicted the Appellant of "ordering" and "instigating" genocide on the basis of findings of fact detailing certain conduct that … should be characterized not just as "ordering" and "instigating" genocide, but also as "committing" genocide",[24] we support the decision not to vacate the finding that Gacumbitsi committed genocide.

Done in both English and French, the English text being authoritative.

Signed on the 28th day of June 2006 at The Hague, The Netherlands, and issued this 7th day of July 2006 at Arusha, Tanzania.

[Signed] : Liu Daqun ; Theodor Meron

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[19] Judgement of the Appeals Chamber, para. 58.
[20] *Naletilić and Martinović* Appeal Judgement, para. 45.
[21] *Naletilić and Martinović*, Case N°IT-98-34-T, Tr. 1851 (10 September 2001).
[22] *Naletilić and Martinović*, Case N°IT-98-34-T, Tr. 1849 (10 September 2001) (stating that the Prosecution would next be discussing counts 9-12 in the indictment).
[23] Another indictment defect at issue in the *Naletilić and Martinović* case – one relating to forcible transfer – was, as another separate opinion in the present case points out, found to have been cured solely on the basis of information provided in a chart of witnesses. With regard to each of the two instances of forcible transfer at issue, however, the Appeals Chamber pointed to multiple chart-entries (each pertaining to a different witness) in concluding that Martinović had adequate notice. See *Naletilić and Martinović* Appeal Judgement, paras 64-65 and fns. 165, 168. In this case, as already mentioned, the Judgement relies on only one chart-entry.
[24] Judgement of the Appeals Chamber, para. 59.

VII. SEPARATE OPINION OF JUDGE SCHOMBURG on THE CRIMINAL RESPONSIBILITY OF THE APPELLANT FOR COMMITTING GENOCIDE

A. Introduction

1. I am in general agreement with the outcome of the Judgement. However, in relation to the Appellant's criminal responsibility for committing genocide, I am concerned about several issues. First, I wish to offer some remarks on committing genocide and the pleading of "committing" genocide which slightly deviate from the opinion of the majority of my distinguished colleagues. Following that, I will concentrate especially on the question whether it was necessary for the Appellant's conviction for committing genocide to plead the killing of Mr. Murefu in the Indictment. Finally, I will discuss the majority's treatment of the Appellant's responsibility for committing genocide in general.

B. Does Committing Refer Generally to the Direct and Physical Perpetration of the Crime by the Offender?

2. The Trial Chamber found the Appellant guilty, *inter alia*, of committing genocide on the basis that he killed Mr. Murefu. The Trial Chamber stated:

> "Committing" refers generally to the direct and physical perpetration of the crime *by the offender himself*. In the present case, the Accused killed Murefu, a Tutsi. The Chamber therefore finds that he committed the crime of genocide, within the meaning of Article 6 (1) of the Statute.[1]

Much to my dismay, the majority of the Appeals Chamber has decided to leave this holding of the Trial Chamber in principle[2] undisturbed despite the fact that it stands in striking contrast to the jurisprudence of both *ad hoc* Tribunals and to modern principles of criminal law and therefore is an error of law which required correction *proprio motu*.

3. Crimes under international law, *e.g.*, those listed in the Statutes of ICTR and ICTY, are often committed by a plurality of co-operating persons. Not necessarily all these persons carry out the crimes by their own hand; nevertheless, in general, they are not less culpable. On the contrary, within the context of international macro criminality, the degree of criminal responsibility frequently grows as distance from the actual act increases. As the ICTY Appeals Chamber found in *Tadić*:

> Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act […], the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.
>
> Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.[3]

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[1] Trial Judgement, para. 285 (footnote omitted) (emphasis added).

[2] In para. 60 of this Judgement, the Appeals Chamber only holds: "In the context of genocide, however, 'direct and physical perpetration' need not mean physical killing; other acts can constitute direct participation in the *actus reus* of the crime." (footnote omitted). However, the Appeals Chamber does not offer any justification at all as to why this holds true only in the context of genocide (See, e.g., in the context of extermination, para. 90 of this Judgement where the Appeals Chamber abstains from convicting the Appellant for committing extermination, but later on (paras. 158-179) examines the Appellant's responsibility for committing extermination based on joint criminal enterprise).

[3] See *Tadić* Appeal Judgement, paras. 191, 192.

Both *ad hoc* Tribunals have therefore accepted that "committing" – in general and not only in the context of genocide – is not limited to direct and physical perpetration.[4]

4. However, instead of correcting the Trial Chamber's above-indicated error, the majority of the Appeals Chamber follows the misleading trail all the way back to the Indictment, which it finds defective because the killing of Mr. Murefu was not pleaded therein.

C. General Remarks on the Pleading of "Committing" Genocide

5. For both *ad hoc* Tribunals, the only authority is their Statute. There can be no interpretation of the Statute beyond the wording of its provisions. Even within the scope of the Statute, any interpretation may not exceed what is recognized by international law. For a charge of criminal responsibility under the Statute, it is therefore necessary to plead a specific crime and a specific mode of participation as expressly contained in one of the provisions of the Statute.

6. Looking at the wording of Article 6 (1) of the ICTR Statute and Article 7 (1) of the ICTY Statute,[5] I first wish to point out that it would have been possible to interpret these provisions as following a monistic model (*Einheitstäterschaft*) in which each participant in a crime is treated as a perpetrator irrespective of his or her degree of participation.[6] This would have allowed the Prosecution to plead Article 6 (1) of the ICTR Statute or Article 7 (1) of the ICTY Statute, respectively, in their entirety without having to choose a particular mode of participation. It would have left it to the Judges to assess the significance of an accused's contribution to a crime under the Statutes at the sentencing stage, thereby saving the Tribunals the trouble of developing an unnecessary "participation doctrine". However, as the Tribunals' jurisprudence favours a distinction between principal and accessory (*Täterschaft und Teilnahme*) for the determination of individual criminal responsibility it must also accept the consequences which follow from this approach. It is impossible to make a difference in terms of substantive law between planning, instigating, ordering, committing or aiding and abetting without acknowledging that, in principle, each of these modes warrants distinction on the sentencing level as well. The difference in individual criminal responsibility must be mirrored in the sentence.[7] In this respect, I wish to add my regrets that the *ad hoc* Tribunals have decided to not compel the Prosecution as a matter of fairness to plead its case based on a specific mode of participation or to specify such at least at the end of the presentation of the Prosecution's case.

7. Since the Statute is the only authority for both *ad hoc* Tribunals, it is, on the other hand, sufficient to plead a specific crime and a specific mode of participation as expressly contained in one of the provisions of the Statute. In particular, the Prosecution is not required to plead any legal interpretation or legal theory concerning a mode of participation, which does not appear in the Statute – be it named, for example, direct or indirect perpetratorship, co-perpetratorship, joint principals,[8] joint criminal enterprise,[9] or the like.

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[4] See only *Ntakirutimana* Appeal Judgement, para. 546.

[5] See ICTR Statute, Art. 6 (1) and ICTY Statute, Art. 7 (1): A person who planned, instigated, ordered, committed or *otherwise* aided and abetted […] (emphasis added).

[6] See, for example, *Strafgesetzbuch* (Austria), Sec. 12: „Treatment of all participants as perpetrators"; for further details, See W. Schöberl, *Die Einheitstäterschaft als europäisches Modell* (2006), pp. 50-65; 197-227. See also *Straffeloven* (Denmark), Sec. 23 (1), reprinted in Danish and in German translation in K. Cornils and V. Greve, *Das Dänische Strafgesetz*, 2nd edn. (2001); for further details, See K. Cornils, *ibid*., p. 9. See especially also *Straffelov* (Norway), Sec. 58; for further details regarding Norway, See W. Schöberl, *Die Einheitstäterschaft als europäisches Modell* (2006), pp. 67-102; 192-227.

[7] In *Krstić*, the Appeals Chamber reduced the sentence from 46 years to 35 years of imprisonment mainly because the nature of the Accused's responsibility for genocide and other crimes was re-qualified from "committing" to "aiding and abetting"; See *Krstić* Appeal Judgement, para. 268. See also *Vasiljević* Appeal Judgement, para. 182. See *also* para. 61 of this Judgement.

[8] See D. Ormerod, *Smith and Hogan Criminal Law*, 11th edn. (2005), p. 168.

[9] As to this, See *Karemera, Ngirumpatse and Nzirorera* Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, 18 May 2006, para. 8 and para. 5. In the case at hand I regard the appeal brought by the prosecutor and its lengthy discussion on how to plead JCE in paras. 158-179 to be absolutely superfluous.

8. Consequently, an indictment containing the charge "committing" genocide puts the accused on notice of the legal nature of the allegations against him.[10] According to established case law of both *ad hoc* Tribunals, the Prosecution has to plead in the indictment all material facts underpinning such a charge, but not the evidence by which the material facts are to be proven.[11] Among others, this includes facts which establish whether the accused individually committed the alleged crime or whether it was committed by several persons (including the accused) acting together. However, it must be emphasised once more that the Prosecution is not required to plead a legal theory to be applied to these facts.

9. Furthermore, although the Prosecution is generally obliged to plead the identity of individual victims with the greatest possible precision,[12] this is not required in the case of genocide. The reason for this lies in the protected legal value of the prohibition of genocide which – unlike murder, for example – is not the individual, but the targeted national, ethnical, racial or religious group as such. It is thus not necessary to plead the names of particular victims in the Indictment just like it is irrelevant whether the Appellant killed someone by his or her own hand. Such an approach would miss the reason behind the prohibition of genocide. It would overlook that the persons most responsible for the killing of at least 800,000 Tutsi in Rwanda in 1994 were those who acted behind the scenes, who organized and planned this genocide, and who instructed, ordered and instigated others to carry it out. They committed genocide on an unimaginable scale. What else should these persons be called, but perpetrators? For a correct pleading of "committing" genocide it therefore suffices to plead the fact that at least one person was killed by acts imputable to the accused acting with *dolus specialis* (special intent).

10. In the instant case, the allegation against the Appellant of having "committed" genocide was pleaded in a manner quite inapprehensible.[13] Nevertheless, the Indictment fulfilled its main functions in that it provided the Appellant with sufficient information about the nature of the charges against him and limited the personal and factual scope of the Prosecution's case. The crime charged was "genocide"; "committing" was the charged mode of participation. The Appellant was put on notice of this charge and the material facts underpinning it. In contrast to what the majority of the Appeals Chamber found, it was neither necessary for the Prosecution to plead the killing of Mr. Murefu nor to plead joint criminal enterprise.

D. The Criminal Responsibility of the Appellant for "Committing" Genocide Based on his Killing of Mr. Murefu

11. The majority of the Appeals Chamber blithely assumes the correctness of the Trial Chamber's approach to the Appellant's responsibility for "committing" genocide and holds:

> The Prosecution should have expressly pleaded the killing of Mr. Murefu, particularly as it had this information in its possession before the Indictment was filed. The Appeals Chamber thus finds by majority […] that the Indictment was defective in this respect.[14]

12. With all due respect, this holding is erroneous.

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[10] In my opinion, the modes of liability for genocide are exhaustively listed in Art. 2 (3) of the Statute (Art. 4 (3) of the ICTY Statute). I accept that some of my colleagues also hold Art. 6 (1) of the Statute (Art. 7 (1) of the ICTY Statute) applicable, but wish to note that there appears to be some tension between Art. 6 (1) of the Statute and Art. 2 (3) of the Statute as the scope of the former extends beyond that of the latter. It seems doubtful whether such an approach amounted to customary international law already at the time the crimes before the ICTR and the ICTY were committed. Thus, as regards some details, there is a risk of infringing the *nullum crimen sine lege* principle.

[11] See this Judgement, para. 49. See also *Naletilić and Martinović* Appeal Judgement, para. 23.

[12] See this Judgement, para. 49.

[13] Under Count 1, the Indictment charged the Appellant pursuant to Art. 2 (3) (a) of the Statute (committing genocide) and Art. 6 (1) of the Statute ("participating in […] the [...] execution" of genocide; "[participation] à la commission"). Thus, neither in its English nor in its French version does the Indictment adhere to the wording of Art. 6 (1) of the Statute which was also criticized by the Trial Chamber; See Trial Judgement, para. 267. Only the French version of the Indictment ("participé à la commission") amounts to an adequate reference to "committing". However, the original Indictment was the (less clear) English version. Nevertheless, based on the circumstances of the case, the Appellant was put on notice that he was charged as a perpetrator of genocide. The Defence was working with the French version of the Indictment, and it is apparent from the trial record as well as from Defence submissions during the Appeals Hearing that the Appellant was informed about the nature of the charges against him. The same conclusion was reached by the Trial Chamber, See Trial Judgement, para. 269. Furthermore, See para. 37 of this Judgement,.

[14] Para. 50 of this Judgement (footnote omitted).

13. Contrary to what the majority of the Appeals Chamber asserts, the Appellant was not charged with Mr. Murefu's killing.[15] This omission on the part of the Prosecution is most unfortunate and incomprehensible given that it had information about this killing long before the beginning of trial.[16] Irrespective of that, the Appeals Chamber is seized of a charge of "committing" genocide. In this respect, the killing of Mr. Murefu is neither a charge nor a material fact underpinning such, but one – albeit most abhorrent – piece of evidence that a genocidal campaign was conducted in which the Appellant participated and which caused the death of at least one victim. According to settled jurisprudence of both *ad hoc* Tribunals evidence does not need to be pleaded.[17] This understanding also underlies the Trial Judgement. The Trial Chamber correctly made a distinction between the allegations of murder and genocide. In relation to the killing of Mr. Murefu, it declined to convict the Appellant for murder because the Indictment did not contain a charge to that effect,[18] but it entered a conviction for genocide.[19]

E. The Criminal Responsibility for "Committing" in General

14. As pointed out before, the problem lies in the Trial Chamber's finding that "committing" in general requires direct and physical perpetration of the crime by the offender himself. The Trial Chamber correctly found that the Appellant played a major role in the genocidal campaign against the Tutsi population.[20] It should have therefore convicted the Appellant of "committing" genocide on the basis of his overall control over the massacre at Nyarubuye compound. In this context, it is irrelevant whether the Appellant killed specific persons by his own hand as his superior role in the massacre requires imputing the commission of all killings to him.

15. Based on the Prosecution's fifth Ground of Appeal, the Appeals Chamber unnecessarily[21] examines whether the Appellant incurs liability under the first and third category of joint criminal enterprise for "committing", *inter alia*, genocide,[22] but concludes that joint criminal enterprise was not pleaded properly in the Indictment and that this defect of the Indictment was not subsequently cured.[23] As already explained, I do not support specific pleading requirements for mere legal theories or interpretations as to the meaning of "committing". With regard to the charge of "committing" genocide, the Indictment was not defective, but precisely put the Appellant on notice of the allegations against him: the Prosecution sufficiently specified the date of the Nyarubuye massacre, its location, the Appellant's criminal acts and the means by which he carried them out, the criminal acts of other perpetrators which must be imputed to the Appellant, as well as the targets of these criminal acts.[24] Also, at various points, the Indictment alludes to concerted action undertaken by the Appellant and others.[25] From this point of view, it becomes clear that the killing of Mr. Murefu was only the starting point of the massacre the Appellant is responsible for in whole. On this reasoning alone, the Appeals Chamber could have established the Appellant's responsibility for

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[15] But See para. 50 of this Judgement.
[16] For the murder of Mr. Murefu, the Appellant should have been cumulatively charged under Art. 2 of the Statute and under Art. 3 (a) of the Statute (murder as a crime against humanity). See the detailed description of this heinous crime by Witness TAQ, T. 29 July 2003 pp. 52, 53; T. 30 July 2003 pp. 20-24, p. 40. See also the testimony of Witness TAO, T. 30 July 2003 pp. 53, 54, 61, 62. In a legal system applying the principle *iuria novit curia*, the Appellant could be convicted also under Art. 3 (a) of the Statute even if such a charge is not pleaded in the Indictment, provided that the Bench gives a judicial hint to that extent.
[17] See *Naletilić and Martinović* Appeal Judgement, para. 23.
[18] See Trial Judgement, para. 176.
[19] See Trial Judgement, para. 285.
[20] See also Trial Judgement, para. 261: "The Trial Chamber is persuaded that the Accused played a leading role in conducting and, especially, supervising the attack [on the Nyarubuye compound]."
[21] As a general rule, a judgement should always directly argue the case to the conclusion and avoid venturing outside the wording of the Statute to finally arrive at the same result in the context of genocide.
[22] See paras. 158-179 of this Judgement.
[23] See paras. 165-178 of this Judgement.
[24] See, in particular, Indictment, paras. 12-19.
[25] See, paras. 22 to 25 of the Indictment. In my opinion, the wording used in these paragraphs, *inter alia*, "acted/acting in concert with [others]", would have been sufficient to put the Appellant on notice even if specific pleading of joint criminal enterprise was required. It is obvious that these allegations refer to the entire charge of genocide (and complicity in genocide).

"committing" genocide. The discussion of joint criminal enterprise at least in the context of committing genocide in the case at hand is, to say the least, misleading.[26]

16. The concept of joint criminal enterprise is not expressly included in the Statute[27] and it is only one possibility to interpret "committing" in relation to the crimes under the ICTR and ICTY Statutes.[28] In various legal systems, however, "committing" is interpreted differently. Since Nuremberg and Tokyo, national as well as international criminal law has come to accept, in particular, co-perpetratorship[29] and indirect perpetratorship (perpetration by means)[30] as a form of "committing".

17. Co-perpetration in general requires "*joint functional* control over a crime". Co-perpetrators must pursue a common goal, either through an explicit agreement or silent consent, which they can only achieve by co-ordinated action and shared control over the criminal conduct. Each co-perpetrator must make a contribution essential to the commission of the crime.[31] The worldwide accepted legal scholar, *Claus Roxin*, provides the following typical example:

> If two people govern a country together – are joint rulers in the literal sense of the word – the usual consequence is that the acts of each depend on the co-perpetration of the other. The reverse side of this is, inevitably, the fact that by refusing to participate, each person individually can frustrate the action.[32]

18. Indirect perpetration (perpetration by means) requires that the indirect perpetrator uses the direct and physical perpetrator as a mere "instrument" to achieve his goal, *i.e.*, the commission of the crime. In such cases, the indirect perpetrator is criminally responsible because he exercises control over the act and the will of the direct and physical perpetrator.[33]

19. Especially the notion of indirect perpetration has been employed in cases concerning organized crime, terrorism, white collar crime or state induced criminality. For example, Argentinean Courts have entered convictions for crimes committed by members of the Junta regime based on indirect

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[26] See, in particular, paras. 158, 177 of this Judgement.
[27] See *Karemera, Ngirumpatse and Nzirorera* Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, 18 May 2006, para. 5.
[28] See paras. 158-179 of this Judgement.
[29] See, for example, Código Penal (Colombia), Art. 29: "Son coautores los que, mediando un acuerdo común, actúan con división del trabajo criminal atendiendo la importancia del aporte [...]"; Código Penal (Paraguay), Art. 29 (2): "También será castigado cómo autor el que obrara de acuerdo con otro de manera tal que, mediante su aporte al hecho, comparta con el otro el dominio sobre su realización."; Strafgesetzbuch (Germany), Sec. 25 (2): "If a number of persons commit the crime jointly, each shall be punished as a perpetrator (co-perpetrator)." Rikoslaki/Strafflag (Finland), Sec. 3 (unofficial translation): "If two or more persons jointly commit a crime with intention, each of them shall be punished as a perpetrator."
For detailed references to further national jurisdictions (in particular, Argentina, France, Spain and Switzerland), See Héctor Olásolo and Ana Pérez Cepeda, 4 *International Criminal Law Review* (2004), pp. 475-526 (p. 500, fn. 71).
[30] See, for example, *Código Penal* (Colombia), Art. 29: "Es autor quien realice la conducta punible por sí mismo o *utilizando a otro como instrumento*." (emphasis added); *Código Penal* (Paraguay), Art. 29 (1): "Será castigado como autor el que realizara el hecho obrando por sí o valiéndose para ello de otro."; *Código Penal* (Spain), Art. 28: "Son autores quienes realizan el hecho por sí solos, conjuntamente *o por medio de otro del que se sirven como instrumento*." (emphasis added); *Model Penal Code* (American Law Institute 1985), Sec. 2.06 (2): "A person is legally accountable for the conduct of another person when: (a) […] *he causes an innocent or irresponsible person to engage in such conduct* [...]." (emphasis added); *Strafgesetzbuch* (Germany), Sec. 25 (1): "Whoever commits the crime himself or *through another person* shall be punished as a perpetrator." (emphasis added). *Rikoslaki/Strafflag* (Finnland), Sec. 4 (unofficial translation): "Whoever intentionally commits a crime by employing another person, that cannot be held criminally responsible due to mental incapacity, lack of *mens rea* or any other reason concerning the establishment of individual criminal responsibility, as an instrument, shall be punished as a perpetrator." See also *Corpus Juris* (2000), Art. 11 (previously Art. 12): "Any person may be held responsible for the offences defined above (Articles 1 to 8) as a main offender, inciter or accomplice: - as a main offender if he commits the offence by himself, jointly with another person or organisation (Article 13) *or by means of an innocent agent* [...]." (emphasis added).
See also G.P. Fletcher, *Rethinking Criminal Law* (2000), p. 639: "Virtually all legal systems [...] recognize the institution of perpetration by means." See also G. Werle, *Principles of International Criminal Law* (2005), marginal n°354.
[31] See C. Roxin, *Täterschaft und Tatherrschaft*, 7th edn. (2000), pp. 275-305. See also K. Ambos, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), Art. 25 marginal n°8.
[32] See C. Roxin, *Täterschaft und Tatherrschaft*, 7th edn. (2000), p. 279.
[33] See C. Roxin, *Täterschaft und Tatherrschaft*, 7th edn. (2000), pp. 142-274. See also K. Ambos, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), Art. 25 marginal n°9.

perpetratorship.[34] In one of its leading cases, the *Politbüro* Case, the German Federal Supreme Court (*Bundesgerichtshof*) held three high-ranking politicians of the former German Democratic Republic responsible as indirect perpetrators for killings of persons at the East German border by border guards.[35]

20. Modern criminal law has come to apply the notion of indirect perpetration even where the direct and physical perpetrator is criminally responsible ("perpetrator behind the perpetrator").[36] This is especially relevant if crimes are committed through an organized structure of power in which the direct and physical perpetrator is nothing but a cog in the wheel that can be replaced immediately. Since the identity of the direct and physical perpetrator is irrelevant, the control and, consequently, the main responsibility for the crimes committed shifts to the persons occupying a leading position in such an organized structure of power.[37] These persons must therefore be regarded as perpetrators irrespective of whether the direct and physical perpetrators are criminally responsible themselves or (under exceptional circumstances) not. This approach was applied, for example, by German courts in cases concerning killings at the East German border: as far as border guards who had killed persons were identified and brought to trial, they were generally convicted as perpetrators. This, however, did not reduce the criminal responsibility of those who had acted "behind the scenes". As the German Federal Supreme Court (*Bundesgerichtshof*) held in the aforementioned *Politbüro* Case:

> [I]n certain groups of cases, however, even though the direct perpetrator has unlimited responsibility for his actions, the contribution by the man behind the scenes almost automatically brings about the constituent elements of the offence intended by that man behind the scenes. Such is the case, for example, when the man behind the scenes takes advantage of certain basic conditions through certain organisational structures, where his contribution to the event sets in motion regular procedures. Such basic conditions with regular procedures are found particularly often among organisational structures of the State [...] as well as in hierarchies of command. If the man behind the scenes acts in full awareness of these circumstances, particularly if he exploits the direct perpetrator's unconditional willingness to bring about the constituent elements of the crime, and if he wills the result as that of his own actions, then he is a perpetrator by indirect perpetration. He has control over the action [...]. In such cases, failing to treat the man behind the scenes as a perpetrator would not do justice to the significance of his contribution to the crime, especially since responsibility often increases rather than decreases the further one is from the scene of the crime [...].[38]

21. For these reasons, the notion of indirect perpetratorship suits the needs also of international criminal law particularly well.[39] It is a means to bridge any potential physical distance from the crime scene of persons who must be regarded as main perpetrators because of their overall involvement and control over the crimes committed. This was recognized upon the establishment of the International Criminal Court whose

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[34] See Argentinean National Appeals Court, *Judgement on Human Rights Violations by Former Military Leaders* of 9 December 1985. For a report and translation of the crucial parts of the judgement, See 26 *ILM* (1987), pp. 317-372. The Argentinean National Appeals Court found the notion of indirect perpetratorship to be included in Art. 514 of the Argentinean Code of Military Justice and in Art. 45 of the Argentinean Penal Code. The Argentinean Supreme Court upheld this judgement on 30 December 1986. See also K. Ambos and C. Grammer, *Tatherrschaft qua Organisation. Die Verantwortlichkeit der argentinischen Militärführung für den Tod von Elisabeth Käsemann*, in: T. Vormbaum (ed.), 4 JAHRBUCH FÜR JURISTISCHE ZEITGESCHICHTE (2002/2003), pp. 529-553 (official Legal Opinion on the Responsibility of the Argentinean Military Leaders for the Death of Elisabeth Käsemann, commissioned by the (German) Coalition against Impunity). On the (German) Coalition against Impunity, See <http://www.fdcl-berlin.de>.

[35] German Federal Supreme Court (Bundesgerichtshof), Judgement of 26 July 1994, *BGHSt* 40, pp. 218-240.

[36] As indirect perpetratorship focuses on the indirect perpetrator's control over the will of the direct and physical perpetrator, it is sometimes understood to require a particular "defect" on the part of the direct and physical perpetrator which excludes his criminal responsibility.

[37] See C. Roxin, *Täterschaft und Tatherrschaft*, 7th edn. (2000), pp. 242 - 252.

[38] German Federal Supreme Court (Bundesgerichtshof), Judgement of 26 July 1994, *BGHSt* 40, pp. 218-240, p. 236.

[39] This appears to be acknowledged also by Pre-Trial Chamber I of the International Criminal Court, who stated in a recent decision:
In the Chamber's view, there are reasonable grounds to believe that, given the alleged hierarchical relationship between Mr Thomas Lubanga Dyilo and the other members of the UPC and the FPLC, *the concept of indirect perpetration which, along with that of co-perpetration based on joint control of the crime* referred to in the Prosecution's Application, *is provided for in article 25 (3) of the Statute*, could be applicable to Mr Thomas Lubanga Dyilo's alleged role in the commission of the crimes set out in the Prosecution's Application.
Prosecutor v. Thomas Lubanga Dyilo, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC-01/04-01/06, 24 February 2006, Annex I: Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, para. 96 (emphasis added).

Statute, in Article 25 (3) (a), includes both the notion of co-perpetration and indirect perpetration ("perpetrator behind the perpetrator"):

> [A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person] (a) Commits such a crime, whether as an individual, *jointly with another or through another person*, regardless of whether that other person is criminally responsible".[40]

Given the wide acknowledgement of co-perpetratorship and indirect perpetratorship, the ICC Statute does not create new law in this respect, but reflects existing law.

22. As an *international* criminal court, it is incumbent upon this Tribunal not to turn a blind eye to these developments in modern criminal law and to show open-mindedness by accepting internationally recognized legal interpretations and theories such as the notions of co-perpetration and indirect perpetration. Co-perpetratorship and indirect perpetratorship differ slightly from joint criminal enterprise with respect to the key element of attribution.[41] However, both approaches widely overlap and should therefore be harmonized by both *ad hoc* Tribunals. Such harmonization could especially provide the third category of joint criminal enterprise with sharper contours by combining objective and subjective components in an adequate way. In general, harmonization will lead to greater acceptance of the Tribunal's jurisprudence by international criminal courts in the future and in national systems which understand imputed criminal responsibility for "committing" to mean co-perpetratorship and/or indirect perpetratorship. It is important to note that neither the law of Rwanda nor the law of the former Yugoslavia and the law of the States on the territory of the former Yugoslavia employs the theory of joint criminal enterprise.

23. In my opinion, this approach towards interpreting "committing" is reconcilable with the *Tadić* Appeal Judgement, which introduced joint criminal enterprise into ICTY jurisprudence. The *Tadić* Appeal Judgement does not only refer to "common (criminal) design", but also – expressly – speaks of co-perpetrators.[42] Furthermore, the *Tadić* Appeals Chamber noted that in many post-World War II trials, courts "did not rely upon the notion of common purpose or common design, preferring to refer instead to the notion of co-perpetration."[43]

F. Conclusion

24. The concept of joint criminal enterprise is established ICTY jurisprudence in order to deal with allegations of "committing" by way of acting in concert with others based on a common purpose or design. Nevertheless, when interpreting the meaning of "committing" based on imputed liability, it is the noble obligation of an international criminal tribunal to merge and harmonize the major legal systems of the world and to accept also other recognized developments in criminal law over the past decades.

25. A person who participated in the commission of a crime in concert with others is responsible for having "committed" that crime irrespective of whether he or she carried out the criminal act by his or her own hand (co-perpetrator, co-principal, first category of joint criminal enterprise).

26. A person who has effective control over the act and the will of the direct and physical perpetrator (the brain of the crime with "white gloves") must be held responsible for having "committed" the crime in question despite the fact that he or she did not act by own hand (indirect perpetrator).

27. If an accused is alleged to have been a perpetrator of a crime under the Statute by way of acting together with others, it is sufficient if the indictment charges "committing" as the relevant mode of participation and if the underlying material facts pleaded in the indictment reveal that the accused acted together with others to commit the crime charged.

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[40] (Emphasis added).
[41] While joint criminal enterprise is based primarily on the common state of mind of the perpetrators (subjective criterion), co-perpetratorship and indirect perpetratorship also depend on whether the perpetrator exercises control over the criminal act (objective criterion).
[42] See *Tadić* Appeal Judgement, paras. 192, 220.
[43] See *Tadić* Appeal Judgement, para. 201 with further references.

28. Apart from the killing of Mr. Murefu, it is abundantly clear that the Appellant had a leading role in the commission of the genocidal campaign against the Tutsi population. He controlled the heinous crimes to be committed, in particular at Nyarubuye compound. He had strong influence not only on his subordinates, but on people living in his *commune* in general. He used this influence to ensure that the genocidal campaign against the Tutsi population would be implemented successfully. Taking into account his predominant role in the genocidal campaign, the Appellant's conduct is best described as indirect perpetration; in some respect the Appellant was also acting as a co-perpetrator.

Done in English and French, the English text being authoritative.

Signed on the 28th day of June 2006 in The Hague, issued on the 7th day of July 2006 in Arusha.

[Signed] : Wolfgang Schomburg

VIII. Partially Dissenting Opinion of Judge Güney

1. I regret that I am not able to agree with some of the holdings of the majority of the Appeals Chamber. There are two matters in relation to which my own view differs from that of the majority. The first matter is one of substance, and relates to the issue of "committing" genocide. The second matter relates to the Appellant's responsibility for aiding and abetting the murders of his tenants.

A. "Committing" Genocide

2. I agree with the present judgement that the Appellant committed genocide through his killing of Mr. Murefu. However, I disagree with the conclusion that "even if the killing of Mr. Murefu were to be set aside, the Trial Chamber's conclusion that the Appellant 'committed' genocide would still be valid"[1] because the Appellant "was present at the crime scene to supervise and direct the massacre, and participated in it actively by separating the Tutsi refugees so that they could be killed".[2]

3. The central element in the majority's reasoning seems to be that "[i]n the context of genocide, however, 'direct and physical perpetration' need not mean physical killing; other acts can constitute direct participation in the *actus reus* of the crime."[3] With all due respect, I am of the view that the majority sets aside the established jurisprudence and gives a new meaning to "committing", without providing convincing reasons for doing so.

4. According to the *Tadić* Appeal Judgement, "committing" refers to a) "the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law"; or b) "participation in the realization of a common design or purpose" (or participation in a joint criminal enterprise).[4] Until the present case, "committing" has always been understood in one of those two ways,[5] and attempts to extend the meaning of "committing" further have not been accepted.[6]

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[1] Appeal Judgement, para. 59.
[2] Appeal Judgement, para. 61.
[3] Appeal Judgement, para. 60 (footnote omitted).
[4] *Tadić* Appeal Judgement, para. 188.
[5] See, *e.g., Kayishema and Ruzindana* Appeal Judgement, para. 187; *Semanza* Trial Judgement, para. 383; *Kunarac et al*. Trial Judgement, para. 390; *Kordić and Čerkez* Trial Judgement, para. 376; *Krstić* Trial Judgement, para. 601; *Kvočka et al*. Trial Judgement, para. 251; *Krnojelac* Trial Judgement, para. 73; *Vasiljević* Trial Judgement, para. 62.
[6] See *Stakić* Appeal Judgement, para. 62 (rejecting the theory of co-perpetratorship as a form of commission).

5. Pursuant to this jurisprudence, the Appellant will have "committed" genocide if (a) he physically perpetrated one of the acts listed at Article 2 (2) of the Statute (with the relevant intent); or (b) he participated in a joint criminal enterprise to commit genocide. In the present case, a majority of the Appeals Chamber concludes that joint criminal enterprise was not properly pleaded, and that the Appellant can therefore not be convicted on this basis, a conclusion with which I agree. As to physical perpetration, the Appellant can be convicted of having committed genocide pursuant to Article 2 (2) (a) of the Statute for the killing of Mr. Murefu. However, even if the Appellant was present at Nyarubuye Parish, played a leading role in conducting and supervising the attack and directed the Tutsi and Hutu refugees to separate, this does not entail that, in addition to "ordering" and "instigating" genocide, he also "committed" genocide. Plainly, "playing a leading role in conducting and […] supervising" the attack and directing the refugees to separate do not constitute the physical perpetration by the Appellant of one of the acts listed at Article 2 (2) of the Statute.[7]

6. In finding that the Appellant committed genocide by his actions at Nyarubuye (other than his killing of Mr. Murefu), the majority thus misapplies, or departs from, the established jurisprudence as to the meaning of "committing". If the intent was to identify a new form of commission, this should have been said openly, and cogent reasons should have been provided.[8] In the case at hand, no reasons or authorities have been provided to justify the departure from the previous jurisprudence.[9] While I concede that various domestic legal systems may recognize other forms of commission than the two forms identified until now in the Tribunal's jurisprudence,[10] I am concerned by the fact that the majority in this case offers no discussion whatsoever to show that any of these forms of commission are recognized in customary international law.[11] Indeed, no analysis of customary international law is provided to show that "committing" goes beyond the physical perpetration of a crime or the participation in a joint criminal enterprise. Further, the majority does not explain clearly how "committing" is now to be understood; it merely states that "other acts can constitute direct participation in the *actus reus* of the crime."[12] With respect, this is as vague as it is unsatisfactory, and this novel approach to "committing" arises very late in the life of the Tribunal.

7. The majority finds that the Appellant's action of directing the Tutsi and Hutu refugees to separate at Nyarubuye "is not adequately described by any other mode of Article 6 (1) liability".[13] In this respect, I would like to emphasize that this action certainly constitutes a contribution to the commission of acts of genocide by others, in other words participation in a joint criminal enterprise. This shows that the expansion of "committing" as suggested by the Appeals Chamber is not necessary: the same analysis could have been made through the lenses of joint criminal enterprise. The real problem here is one of lack of adequate notice of that mode of liability.

8. Finally, even if it could be shown that customary international law recognizes forms of commission other than those outlined in *Tadić*, I would not convict the Appellant on that basis, as he was never put on

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[7] Article 2 (2) of the Statute reads as follows:
Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

[8] See *Aleksovski* Appeal Judgement, paras. 107-111.

[9] In this connection, the Appeals Chamber notes "that the selection of prisoners for extermination played an integral role in the Nazi genocide" (See Appeal Judgement, footnote 145). This is not disputed. But this reference does not suffice to show that "committing" according to Article 6 (1) of the Statute goes beyond physical perpetration of a crime or participation in a joint criminal enterprise.

[10] On this subject See, e.g., *Prosecutor v. Milutinović et al.*, Case N°IT-05-87-PT, Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration, 22 March 2006, Separate Opinion of Judge Iain Bonomy, paras. 28-30.

[11] In fact, as noted above, the Appeals Chamber has rejected co-perpetration as a form of commission: See *Stakić* Appeal Judgement, para. 62.

[12] See Appeal Judgement, para. 60.

[13] Appeal Judgement, para. 60.

notice that such a form of commission could apply in his case – this mode of liability was certainly not pleaded in the Indictment. In this connection, I recall that if the Prosecution seeks a conviction for "committing" a crime on the basis of a form of commission other than direct physical perpetration, it should state so explicitly in the indictment.[14]

9. For the above reasons, I conclude that the majority errs in finding that, through his acts at Nyarubuye (other than the killing of Mr. Murefu), the Appellant "committed" genocide. I also note that the Trial Chamber did not find that the Appellant committed genocide otherwise than by his killing of Mr. Murefu,[15] and that none of the Parties in the present appeal invited the Appeals Chamber to do so. Certainly, the Appeals Chamber is entitled to intervene *proprio motu* if it considers that a Trial Judgement needs to be reformed on a point, but I am not convinced that this was necessary in the present case: it would have been sufficient to uphold the finding that the Appellant committed genocide on the basis of his killing of Mr. Murefu. Further, I am concerned that the Appellant was never put on notice or given the opportunity to present arguments as to whether his actions at Nyarubuye (other than his killing of Mr. Murefu) could lead to a finding that he "committed" genocide there.

B. Aiding and Abetting the Murders of Marie and Béatrice

10. In the present judgement, a majority of the Appeals Chamber finds that the Appellant could be convicted for aiding and abetting the murder of Marie and Béatrice as this mode of liability was sufficiently pleaded in the Indictment.[16] With respect, I disagree. In my view, the Appellant was never clearly informed that he would have to defend himself against a charge not just that he ordered the killing of his tenants, but also that, by expelling his tenants, he knowingly contributed to their killing a few hours later, and thus aided and abetted their murder.

11. While the preamble to Count 4 of the Indictment (Murder) states that the Appellant is charged under Article 6 (1) of the Statute "by virtue of his affirmative acts in planning, instigating, ordering, committing, or otherwise aiding and abetting the planning, preparation or execution of the crime charged",[17] this did not make clear to which of the numerous alleged killings each mode of liability was meant to correspond. Arguably, it could have been inferred that all of the modes applied to all of the killings – yet this implication is dispelled by the specific language of paragraph 36 of the Indictment, which contains the specific allegation as to the murders of the two women and which makes reference only to ordering. Paragraph 36 of the Indictment reads as follows:

> On a date uncertain during April – June 1994, Sylvestre Gacumbitsi personally ordered the tenants in one of his homes to vacate the premises. After announcing that his home was not CND, a reference to the cantonment of RPF soldiers in Kigali, Sylvestre Gacumbitsi ordered the killing of his former tenants.

Given this language, the Appellant could reasonably infer that he was only charged with ordering those two murders. No other paragraph of the Indictment corrects that impression. Thus, the Indictment did not put the Appellant properly on notice that he could be convicted for having aided and abetted the murders of his tenants. Further, this defect in the Indictment was not cured by timely, clear and consistent information. With respect to the murders of Marie and Béatrice, the Prosecution Pre-Trial Brief exclusively argues the ordering theory.[18] Some of the witness statements in the annexes allege facts that might be read as supporting aiding and abetting – for instance, the statement of Witness TBC says that the Appellant chased Marie and Béatrice out of the house and that they were then killed on the spot.[19] But in light of the fact that the Pre-Trial Brief to which these statements were appended clearly creates the impression that the Prosecution was continuing to

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[14] See *Kvočka et al*. Appeal Judgement, paras. 41-42 (finding that it is not sufficient to charge only for "committing" if responsibility is sought pursuant to a joint criminal enterprise).
[15] See Trial Judgement, para. 285.
[16] Appeal Judgement, para. 123.
[17] Indictment, Count 4.
[18] See Prosecution Pre-Trial Brief, para. 2.27.
[19] See Prosecution Pre-Trial Brief, Appendix 3, anticipated testimony of Witness TBC; See also *ibid*., anticipated testimony of Witness TAS (stating that Kazoba "bragged" that he had shot dead Béatrice and Marie).

rely only on ordering, the statements cannot be said to have been sufficient to cure the defect.[20] Accordingly, I am of the opinion that the Appellant did not receive clear, timely, and consistent information that he was being charged with aiding and abetting his tenants' murders. As a result, I would have concluded that the Trial Chamber did not err in declining to convict the Appellant for these crimes.

Done in English and French, the English text being authoritative.

Signed on the 28th day of June 2006 at The Hague, The Netherlands.

Issued on the 7th day of July 2006 at Arusha, Tanzania.

[Signed] : Mehmet Güney

[20] Further, it should be noted that, contrary to the anticipated testimony of Witness TBC (according to which Marie and Béatrice were killed "on the spot" after being expelled by the Appellant), the Trial Chamber found that the killing of Marie and Béatrice occurred several hours after they were expelled by the Appellant ("in the night of 13 April 1994": See Trial Judgement, para. 196).

IX. PARTIALLY DISSENTING OPINION OF JUDGE MERON

For the reasons expressed by Judge Güney in section B of his partially dissenting opinion, I too believe that the indictment failed to properly charge Gacumbitsi with aiding and abetting the murders of Marie and Béatrice, and that subsequent Prosecution submissions failed to cure this defect in the indictment. I therefore respectfully dissent from the judgement's conclusion[1] that Gacumbitsi should be convicted for aiding and abetting these murders.

Done in both English and French, the English text being authoritative.

Signed on the 28th day of June 2006 at The Hague, The Netherlands, and issued this 7th day of July 2006 at Arusha, Tanzania.

[Signed] : Theodor Meron

[1] See Judgement of the Appeals Chamber, paras 118-125.

Annex a: Procedural background

1. The main aspects of the appeal proceedings are summarized below.

A. Notice of Appeal and Briefs

2. The Trial Judgement was delivered in French on 17 June 2004.[5947] The Prosecution and the Appellant both submitted Notices of Appeal against the Trial Judgement.

1. Prosecution's Appeal

3. The Prosecution submitted its Notice of Appeal on 16 July 2004 and its Appeal Brief on 28 September 2004.[5948] On 29 September 2004, the Prosecution submitted a motion to vary and clarify three grounds in its Notice of Appeal.[5949] The Appellant did not respond to that motion.[5950] On 15 December 2004, the Appeals Chamber allowed the motion[5951] and the Prosecution filed its Amended Notice of Appeal on 16 December 2004. The Appellant submitted his Response to the Prosecution Appeal Brief on 10 January 2005. On 19 January 2005, the Prosecution submitted its Reply.[5952]

2. Appellant's Appeal

4. The Appellant submitted his Notice of Appeal on 20 July 2004 and his Appeal Brief on 4 October 2004.[5953] The Prosecution filed its Response in English on 12 November 2004, and a French translation of the Prosecution Response was filed on 1 March 2005. During a Status Conference held on 8 March 2005, the Pre-Appeal Judge granted the Appellant's request for an extension of time to file his Reply by 23 March 2005.[5954] On 22 March 2005, the Appellant requested a further extension of time to file his Reply.[5955] The Pre-Appeal Judge ordered the Appellant to file his Reply no later than 29 March 2005.[5956] The Appellant filed his Reply on 1 April 2005.

B. Assignment of Judges

5. On 23 July 2004, the Presiding Judge of the Appeals Chamber assigned the following Judges to hear the appeal: Judge Mohamed Shahabuddeen, Judge Florence Ndepele Mwachande Mumba, Judge

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[5947] A Judgement Corrigendum to the English version was filed on 27 October 2004.
[5948] The Appellant submitted a motion (Motion for Transmission of Documents in French and for an Extension of the Time Limit, filed confidentially in French on 5 October 2004) to obtain a French translation of this document and the Pre-Appeal Judge ordered the Registrar to provide such translation to the Appellant no later than 17 November 2004 (Order Concerning Translation, 15 November 2004). The translation was filed on 17 November 2004, and communicated to the Defence on 1 December 2004 (See Gacumbitsi Response, para. 31).
[5949] Prosecution's Motion for Variation of Three Grounds in its Notice of Appeal Pursuant to Rule 108, 29 September 2004.
[5950] The French translation of the Prosecution's Motion for Variation of Three Grounds in its Notice of Appeal Pursuant to Rule 108 of the Rules was transmitted to the Appellant on 17 November 2004, and the Appellant was ordered to file his response at the latest on 29 November 2004: *Ordonnance portant calendrier*, 19 November 2004. The Appellant did not submit any response.
[5951] Décision relative à la requête du Procureur en modification de son acte d'appel, 15 December 2004.
[5952] A French translation (Réplique du Procureur au mémoire en réponse de la Défense) was filed on 18 April 2005.
[5953] The brief was originally filed on 30 September 2004, but returned because of deficient filing.
[5954] T. 8 March 2005 pp. 2, 3.
[5955] Extremely Urgent Motion, filed confidentially in French on 22 March 2005. The Prosecution objected to this request in its Prosecutor's Response to the *Requête en Extrême Urgence*, filed confidentially on 23 March 2005. However, this response was only received by the Appeals Chamber after the Pre-Trial Judge had issued the Order of 24 March 2005.
[5956] Order, 24 March 2005.

Mehmet Güney, Judge Wolfgang Schomburg, and Judge Inés Mónica Weinberg de Roca.[5957] Judge Weinberg de Roca was designated the Pre-Appeal Judge.[5958] On 15 July 2005, Judge Fausto Pocar was assigned to replace Judge Weinberg de Roca, effective 15 August 2005.[5959] On 18 November 2005, Judges Liu Daqun and Theodor Meron were assigned to replace Judges Mumba and Pocar, with immediate effect.[5960]

C. Motions to Admit Additional Evidence and Related Motions

6. On 18 July 2005, the Appellant filed a motion for the admission of additional evidence.[5961] The Prosecution submitted its response on 28 July 2005.[5962] A French translation of that response was filed on 6 September 2005, and the Appellant did not file a reply. On 7 September 2005, the Prosecution filed its Motion to Seek Leave to File Supplementary Material Relating to Gacumbitsi's Rule 115 Application. A French translation of that motion was filed on 22 September 2005. The Appellant filed a response on 12 October 2005.[5963] The Appeals Chamber denied the Appellant's motion for the admission of additional evidence and dismissed the Prosecution's related motion as moot.[5964]

7. On 9 December 2005, the Appellant filed a motion seeking, *inter alia*, to be provided with copies of all statements of witnesses and *parties civiles* in a Belgian court proceeding in the case of *Nzabonimana et al*.[5965] The Appeals Chamber denied this request.[5966]

8. On 1 February 2006, the Prosecution made a disclosure of potentially exculpatory material in the form of two documents.[5967] On 9 February 2006, the Appellant moved to admit these documents as additional evidence,[5968] and, on the same date, the Appeals Chamber denied this motion.[5969]

D. Hearing of the Appeals

9. Pursuant to a Scheduling Order of 8 December 2005,[5970] the Appeals Chamber heard the parties' oral arguments on 8 and 9 February 2006 in Arusha, Tanzania. At the close of the hearing, the Appellant made use of the opportunity to address the Appeals Chamber.

[5957] Order of the Presiding Judge Assigning Judges, 23 July 2004.
[5958] Ordonnance portant désignation d'un Juge de la mise en état en appel, 21 September 2004.
[5959] Order Replacing a Judge in a Case before the Appeals Chamber, 15 July 2005.
[5960] Order Replacing a Judge in a Case before the Appeals Chamber, 18 November 2005.
[5961] Requête en extrême urgence aux fins d'admission en appel des moyens de preuves supplémentaires et d'un témoin expert, filed confidentially on 18 July 2005.
[5962] Prosecutor's Response to Requête en extrême urgence aux fins d'admission en appel des moyens de preuves supplémentaires et d'un témoin d'expert, 28 July 2005.
[5963] *Réponse à la requête du Procureur datée du 7 septembre 2005*, 12 October 2005. That response was disregarded by the Appeals Chamber as untimely filed and incoherent. See Decision on the Appellant's Rule 115 Motion and Related Motion by the Prosecution, 21 October 2005, para. 3.
[5964] Decision on the Appellant's Rule 115 Motion and Related Motion by the Prosecution, 21 October 2005.
[5965] Requête en extrême urgence, 9 December 2005.
[5966] Decision on the Appellant's Motion of 8 December 2005, 16 December 2005.
[5967] Prosecutor's Urgent Pre-Appeal Disclosure of Exculpatory Information, filed confidentially on 1 February 2006.
[5968] Requête en extrême urgence aux fins d'admission de moyen de preuve supplémentaire en appel, filed confidentially on 9 February 2006.
[5969] Decision on Requête en extrême urgence aux fins d'admission de moyen de preuve supplémentaire en appel, filed confidentially on 9 February 2006.
[5970] Scheduling Order, 8 December 2005.

Le Procureur c. Sylvestre GACUMBITSI

Affaire N° ICTR-2001-64

Fiche technique

- Nom: GACUMBITSI
- Prénom: Sylvestre
- Date de naissance: 1947
- Sexe: masculin
- Nationalité: rwandaise
- Fonction occupée au moment des faits incriminés: bourgmestre de Rurumo
- Date de confirmation de l'acte d'accusation: 20 juin 2001
- Chefs d'accusation: génocide et, alternativement, complicité de génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date et lieu de l'arrestation : 20 juin 2001, à Kigoma, en Tanzanie
- Date du transfert: 20 juin 2001
- Date de la comparution initiale: 26 juin 2001
- Précision sur le plaidoyer: non coupable
- Date du début du procès: 28 juillet 2003
- Date et contenu du prononcé: 17 juin 2004, condamné à 30 ans d'emprisonnement
- Appel: 7 juillet 2006, condamné à la prison à vie pour le restant de ses jours

The Prosecutor v. Juvénal KAJELIJELI

Case N° ICTR-98-44A

Case History

- Name: KAJELIJELI
- First Name: Juvénal
- Date of Birth: unknown
- Sex: male
- Nationality: Rwandan
- Former Official Function: *Bourgmestre* of Mukingo
- Date of Indictment's Confirmation: 29 August 1998
- Date of Indictment's Amendments: 25 January 2000
- Date of Indictment's Severance: 6 July 2000 – Bizimana, Kabuga, Karemera, Ngirumpatse, Nzabonimana, Nzirorera and Rwamakuba
- Counts: genocide, complicity in genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date and Place of Arrest: 5 June 1998, in Benin
- Date of Transfer: 10 September 1998
- Date of Initial Appearance: 19 April 1999
- Pleading: not guilty
- Date Trial Began: 13 March 2001
- Date and content of the Sentence: 1 December 2003, sentenced to life imprisonment for genocide and crime against humanity and sentenced to 15 years of imprisonment for direct and public incitement to commit genocide
- Appeal: 23 Mai 2005, sentence reduced to 45 years imprisonment

Decision on Disclosure of Closed Session Testimony of Witness FMB 26 September 2006 (ICTR-98-44A)

(Original: English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Juvénal Kajelijeli – Disclosure of Closed Session Testimony of Witness, Witness has revealed his protected status to the Defence – No reason not to order the disclosure of these Tribunal records – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 75 (G) (ii)

International Case cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Disclosure of Closed Session Testimony of BDR-1 and LK-2, 29 August 2006 (ICTR-98-44)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion to Request the Communication of the Closed Sessions Transcripts of … Witness FMB", etc., filed by the Kabiligi Defence on 22 September 2006;

HEREBY DECIDES the motion.

1. The Kabiligi Defence in the *Bagosora et al*. trial requests disclosure of the closed session testimony of Witness FMB in the case of *The Prosecutor v. Juvenal Kajelijeli*. This same witness will shortly appear as a Kabiligi witness in the *Bagosora* case. The Defence wishes to review the witness's prior testimony as part of its preparation.

2. As no Chamber is currently seized of the *Kajelijeli* trial, this request is properly made before this Chamber under Rule 75 (G) (ii) of the Rules of Procedure and Evidence.[5971] The witness has apparently revealed his protected status to the Defence; accordingly, there is no reason not to order the disclosure of these Tribunal records, on the understanding that the applicable witness protection orders will apply *mutatis mutandis* to any party in the present case in receipt of the protected information.[5972]

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

[5971] Final judgement on appeal was rendered on 23 May 2005.
[5972] See *Bagosora et al*., Decision on Disclosure of Closed Session Testimony of BDR-1 and LK-2 (TC), 29 August 2006, para. 4.

ORDERS the Registry to disclose the closed session transcripts and sealed exhibits of Witness FMB to the Kabiligi Defence;

ORDERS that the Kabiligi Defence and any other party in receipt of the protected information, including the Accused, are bound *mutatis mutandis* by the terms of the witness protection order governing the testimony of Witness FMB.

Arusha, 26 September 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Le Procureur c. Juvénal KAJELIJELI

Affaire N° ICTR-98-44A

Fiche technique

• Nom: KAJELIJELI

• Prénom: Juvénal

• Date de naissance: inconnue

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: bourgmestre de Mukingo

• Date de confirmation de l'acte d'accusation: 29 août 1998

• Date des modifications de l'acte d'accusation: 25 janvier 2000

• Date de la disjonction de l'acte d'accusation: 6 juillet 2000 – Bizimana, Kabuga, Karemera, Ngirumpatse, Nzabonimana, Nzirorera et Rwamakuba

• Chefs d'accusation: génocide, ou subsidiairement complicité de génocide, entente en vue de commettre le génocide, incitation publique et directe à commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date et lieu de l'arrestation: 5 juin 1998, au Bénin

• Date du transfert: 10 septembre 1998

• Date de la comparution initiale: 19 avril 1999

• Précision sur le plaidoyer: non coupable

• Date du début du procès: 13 mars 2001

• Date et contenu du prononcé: 1décembre 2003, condamné à l'emprisonnement à vie des chefs de génocide et de crime contre l'humanité et condamné à 15 ans d'emprisonnement pour incitation directe et publique à commettre le génocide

• Appel: 23 mai 2005, peine réduite à 45 ans d'emprisonnement

The Prosecutor v. Jean de Dieu KAMUHANDA

Case N° ICTR-99-54A

Case History

- Name: KAMUHANDA
- First Name: Jean de Dieu
- Date of Birth: 3 March 1953
- Sex: male
- Nationality: Rwandan
- Former Official Function: Minister for Culture and Education
- Date of Indictment's Confirmation: 1 October 1999
- Date of Indictment's Severance: 7 November 2000 – Bicamumpaka, Bizimungu, Karemera, Mugenzi, Mugiraneza, Niyitegeka and Rwamakuba
- Counts: genocide, conspiracy to commit genocide, complicity in genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date and Place of Arrest: 26 November 1999, in France
- Date of Transfer: 7 March 2000
- Date of Initial Appearance: 24 March 2000
- Pleading: not guilty
- Date Trial Began: 17 April 2001
- Trial recommenced: 3 September 2001
- Date and content of the Sentence: 22 January 2004, sentenced to life imprisonment for genocide and sentenced to life imprisonment for crime against humanity (extermination), cumulative penalties
- Appeal: 19 September 2005, confirmation of the penalties

Order Assigning Judges to a Case before the Appeals Chamber
4 April 2006 (ICTR-99-54A-A)

(Original: English)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

Jean de Dieu Kamuhanda – Assignment of Judges

International Instruments cited :

Rules of Procedure and Evidence, rules 75 (F), 77 (C), 107 and 115 ; Statute, art. 11 (3) and 13 (4)

I, FAUSTO POCAR, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

RECALLING the Oral Decision on Rule 115 and Contempt of False Testimony rendered by the Appeals Chamber on 19 May 2005;

NOTING the "Prosecutor's Disclosure Pursuant to Rule 75 (F) of the Rules, of the Confidential Transcript of the Testimony of Defence Witness 7/14, in *Prosecutor v. Rwamakuba*" filed on 3 March 2006;

NOTING the « Conclusions en réplique à la requête du Procureur sur le fondement de l'article 75 F » filed by Jean de Dieu Kamuhanda on 13 March 2006;

CONSIDERING Articles 11 (3) and 13 (4) of the Statute of the International Tribunal and Rules 77 (C) and 107 of the Rules of Procedure and Evidence;

CONSIDERING the composition of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia as set out in document IT/242 issued on 17 November 2005;

HEREBY ORDER that the Bench in *Prosecutor v. Jean de Dieu Kamuhanda,* Case N°ICTR-99-54A-A, shall be composed as follows:

Judge Pocar, Presiding Judge
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Done in English and French, the English version being authoritative.

Done this 4th day of April 2006, At The Hague, The Netherlands.

[Signed] : Fausto Pocar

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Decision on Jean de Dieu Kamuhanda's Request Related to Prosecution Disclosure and Special Investigation
7 April 2006 (ICTR-99-54A-A)

(Original: English)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

Jean de Dieu Kamuhanda – Request for disclosure of transcripts of witnesses testimonies, Current investigate discrepancies arising from testimony given during the hearing of the merits of the Appeal and the consequent possibility of false testimony, No demonstration of failure of the Prosecutor in discharging its continuing disclosure obligations, Categories of material subject to disclosure – Motion dismissed

International Instrument cited :

Rules of Procedure and Evidence, rules 68, 68 (E), 70 (A), 77 (C) (i) and 120

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Jean de Dieu Kamuhanda, Judgement, 22 January 2004 (ICTR-99-54) ; Appeals Chamber, The Prosecutor v. Jean de Dieu Kamuhanda, Oral decision (Rule 115 Contempt of False Testimony), 19 May 2005 (ICTR-99-54A) ; Appeals Chamber, The Prosecutor v. Jean de Dieu Kamuhanda, Judgement, 19 September 2005 (ICTR-99-54A)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Stanislav Galić, Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the Galic Case, 16 February 2006 (IT-98-29)

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber", "Tribunal") is seized with a request, filed on 13 March 2006 by Jean de Dieu Kamuhanda, to dismiss Prosecution submissions related to a recent filing and to issue various orders related to an ongoing investigation into false testimony.[5973]

2. On 19 September 2005, the Appeals Chamber dismissed Mr. Kamuhanda's appeal from this conviction and life sentence, entered by Trial Chamber II on 22 January 2004, for genocide and crimes against humanity.[5974] Presently, Mr. Kamuhanda has no proceedings before the Tribunal. The Appeals Chamber recalls, however, that it directed the Prosecution, pursuant to Rule 77 (C) (i) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), to investigate discrepancies arising from testimony given during the hearing of the merits of the Appeal and the consequent possibility of false

[5973] The Prosecutor v. Kamuhanda, Case N°ICTR-1999-54A-A, Conclusions en réplique à la requête du procureur sur le fondement de l'article 75 (F), filed 13 March 2006 ("Kamuhanda request").
[5974] *Kamuhanda v. The Prosecutor*, Case N°ICTR-1999-54A-A, Judgement, 19 September 2005 ; *The Prosecutor v. Kamuhanda*, Case N°ICTR-1999-54A-T, Judgement and Sentence, 22 January 2004.

testimony.[5975] As a result, the Prosecutor appointed a Special Counsel to conduct the instigation which is ongoing and near completion.[5976]

3. On 3 March 2006, the Prosecution disclosed to Mr. Kamuhanda a confidential transcript of closed session testimony given by Defence Witness 7/14 in *Prosecutor v. Rwamakuba*, ICTR Case No. 98-44C-T.[5977] In a statement accompanying its disclosure, the Prosecution explained that it disclosed this transcript because the witness provided evidence "relevant" to Mr. Kamuhanda.[5978] The Prosecution stated that Witness 7/14 testified that Witnesses GET and GEK in the *Kamuhanda* trial organized false testimony against Mr. Kamuhanda.[5979] The Prosecution added that it had also provided the transcripts to the Special Counsel appointed by the Prosecutor to investigate allegations of false testimony in the *Kamuhanda* case.[5980]

4. In his submissions, Mr. Kamuhanda raises issues related to the use of the disclosed transcripts in review of proceedings and questions related to the special investigations generally. Mr. Kamuhanda characterizes the Prosecution's filing as a request to the Appeals Chamber to preclude the use of the transcript in an eventual request for review under Rule 120.[5981] This is perhaps due to the fact that the Prosecution filing disclosing the transcript was accompanied by a discussion of why, in its view, the transcripts did not constitute a "new fact" in the event that Mr. Kamuhanda were to use the evidence in review proceedings pursuant to Rule 120.[5982] In its response to Mr. Kamuhanda's submissions, the Prosecution clarifies that its original filing was simply a fulfilment of its continuing disclosure obligations under Rule 68 (E), and not an attempt to prevent the use of the transcript.[5983] Nonetheless, in reply, Mr. Kamuhanda persists in his objections to the other witnesses from the *Rwamakuba* case.[5984] Mr. Kamuhanda does not elaborate in any detail on the specific relevance of that evidence to him.

5. The Appeals Chamber considers that the Prosecution's original filing is a routine disclosure pursuant to Rule 68. At this Stage, the Prosecution's submissions which accompanied its filing of the disclosed material are both irrelevant and premature, and the Appeals Chamber does not take them into account. It is for Mr. Kamuhanda to determine what use, if any, to make of the disclosed material. In addition, the Appeals Chamber does not find it appropriate to consider Mr. Kamuhanda's request for additional disclosure, Mr. Kamuhanda presently has no case pending before the Appeals Chamber. Furthermore, he has not identified any failing on the Prosecution's part in discharging its continuing disclosure obligations.[5985] The Appeals Chamber highlights that Mr. Kamuhanda may obtain public

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[5975] See *The Prosecutor v. Kamuhanda*, Case N°ICTR-1999-54A-A, Oral Decision on Rule 115 and Contempt of false testimony, 19 May 2005.
[5976] *The Prosecutor v. Kamuhanda*, Case N°ICTR-1999-54A-A, Prosecution Reply by Way of Clarification in Relation to Jean de Dieu Kamuhanda's Response to the "Prosecutor's Disclosure Pursuant to Rule 75 (F) of the Rules, of the Confidential Transcript of Defence Witness 7/14, in *Prosecutor v. Rwamakuba*", filed 20 March 2006, paras. 10, 11 ("Prosecution Reply").
[5977] *The Prosecutor v. Kamuhanda*, Case N°ICTR-1999-54A-A, Prosecutor's Disclosure Pursuant to Rule 75 (F) of the Rules, of the Confidential Transcript of Defence Witness 7/14, in *Prosecutor v. Rwamakuba*, filed 3 March 2006 ("Prosecution Disclosure"). See also *The Prosecutor v. Kamuhanda*, Case N°ICTR-1999-54A-A, Corrigendum to Submissions Accompanying the Prosecutor's Disclosure Pursuant to Rule 75 (F) of the Rules, of the Confidential Transcript of Defence Witness 7/14, in *Prosecutor v. Rwamakuba*, filed 3March 2006.
[5978] Prosecution Disclosure, para. 2.
[5979] Prosecution Disclosure, para. 2.
[5980] Prosecution Disclosure, para. 3.
[5981] Kamuhanda Request, p. 2.
[5982] Prosecution Disclosure, paras. 5-15.
[5983] Prosecution Reply, paras. 3-5.
[5984] The Prosecutor v. Kamuhanda, Case N°ICTR-1999-54A-A, Conclusions en duplique à la requête du procureur sur le fondement de l'article 75 (F), filed 28 March 2006, pp. 1, 2 ("Kamuhanda Reply").
[5985] The Appeals Chamber also observes that the Prosecution has recently provided Mr. Kamuhanda with the requested material. See *The Prosecutor v. Kamuhanda*, Case N°ICTR-1999-54A-A, Prosecutor's Disclosure Pursuant to Rule 75 (F) of the Rules, of the Confidential Transcript of Defence Witnesses 1/5, 3/1, 3/11, 3/22, 7/3, and 9/31 in *Prosecutor v. Rwamakuba*, filed 31 March 2006.

transcripts from the Registry and direct any request for confidential material to the Chamber seized of the given case.[5986]

6. Mr. Kamuhanda also complains that, despite repeated requests on his part, the Special Counsel appointed by the Prosecutor to investigate possible false testimony in his case has not yet interviewed either him or his counsel.[5987] Consequently, Mr Kamuhanda asks the Appeals Chamber to order the Prosecution to cease its investigation or, in the alternative, to allow him and his counsel an opportunity to be heard.[5988] In any event, he requests the Appeals Chamber to fix a date for the filing of the Special Counsel's final report and to provide him with a copy.[5989] The Prosecution responds that Mr. Kamuhanda's request is inappropriate, emphasizing its discretion and independence in the conduct of the investigation.[5990]

7. In directing the Prosecution to investigate the possibility of false testimony, the Appeals Chamber left it to the Prosecutor's discretion to take the eventual steps and measures which he may deem necessary and appropriate under the circumstances.[5991] Moreover, Rule 70 (A) provides that reports prepared in connection with the investigation of a case are not subject to disclosure.[5992] Consequently, Mr. Kamuhanda's requests related to the investigation lack merit.

8. For the foregoing reasons, the Appeals Chamber dismisses Mr. Kamuhanda's request in all respects.

Done this 7th day of April 2006, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

[5986] See, *e.g.*, *The Prosecutor v. Galić*, Case N°IT-98-29-A, Decision on Momcilo Perisić Motion seeking Access to Confidential Material in the Galić Case, 16 February 2006.
[5987] Kamuhanda Request, pp. 2, 3 ; Kamuhanda Reply (annexes)
[5988] Kamuhanda Request, p. 4.
[5989] Kamuhanda Request, p. 4 ; Kamuhanda Reply, pp. 2, 3.
[5990] Kamuhanda Reply, paras. 6-11.
[5991] *Kamuhanda v. The Prosecutor*, Case N°ICTR-1999-54A-A, Oral Decision on Rule 115 and Contempt of false testimony, 19 May 2005 ("The Appeals Chamber stresses that in so directing the Prosecutor, it leaves it to his discretion to take the eventual steps and measures which he deems necessary and appropriate under the circumstances").
[5992] This does not mean that the Prosecution is excused from providing Mr. Kamuhanda with any exculpatory material obtained in the course of the investigation in some other form.

Le Procureur c. Jean de Dieu KAMUHANDA

Affaire N° ICTR-99-54A

Fiche technique

- Nom: KAMUHANDA
- Prénom: Jean de Dieu
- Date de naissance: 3 mars 1953
- Sexe: masculin
- Nationalité: rwandaise
- Fonction occupée au moment des faits incriminés: Ministre de l'enseignement supérieur et de la culture
- Date de confirmation de l'acte d'accusation: 1 octobre 1999
- Date de la disjonction de l'acte d'accusation: 7 novembre 2000 – Bicamumpaka, Bizimungu, Karemera, Mugenzi, Mugiraneza, Niyitegeka et Rwamakuba
- Chefs d'accusation: génocide, entente en vue de commettre le génocide, complicité de génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date et lieu de l'arrestation : 26 novembre 1999, en France
- Date du transfert: 7 mars 2000
- Date de la comparution initiale: 24 mars 2000
- Précision sur le plaidoyer: non coupable
- Date du début du procès: 17 avril 2001
- Réouverture du procès: 3 septembre 2001
- Date et contenu du prononcé: 22 janvier 2004, condamné à l'emprisonnement à vie pour génocide et condamné à l'emprisonnement à vie pour crime contre l'humanité (extermination), les deux peines étant cumulatives
- Appel: 19 septembre 2005, décision confirmée

Ordonnance portant affectation des juges à une affaire devant la Chambre d'appel 4 avril 2006 (ICTR-99-54A-A)

(Original : Anglais)

Chambre d'appel

Juge : Fausto Pocar, Président de Chambre

Jean de Dieu Kamuhanda – Affectation de juges

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 75 (F), 77 (C), 107 et 115 ; Statut, art. 11 (3) et 13 (4)

Nous, FAUSTO POCAR, Président de la Chambre d'appel du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'États voisins entre le 1er janvier et le 31 décembre 1994 (le « Tribunal international »),

Rappelant la décision en ce qui a trait à l'article 115 du Règlement et aux questions d'outrage et de faux témoignage que la Chambre d'appel a rendue oralement le 19 mai 2005,

Vu le document intitulé « Prosecutor's Disclosure Pursuant to Rule 75 (F) of the Rules, of the Confidential Transcripts of the Testimony of Defence Witness 7/14 in Prosecutor v. Rwamakuba » déposé le 3 mars 2006,

Vu les Conclusions en réplique à la requête du Procureur sur le fondement de l'article 75 (F), déposées par Jean de Dieu Kamuhanda le 13 mars 2006,

Vu les articles 11 (3) et 13 (4) du Statut du Tribunal international et les articles 77 (C) et 107 du Règlement de procédure et de preuve,

Vu la composition de la Chambre d'appel du Tribunal pénal international pour l'ex-Yougoslavie, énoncée dans le document IT/242, publié le 17 novembre 2005,

Ordonnons que dans l'affaire n°ICTR-99-54A-A, *Le Procureur c. Jean de Dieu Kamuhanda,* la Chambre d'appel sera composée des juges suivants :

Fausto Pocar, Président,
Mohamed Shahabuddeen
Liu Daqun
Theodor Meron
Wolfgang Schomburg

Fait en anglais et en français, le texte en anglais faisant foi.

Fait à La Haye (Pays-Bas), le 4 avril 2006.

[Signé] : Fausto Pocar

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The Prosecutor v. Joseph KANYABASHI, Elie NDAYAMBAJE, Sylvain NSABIMANA, Alphonse NTEZIRYAYO, Arsène Shalom NTAHOBALI and Pauline NYIRAMASUHUKO

Case N° ICTR-98-42 (Cases N° ICTR-96-15, ICTR-96-8, ICTR-97-21 and ICTR-97-29)

Case History : Joseph Kanyabashi

- Name: KANYABASHI
- First name: Joseph
- Date of birth: 1937
- Sex: male
- Nationality: Rwandan
- Former Official Function: *Bourgmestre* of Ngoma
- Date of Indictment's Confirmation: 15 July 1996
- Date of Indictment's Amendments: 12 August 1999 and 11 May 2000
- Date of the decision to joint Trials: 5 October 1999 – Ndayambaje, Nsabimana, Ntahobali, Nteziryayo and Nyiramasuhuko
- Counts: genocide, conspiracy to commit genocide, complicity in genocide, direct and public incitement to commit genocide serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date and Place of Arrest: 28 June 1995, in Belgium
- Date of Transfer: 8 November 1996
- Date of Initial Appearance: 29 November 1996
- Pleading: not guilty
- Date Trial Began: 12 June 2001

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Case History : Elie Ndayambaje

• Name: NDAYAMBAJE

• First Name: Elie

• Date of Birth: 8 March 1958

• Sex: male

• Nationality: Rwandan

• Former Official Function: *Bourgmestre* of Muganza

• Date of Indictment's Confirmation: 21 June 1996

• Date of the decision to joint Trials: 5 October 1999 – Kanyabashi, Nsabimana, Ntahobali, Nteziryayo and Nyiramasuhuko

• Counts: genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

• Date and Place of Arrest: 28 June 1995, in Belgium

• Date of Transfer: 8 November 1996

• Date of Initial Appearance: 29 November 1996

• Pleading: not guilty

• Date Trial Began: 12 June 2001

***

Case History : Sylvain Nsabimana

• Name: NSABIMANA

• First Name: Sylvain

• Date of Birth: 29 July 1953

• Sex: male

• Nationality: Rwandan

• Former Official Function: *Préfet* in Butare

• Date of Indictment's confirmation: 16 October 1997

• Date of Indictment's Amendments: 24 June 1999

• Date of the decision to joint Trials: 5 October 1999 – Kanyabashi, Ndayambaje, Ntahobali, Nteziryayo and Nyiramasuhuko

• Counts: genocide, conspiracy to commit genocide, direct and public incitement to genocide, complicity in genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

• Date and Place of Arrest: 18 July 1997, in Kenya

• Date of transfer: 18 July 1997

• Date of initial appearance: 24 October 1997

• Pleading: not guilty

• Date Trial Began: 12 June 2001

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Case History: Alphonse Nteziryayo

• Name: NTEZIRYAYO

• First Name: Alphonse

• Date of Birth: unknown

• Sex: male

• Nationality: Rwandan

• Former Official Function: Commanding Officer of the Military Police, then *Préfet* of Butare

• Date of Indictment's Confirmation: 16 October 1997

• Date of Indictment's Amendments: 24 June 1999

• Date of the decision to joint Trials: 5 October 1999 – Kanyabashi, Ndayambaje, Nsabimana, Ntahobali and Nyiramasuhuko

• Counts: genocide, conspiracy to commit genocide, direct and public incitement to genocide, complicity in genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

• Date and Place of Arrest: 24 April 1998, in Burkina Faso

• Date of Transfer: 21 May 1998

• Date of Initial Appearance: 17 August 1998

• Pleading: not guilty

• Date Trial Began: 12 June 2001

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Case History : Arsène Shalom Ntahobali

• Name: NTAHOBALI

• First Name: Arsène Shalom

• Date of Birth: 1970

• Sex: Male

• Nationality: Rwandan

• Former Official Function: Student and a leader of MRND militiamen (*Interahamwe*)

• Date of Indictment's Confirmation: 29 May 1997

• Date of Indictment's Amendments: 17 June 1997

• Date of the decision to joint Trials: 5 October 1999 – Kanyabashi, Ndayambaje, Nsabimana, Nteziryayo and Nyiramasuhuko

• Counts: conspiracy to commit genocide, genocide, complicity in genocide, direct and public incitement to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

• Date and Place of Arrest: 24 July 1997, in Kenya

• Date of Transfer: 24 July 1997

• Date of Initial Appearance: 17 October 1997

• Pleading: not guilty

• Date Trial Began: 12 June 2001

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Case History: Pauline Nyiramasuhuko

• Name: Nyiramasuhuko

• First Name: Pauline

• Date of Birth: 1946

• Sex: Female

• Nationality: Rwandan

• Former Official Function: Minister of family and Women Affairs

• Date of Indictment's Confirmation: 29 May 1997

• Date of the decision to joint Trials: 5 October 1999 – Kanybashi, Ndayambaje, Nsabimana, Ntahobali and Nteziryayo

• Counts: conspiracy to commit genocide, genocide, complicity in genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

• Date and Place of Arrest: 18 July 1997, in Kenya

• Date of Transfer: 18 July 1997

• Date of Initial Appearance: 3 September 1997

• Pleading: not guilty

• Date Trial Began: 12 June 2001

Decision on Arsène Shalom Ntahobali's Motion to Amend his Witness List and to Reconsider the Decision of 26 August 2005 titled: "Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali" 27 January 2006 (ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Georges Rutaganda – Addition of Georges Rutaganda as a Defence Witness, Indication of the proposed witness' testimony to allow the Chamber to make a proper determination as to the materiality and probative value of the proposed testimony, Purpose of a will-say statement, Inherent and discretionary jurisdiction of the Trial Chamber to reconsider an impugned decision – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rules 67, 67 (B), 73, 73 (A) and 73 ter

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza, Decision (Prosecutor's Request for Review or Reconsideration) (Separate Opinion of Judge Shahabuddeen), 31 March 2000 (ICTR-97-19) ; Trial Chamber, The Prosecutor v. Ferdinand Nahimana, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Prosecutor's Motions for Leave to Call Additional Witnesses and for the Transfer of Detained Witnesses, 24 July 2001 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Prosecutor's Motion to Modify the Sequence of Appearance of Witnesses on her Witness List, 27 February 2002 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. André Ntagerura et al., Decision on Defence for Ntagerura's Motion to Amend Its Witness List Pursuant to Rule 73 ter (E), 4 June 2002 (ICTR-99-46) ; Trial Chamber, The Prosecutor v. André Ntagerura et al., Decision on Defence of Ntagerura's Motion to Vary its Witness List Pursuant to Rule 73 ter (E), 11 June 2002 (ICTR-99-46) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E), 26 June 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 July 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on econsideration of Order to reduce Witness List and on Motion for Contempt for Violation of that order, 1 March 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E), 21 May 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E)", 15 June 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Nyiramasuhuko et al., Decision on Prosecutor's Motion for Leave to Be Authorised to Have Admitted the Affidavits Regarding the Chain of Custody of the Diary of Pauline Nyiramasuhuko under Rule 92 bis, 14 October 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko, Decision on the Confidential Prosecutor's Motion to Be Served with Particulars of Alibi Pursuant to Rule 67(A) (ii) (A), 1 March 2005 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Pauline Nyiramasuhuko's Ex-Parte - Extremely Urgent Motion for Reconsideration of Trial Chamber II's Decision on Nyiramasuhuko's Strictly Confidential Ex-Parte - Under Seal - Motion for Additional Protective Measures for Defence Witness WBNM dated 17 June 2005 or, Subsidiarily,

on Nyiramasuhuko's Strictly Confidential Ex-Parte - Under Seal - Motion for Additional Protective Measures for Defence Witness WBNM, 4 July 2005 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali, Rule 73 ter (E), Rules of Procedure and Evidence, 26 August 2005 (ICTR-98-42)

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEISED of the "Requête de Arsène Ntahobali pour amender sa liste de témoins et en reconsidération de la décision de la Chambre de Première Instance II « Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali »", filed on 30 November 2005 (the "Motion");

CONSIDERING

(i) The "Réponse de Joseph Kanyabashi à la « Requête de Arsène Shalom Ntahobali pour amender sa liste de témoins et en reconsidération de la décision de la Chambre de Première Instance II « Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali »", filed on 5 December 2005 (the "Kanyabashi's Response");

(ii) The "Prosecutor's Response to the Defence « Requête de Arsène Ntahobali pour amender sa liste de témoins et en reconsidération de la décision de la Chambre de Première Instance II « Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali", filed on 12 December 2005 (the "Prosecutor's Response");

(iii) The "Réplique à la réponse de Joseph Kanyabashi à la « Requête de Arsène Shalom Ntahobali pour amender sa liste de témoins et en reconsidération de la décision de la Chambre de Première Instance II - Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali »", filed on 12 December 2005 (the "Ntahobali's Reply to Kanyabashi's Response");

(iv) The "Réplique de Arsène Ntahobali à la Prosecutor's Response to the Defence « Requête de Arsène Ntahobali pour amender sa liste de témoins et en reconsidération de la décision de la Chambre de Première Instance II « Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali", filed on 19 December 2005 (the "Ntahobali's Reply to the Prosecutor's Response");

RECALLING

(i) The "Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali", issued on 26 August 2005 (the "Decision of 26 August 2005");

(ii) The "Decision on the « Requête d'Arsène Shalom Ntahobali en autorisation de rencontrer le détenu Georges Rutaganda en l'absence du représentant du Procureur et du Greffe »", issued on 22 September 2005 (the "Decision of 22 September 2005").

NOTING:

(i) The "Prosecutor's Request for an Extension of Time to Respond to Arsène Shalom Ntahobali's Motion to Vary its Witnesses List and Reconsideration of the Trial Chamber Decision on the Defence Motion to Modify the List of Witnesses for Arsène Shalom Ntahobali", filed on 6 December 2005 (the "Prosecutor's Request for Extension of Time");

(ii) The "*Réponse de Arsène Shalom Ntahobali à la* Prosecutor's Request for an extension of Time to Respond to Arsène Shalom Ntahobali's Motion to Vary its Witnesses List and Reconsideration of the Trial Chamber Decision on the Defence Motion to Modify the List of

Witnesses for Arsène Shalom Ntahobali", filed on 7 December 2005 (the "Ntahobali's Response");

(iii) The facsimile titled "File Submission-In the matter of the Prosecutor vs. Nyiramasuhuko et al.", issued by the Registry on 8 December 2005;

(iv) The Oral Decision issued by the Chamber on 12 December 2005, prescribing a timeframe of five days running from the date of the decision for other Parties to respond to the "*Requête de Arsène Ntahobali pour amender sa liste de témoins et en reconsidération de la décision de la Chambre de Première Instance II «* Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali"[1] (the "Oral Decision of 12 December 2005");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular its Rules 73 and 73 *ter;*

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

Submissions of the Parties

Defence for Ntahobali

1. The Defence moves the Chamber for leave to add convictee Georges Rutaganda and Witness WDSA to its witness list and to reconsider the Decision of 26 August 2005, thereby allowing Witness MJ110 to testify to the following:

- That the Accused was bedridden for nearly one week between late April and early May 1994 and therefore, he did not leave the Hotel Ihuriro during this period;

- That the Accused left for Cyangugu on 28 May 1994.

2. The Defence submits that Georges Rutaganda is identified as Witness NMRG and that a request for his addition to Ntahobali's initial witness list was denied by the Chamber on 26 August 2005. The Defence further states that it failed to provide the Chamber with the summary of Witness NMRG's expected testimony in the previous motion to vary the list of its witnesses filed on 2 August 2005, as the decision in relation to its motion to meet with said witness in the absence of the Prosecution and the Registry was still pending at that time.

3. The Defence submits that it only managed to meet with Georges Rutaganda on 28 October 2005, following the Decision of 22 September 2005, which granted such a visit.[2] During that meeting, Georges Rutaganda provided the Defence with a lot of information relevant to Ntahobali's case and accepted to testify for the Accused.

4. The Defence submits that in his capacity as a former member of the Council of Direction of *Interahamwe za MRND*, Georges Rutaganda is the only witness who will be able to enlighten the Chamber in relation to the Accused's purported involvement with the *Interahamwe*.[3] According to the Defence, no other witness for Ntahobali will testify to this issue.

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[1] *Nyiramasuhuko et al*., T. 12 December 2005, pp. 49-50.

[2] The Decision is titled : "Decision on the « Requête d'Arsène Shalom Ntahobali en autorisation de rencontrer le détenu Georges Rutaganda en l'absence du représentant du Procureur et du Greffe »".

[3] Paragraphs 33 and 34 of the Motion.

5. The Defence submits that it intends to call Georges Rutaganda as one of the last witnesses, thereby allowing the Prosecution and the other Defence teams sufficient time to conduct their investigations and to prepare their cross-examinations.[4]

6. With regard to Witness WDUSA, the Defence recalls that the Chamber denied the request for his addition to its witness list on 26 August 2005.[5] However, the Defence filed its notice of intent to enter a defence of alibi on 13 October 2005[6] and stated that Witness WDUSA is one of the proposed alibi witnesses. The Defence argues that the current request for his addition to the initial witness list is therefore justified. The Defence further asserts that Witness WDUSA, being the only alibi witness not related to the Accused, will testify to his and the Accused's presence in Cyangugu.[7]

7. With regard to Witness MJ110, the Defence recalls that the Chamber granted the request for her addition on 26 August 2005 but limited her expected testimony to the events involving the "Bihira girls" and to the sheltering of Tutsi refugees by the Accused.[8] The Defence submits that Witness MJ110 is amongst the alibi witnesses it intends to call, as specified in the notice of intent to enter a defence of alibi of 13 October 2005. As such, Witness MJ110 should be allowed to extend her testimony to the facts that the Accused was bedridden for nearly one week between late April and early May 1994 and that he left for Cyangugu towards 28 May 1994.[9] The Defence points out that the notice of alibi constitutes a new circumstance warranting the reconsideration of the Decision of 26 August 2005 as proposed above.[10]

8. The Defence alleges that the *will-say* statements of Witnesses WDUSA and MJ110 were filed on 10 August 2005 and that their respective identity and current address are included in the Defence notice of intent to enter a defence of alibi filed previously. The Prosecution and the other Defence teams will therefore be able to conduct an effective cross-examination of these two witnesses.

Kanyabashi's Response

9. The Defence for Kanyabashi moves the Chamber to limit the potential testimony of Georges Rutaganda to what is alleged in paragraphs 33 and 34 of the Motion and therefore requests the removal of paragraphs 1 and 2 from his *will-say* statement.[11] As for paragraphs 3, 6, 7, 9, 10, 12, 13, 15, 18, 19, and 20, the Defence for Kanyabashi submits that it is unable to make any investigation in relation to the allegations mentioned in these paragraphs in the absence of precise and concrete facts making the cross-examination ineffective. It therefore requests the deletion of those paragraphs.[12]

10. The Defence for Kanyabashi submits that Georges Rutaganda's *will-say* statement gives no indication with regard to the moment in 1994 when he would have been present in Butare, in Ngoma Commune, or in Butare *Prefecture*, particularly between 6 April and 3 July 1994.[13]

Prosecutor's Response

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[4] The Defence attached to its Motion as Annex A the Particular Sheet and the *Will-say statement* of Georges Rutaganda.
[5] "Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali", paragraphs 62-65.
[6] Paragraph 50 of the Motion.
[7] Paragraph 52 of the Motion.
[8] "Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali", paragraphs 53-55.
[9] Paragraph 74 of the Motion.
[10] Paragraph 75 of the Motion.
[11] Paragraph 15 of Kanyabashi's Response.
[12] Paragraph 16 of Kanyabashi's Response.
[13] Paragraph 11 of Kanyabashi's Response.

11. The Prosecution does not object to the proposed addition of Georges Rutaganda to the Accused's witness list. Nevertheless, the Prosecution underscores that the attached will-say statement of Georges Rutaganda is broad, imprecise, and has paragraphs that go beyond the temporal jurisdiction of the Tribunal or are irrelevant to the matter at hand. Thus, the Prosecution will suffer irreparable prejudice if the Defence is allowed to present such evidence.[14]

12. The Prosecution therefore requests the exclusion of the following paragraphs from Georges Rutaganda's *will-say* statement: 1, 2, 3, 4, 6, 7, 9, 10, 12, 13, 14, 15, 18, 19 and 20. The Prosecution argues that paragraph 1 falls outside the temporal jurisdiction of the Tribunal and is not material to the matter before the Chamber. Some witnesses previously called by Accused Nyiramasuhuko have sufficiently testified on the 1990 war and its impact on Butare, rendering paragraph 2 of the *will-say* statement unnecessary. As for paragraphs 3, 4, 6, 7, 9, 10, 13, 19, and 20, they lack precision and/or specific dates or incidents to support the alleged facts. The Prosecution further submits that Georges Rutaganda is not an expert witness; as such, he cannot be allowed to draw conclusions with respect to opinion of the experts referred to in paragraph 12 of the *will-way* statement. Paragraph 14 is outside the temporal jurisdiction of the Tribunal and the Defence failed to make the requisite disclosure, pursuant to Rule 67 (C). Regarding paragraph 15, the Prosecution submits that it is imprecise and irrelevant as it is not the *Interahamwe* or the RPF which are charged in the Indictment. According to the Prosecution, paragraph 18 is also irrelevant and imprecise.[15]

13. As far as the prayer for reconsideration is concerned, the Prosecution argues that the Defence has failed to demonstrate any special circumstances that would warrant reconsideration, nor has it demonstrated a clear error, or that a reconsideration of the Decision of 26 August 2005 will prevent an injustice in conformity with the jurisprudence.[16] The Prosecution submits that on 1 August 2005, when the Defence filed its first motion to vary its witness list, it was aware that Witness WDUSA would be giving alibi evidence but that it chose not to serve notice under Rule 67, until after the Trial Chamber ruled on that application on 29 August 2005.

14. With regard to Witness MJ110, the Prosecution submits that the Trial Chamber has occasioned no injustice warranting a reconsideration of the Decision of 26 August 2005 in limiting this witness' expected testimony strictly to the "Bihira girls" and to the alleged sheltering of Tutsi refugees by the Accused. Furthermore, the Prosecution argues that the Defence should have known about the new proposed facts as referred to in paragraph 7 above and should have provided the Trial Chamber with this information on 1 August 2005, when it filed its application to vary its witness list. Finally, the Prosecution submits that the Defence has failed to comply with the Trial Chamber Decision of 1 March 2005, directing all Defence teams to immediately make the necessary disclosures in accordance with Rule 67 if they wish to rely on the defence of alibi, for the reason that it only filed its notice of alibi on 1 and 13 October 2005.

Ntahobali's Reply to Kanyabashi's Response

15. The Defence for Ntahobali submits that paragraphs 1 and 2 of Georges Rutaganda's *will-say* statement should stand as they do not go beyond what is elaborated in paragraphs 33 and 34 of the Motion. Rather, Paragraphs 1 and 2 are intended for illustration of paragraphs 33 and 34 of the Motion; as such they constitute evidence which is necessary to the Accused's defence strategy.[17]

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[14] Paragraph 6 of the Prosecutor's Response.
[15] Paragraphs 8-14 of the Prosecutor's Response.
[16] The Prosecution quotes the following Appeals Chamber Decisions: *Prosecutor v. Barayagwiza,* "Decision on Review and Reconsideration", 14 September 2000; *Prosecutor v. Niyitegeka,* "Decision on Eliezer Niyitegeka's Urgent Motion for Reconsideration of Appeals Chamber Decision dated 3 December 2003", 4 February 2004; *Prosecutor v. Kanyabashi,* "Decision for Review or Reconsideration", 12 September 2000; *Prosecutor v. Semanza*, "Decision on Application for Reconsideration on Amicus Curiae Application of Paul Bisengimana", 19 May 2004.
[17] Paragraph 10 of Ntahobali's Reply to Kanyabashi's Response.

16. The Defence for Ntahobali submits that nowhere in the *will-say* statement is it mentioned that Georges Rutaganda came to Butare; rather, he will talk about his knowledge of Kajuga's coming there.[18]

17. The Defence for Ntahobali alleges that the purpose of a *will-say* statement is to enunciate the subjects which will be dealt with by the witness during his/her testimony but not to indicate all the concrete and precise facts to which he/she will testify, as claimed by the Defence for Kanyabashi.[19] Finally, the Defence for Ntahobali submits that it has fully complied with the provision of Rule 73 *ter* (B) (iii) in providing the summary of facts to which Georges Rutaganda will testify.[20]

HAVING DELIBERATED,

18. Following its Oral Decision of 12 December 2005, the Chamber finds that both the Prosecutor's Request of 6 December 2005 for an extension of time to reply[21] and the subsequent response filed by the Defence for Ntahobali on 7 December 2005[22] have become moot.

19. The Chamber also notes that on 19 December 2005, the Defence for Ntahobali filed its Reply to the Prosecutor's Response dated 12 December 2005. The Chamber finds such filing out of time as the timeframe of five days within which the Defence for Ntahobali should have filed its Reply expired on 17 December 2005 following the Oral Decision of 12 December 2005. The Chamber therefore concludes that Ntahobali's Reply to the Prosecutor's Response of 19 December 2005 is inadmissible and the Chamber will therefore not take it into consideration in deciding the instant Motion.

On the Addition of Georges Rutaganda as a Defence Witness for Ntahobali

20. The Chamber recalls decisions issued by this Tribunal where motions for additional witnesses have been granted in the interest of justice, and notes that the moving party has always provided the Chamber and the other Parties with an indication of the proposed witness' testimony, usually in the form of a summary of the proposed testimony or *will-say* statement, an indication of the relevance of the evidence to the proceedings, and an estimated length of the testimony. This is to ensure that other Parties are not taken by surprise or otherwise suffer prejudice and that there exists sufficient information upon which to prepare their examinations and carry out the necessary investigations if required. More importantly, it allows the Chamber to make a proper determination as to the materiality and probative value of the proposed testimony to the proceedings.[23]

21. The Chamber notes the Defence submissions alleging that Georges Rutaganda's testimony is relevant to its case; in his capacity as a former member of the Council of Direction of *Interahamwe za MRND*, Georges Rutaganda is the sole witness who will be able to enlighten the Chamber in relation

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[18] Paragraph 12 of Ntahobali's Reply to Kanyabashi's Response.
[19] Paragraph 17 of Ntahobali's Reply to Kanyabashi's Response.
[20] Paragraph 21 of Ntahobali's Reply to Kanyabashi's Response.
[21] The Motion is titled "Prosecutor's Request for an extension of Time to Respond to Arsène Shalom Ntahobali's Motion to Vary its Witnesses List and Reconsideration of the Trial Chamber Decision on the Defence Motion to Modify the List of Witnesses for Arsène Shalom Ntahobali".
[22] The Response is titled: "*Réponse de Arsène Shalom Ntahobali à la* Prosecutor's Request for an extension of Time to Respond to Arsène Shalom Ntahobali's Motion to Vary its Witnesses List and Reconsideration of the Trial Chamber Decision on the Defence Motion to Modify the List of Witnesses for Arsène Shalom Ntahobali".
[23] *Nyiramasuhuko et al*., Decision on the Prosecutor's Motions for Leave to Call Additional Witnesses and for the Transfer of Detained Witnesses (TC), 24 July 2001; Decision on the Prosecutor's Motion to Modify the Sequence of Appearance of Witnesses on her Witness List (TC), 27 February 2002; Decision of 30 March 2004; Decision of 14 October 2004; *Nahimana et al*., Decision of 26 June 2001; *Ntagerura et al*., Decision of 4 June 2002; Decision of 11 June 2002; *Bagasora et al*., Decision of 26 June 2003; Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) (TC), 21 May 2004; *Nyiramasuhuko et al*. Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Ntahobali (TC), 26 August 2005.

to the Accused's purported involvement with the *Interahamwe*. After having reviewed Georges Rutaganda's *will-say* statement attached to the Motion, the Chamber is satisfied that his proposed testimony contains relevant and probative evidence which the Chamber should hear in the interest of justice. The Chamber therefore grants the motion for the addition of Georges Rutaganda as a Defence Witness for Ntahobali in the sense which will be discussed below.

On the Scope of Georges Rutaganda's Expected Testimony

22. Chamber notes that both the Prosecution and the Defence for Kanyabashi request that some paragraphs be removed from Georges Rutaganda's *will-say* statement and should not be part of his expected testimony before the Chamber.

23. The Chamber also notes the Defence for Ntahobali's submissions alleging that the purpose of a *will-say* statement is to enunciate the subjects which will be dealt with by the witness during his/her testimony, but not to indicate all the concrete and precise facts to which he/she will testify.[24]

24. The Chamber recalls its Oral Decision of 13 December 2005 and reiterates that since the sole purpose of the *will-say* statement is to enable the other party or the other parties to prepare and to raise issues, it must be clear enough to cover the scope of the proposed testimony of the witness. Accordingly, *will-say* statements must be full and comprehensive, not in the sense of giving all the details, but at least laying out the scope of what the witness is expected to cover in clear terms.[25]

25. After having thoroughly reviewed the Motion and the attached *will-say* of Georges Rutaganda, the Chamber finds that Georges Rutaganda's expected testimony, in his capacity as a former member of the Council of Direction of *Interahamwe za MRND*, should be strictly limited to the alleged involvement of Ntahobali with the *Interahamwe* as it is charged in the Indictment and supported by certain Prosecution witnesses. Accordingly, the Chamber limits Georges Rutaganda's expected testimony to paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 of his *will-say* statement. Regarding paragraph 12, the Chamber notes that Georges Rutaganda is being called as a factual witness and his testimony should be limited to the factual issues raised in this paragraph.

On the Reconsideration of the Decision of 26 August 2005

26. The Chamber recalls its jurisprudence on reconsideration, namely that,

> [t]he fact that the Rules are silent as to reconsideration, however, is not, in itself, determinative of the issue whether or not reconsideration is available in "particular circumstances" and a judicial body has inherent jurisdiction to reconsider its decision in "particular circumstances." Therefore, although the Rules do not explicitly provide for it, the Chamber has an inherent power to reconsider its own decisions. However, it is clear that reconsideration is an exceptional measure that is available only in particular circumstances.[26]

27. The Chamber notes that it has the inherent jurisdiction, to be exercised as its discretion, to reconsider an impugned decision, including but not limited to the following circumstances:

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[24] Paragraph 17 of Ntahobali's Reply to Kanyabashi's Response.
[25] *Nyiramasuhuko et al*, T. 13 December 2005, p. 57.
[26] *Nyiramasuhuko et al*., Decision on Pauline Nyiramasuhuko's Ex-Parte-Extemely Urgent Motion for Reconsideration of Trial Chamber II's Decision on Nyiramasuhuko's Strictly confidential Ex-Parte-Under Seal-Motion for Additional Protective Measures for Defence Witness WBNM, dated 17 June 2005 or, Subsidiarily, on Nyiramasuhuko's Strictly Confidential Ex-Parte-Under Seal-Motion for Additional protective Measures for Defence Witness WBNM (TC), 4 July 2005, para. 3, quoting *Bagosora et al.,* ICTR-98-41-T, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E)" (TC), 15 June 2004, para. 7.

i. Where the impugned decision was erroneous in law or an abuse of discretion when decided and for this reason a procedural irregularity has caused a failure of natural justice; or,
ii. Where new material circumstances have arisen since the decision was issued.[27]

28. As for the reconsideration sought regarding Witness WDUSA, the Chamber notes the Defence submissions alleging that he is among the alibi witnesses, that he will testify to his and the Accused's presence in Cyangugu, and that he is the only alibi witness who is not related to the Accused.

29. The Chamber recalls the provision of Rule 67 and its Decision of 1 March 2005 where it directed "the Defence, to immediately, make the necessary disclosures in accordance with Rule 67 if they wish to rely on the defence of alibi."[28] Given that the Defence only filed its notice of alibi on 13 October 2005, the Chamber finds that this notice has not been filed in a timely manner. Further, the Chamber recalls its Decision for Certification to Appeal of 21 September 2005, draws the Defence's attention to Rule 67 in full and Sub-Rule 67 (B) in particular, and reiterates that the Defence for Ntahobali is not limited by the Chamber's Decision of 26 August 2005 if it wishes to avail itself of its right to present a defence of alibi.

30. The Chamber is of the opinion that the filing of the notice of intention to enter a defence of alibi with regard to Witness WDUSA on 13 October 2005 does not constitute a "new material circumstance" warranting a reconsideration of the Decision of 26 August 2005. The Chamber finds that the Defence must have known about the alleged alibi evidence prior to the issuance of said Decision. The motion for reconsideration is therefore denied.

31. However, the Chamber grants the motion for the addition of Witness WDUSA as an alibi witness whose expected testimony will be limited to the presence of the Accused in Cyangugu.

32. As for the reconsideration sought for Witness MJ110, the Chamber recalls the Defence submissions that she is also an alibi witness expected to testify to the facts that Ntahobali was bedridden for nearly one week between late April and early May 1994, and that he left for Cyangugu towards 28 May 1994.

33. The Chamber reiterates its reasoning set out in paragraphs 29 and 30 above and denies the motion for reconsideration of its Decision of 26 August 2005. Nonetheless, it grants the Defence motion to allow Witness MJ110 as an alibi witness to extend her testimony to the facts that Ntahobali was bedridden for nearly one week between late April and early May 1994, and that he left for Cyangugu towards 28 May 1994, coming back to Butare one week later.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the motion for the addition of Georges Rutaganda, identified as Witness NMRG, to Ntahobali's witness list;

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[27] *Barayagwiza,* Decision (Prosecutor's Request for Review or Reconsideration) (AC), 31 March 2000, Separate Opinion of Judge Shahabuddeen, paras. 4-5; *Bagosora et al.,* Decision on Reconsideration of Order to reduce Witness List and on Motion for Contempt for Violation of that Order (TC), 1 March 2004, para. 11; *Bagosora et al.,* Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003, para. 25.

[28] *Nyiramasuhuko et al.,* Decision on the Confidential Prosecutor's Motion to be Served With Particulars of Alibi Pursuant to Rule 67 (A) (ii) (a) (TC), 1 March 2005.

LIMITS Georges Rutaganda's testimony to paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 of his *will-say* statement, and orders that the estimated duration of testimony of one day should be accordingly reduced;

DENIES the request for reconsideration of the Decision of 26 August 2005;

GRANTS the motion for the addition of Witness WDUSA to Ntahobali's witness list and orders that his testimony shall be strictly limited to the Accused's presence in Cyangugu;

GRANTS the motion for the expansion of the scope of Witness MJ110's testimony, and orders that she be allowed to testify to the facts that Ntahobali was bedridden for nearly one week between late April and early May 1994 and that he left for Cyangugu towards 28 May 1994 and came back to Butare one week later;

DENIES the Motion in all other respects.

Arusha, 27 January 2006

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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Decision on Arsène Shalom Ntahobali's Motion for Disclosure of Documents Rules 66, 68 and 73 of the Rules 31 January 2006 (ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Disclosure of Documents, Obligation of the Prosecutor to permit the Defence to inspect items enumerated in Rule 66 but no obligation to disclose them, Charge on the Defence to demonstrate the prima fade materiality of the evidence in question to the preparation of its case – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rules 66, 66 (B), 67 (C), 68, 73 and 73 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Defence Motion for Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda, and All Other Documents or Information Pertaining to the Judicial Proceedings in their Respect, 18 September 2001 (ICTR-98-42)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Zejnil Delalić, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996 (IT-96-21)

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEISED of the "Requête de Arsène Shalom Ntahobali en communication de documents (Art. 66, 68 et 73, Règlement de Procédure et de Preuve)", filed on 1 December 2005 (the "Motion");

CONSIDERING the "Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Disclosure of Documents", filed on 7 December 2005 (the "Prosecution Response") AND the « *Réplique de Arsène Shalom Ntahobali à la* "Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Disclosure of Documents"», filed on 12 December 2005 (the "Defence Reply");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular its Rules 66, 68 and 73;

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

Submissions of the Parties

The Defence

1. The Defence outlines the sequence of events during which it requested the Prosecution to disclose to it certain documents, which it describes as forming pat of the "Belgian files" pursuant to Rule 66 (B) of the Rules.[1] The Defence notes that, while the Prosecution disclosed some of the said files, it neglected to disclose others despite numerous reminders to that effect.[2] The Defence submits that the said "Belgian files" concern persons accused of committing crimes in Butare, such as Higaniro, Kanyabashi, Ntezimana and Ndayambaje. The Defence argues that their case files are of interest to the case against the Accused Ntahobali.[3]

2. In a letter dated 26 August 2005, the Defence noted that the documents numbered K006-4772 to K006-5719, K007-5604 to K007-5629, K002-8277 to K002-8350 and K028-8207 were missing and requested the Prosecution to make the necessary disclosure.[4]

3. In a letter dated 9 September 2005, the Prosecution indicated to the Defence that having perused the documents requested, it had formed the opinion that the requested documents did not concern the Accused and that they were neither relevant nor of any interest. Therefore, the Prosecution argued that it would not disclose them unless the Defence proved that they were relevant.[5] Furthermore, the Prosecution indicated that it had not used the requested documents during the presentation of its case.[6]

4. Following further unsuccessful requests for documents dated 13 September 2005, 14 November 2005, and 21 November 2005, the Defence decided to file a formal Motion under Rule 66 (B),[7] relying on the *Bagosora* Decision of 27 November 1997.[8]

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[1] Motion at paras. 1 - 3, 5.
[2] Motion at para. 4.
[3] Motion at paras. 5, 39.
[4] Motion at para. 7.
[5] Motion at para. 8.
[6] Motion at para. 9.
[7] Motion at paras. 16-23.
[8] Decision on the Motion by the Defence Counsel for Disclosure of 27 November 1997 ; Motion at para. 57.

5. The Defence notes that none of the requirements under Rule 66 (B) call for the Defence to demonstrate that the documents it requests are relevant and of interest, contrary to the Prosecution's argument.[9]

6. The Defence outlines that contrary to the Prosecution' assertion that the Defence is asking for an unrestricted search, the Defence request is very precise and limited.

7. Moreover, the Defence recalls that the documents disclosed by the Prosecution in June 2005 are of the same nature as those currently requested, and there is no reference to the Accused in those documents either.

8. The Defence submits that the conditions under Rule 66 (B) are not cumulative and that it is sufficient for it to show that the documents requested are material to the preparation of its case.[10] On this issue, the Defence submits that:

(i) The requested documents from the "Belgian files" are documents which it has not yet perused and that therefore it is impossible for the Defence to precisely indicate the relevance of each document to its case;

(ii) The fact that the Prosecution did not use those documents when presenting its evidence is only one criterion under Rule 66 (B). The Defence argues that it suffices that *prima facie*, those documents are material to the preparation of the Defence. Since all the documents with the identified K-numbers seem to refer to events in Ngoma commune, a location where the Accused is alleged to have committed crimes, their disclosure could enlighten Counsel as to whether the Accused should testify or otherwise;

(iii) Higaniro's file is important to the Accused's case who is allegedly an *Interahamwe* leader: Higaniro was the director of SORWAL, a Company which was allegedly the financing organ of the *Interahamwe*, as testified to by Prosecution Expert Witness Guichaoua;

(iv) Kanyabashi's and Ndayambaje's files are important because they are both co-Accused who allegedly conspired in the planning and execution of the genocide;

(v) Ntezimana's file is material to the case of the Accused because he was a professor at *Université Nationale* du *Rwanda (UNR),* a location where the Accused is alleged to have led attacks.

9. The Defence argues that the Prosecution is not in a position to know how material the files are to the case against the Accused and that moreover, since the Prosecution has not raised any of the three exceptions for disclosure of materials under Rule 66 (B), the Prosecution is duty-bound to disclose the same to the Defence.[11]

The Prosecution Response

10. The Prosecution admits that it corresponded with the Defence regarding disclosure of documents. The Prosecution submits, however, that the request of November 2005 listed in the Motion concerned 3,800 pages of English, French, and Kinyarwanda documents.

11. The Prosecution requested the Defence to identify those documents it deemed necessary to its case among the 3,800 pages so that it could make a proper disclosure. The Prosecution submits that the Defence response to this request has been rather vague.

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[9] Motion at para. 24.
[10] Motion at paras. 34 and 38.
[11] Motion at paras. 50, 52, 53.

12. Regarding the requirements of Rule 66 (B), the Prosecution submits that the Defence has failed to demonstrate whether the 3,800 pages it requests are "material to the preparation of the Defence". Rather, the Prosecution argues that the Defence's mere submission that the requested documents form part of the "Belgian files" is too broad and could cover innumerable or many more thousands of files/documents.

13. The Prosecution submits that it is the Chamber's discretion to determine the scope of documents which are "material to the preparation of the defence," and therefore not all documents mentioning Butare *Préfecture* could be requested and disclosed under Rule 66, because the spirit of the Rule is not to permit the Defence to go on a "fishing expedition".

14. Noting that the Defence has merely indicated a series of "K" numbers without specifying the documents in question and without providing a schedule or index of the actual documents, the Prosecution points out that according to the Decision in *Bizimungu et al*.[12] referred to by the Defence, Rule 68 does not give the Defence the right to conduct an unrestricted search of the Prosecution's electronic databases for material which the Prosecution is under no obligation to disclose under the Rules.

15. The Prosecution thus prays the Chamber to deny the Motion to disclose the listed documents in its entirety.

The Defence Reply

16. As a preliminary matter, the Defence, citing the jurisprudence of the Chamber to this effect, argues that the Prosecution Response was filed one day out of time and should therefore be rejected since no explanations have been provided for filing out of time.[13]

17. In the eventuality that the Chamber admits the Response, the Defence essentially submits the following:

(i) Regarding the Prosecution's argument that the Defence request is too broad and vague as to the materiality of the requested documents to the case of the Accused, the Defence reiterates its arguments at paras. 45 to 48 of its Motion, adding that the Indictment against the Accused alleges that he exercised authority over the *Interahamwe* militia of Butare *Préfecture*;

(ii) Para. 6.9 of the Indictment alleges that the crimes committed in Butare *Préfecture* from 19 April 1994 onwards were planned;

(iii) Furthermore, the Indictment alleges that the Accused conspired to commit genocide with, among others, two retired *bourgmestres* of Butare *Préfecture*, namely Ndayambaje and Kanyabashi;

(iv) In this regard, the Defence argues that all the documents pertaining to Butare *Préfecture* are material to the preparation of the case for the Accused;

(v) Regarding the Prosecution's accusation of a "fishing expedition" by the Defence because it merely lays out the "K" numbers of documents it requests, the Defence reiterates its submissions in the Motion and argues further that since it is not in possession of the documents in question, it is not possible for it to make an index of the same.

18. In conclusion, the Defence argues that it has largely demonstrated *prima facie* that the documents requested are material to the preparation of the Defence.

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[12] *Prosecutor v. Bizimungu et al,* "Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material," of 1 December 2004 at para. 9

[13] Defence Reply at paras. 4-20.

Having deliberated

19. The Chamber has considered all the submissions of the Parties.

20. As a preliminary matter, the Chamber notes the Defence submissions that the Prosecution Response filed on 7 December 2005 was filed out of the time-limits set by the Chamber. The Chamber finds that the said Response was indeed filed one day out of time. Because the Prosecution has not provided the Chamber with any explanations for its tardy filing, the Chamber finds the said filing inadmissible.

21. The Chamber recalls the provisions of Rule 66 (B):

> "At the request of the Defence, the Prosecutor shall, subject to Sub-Rule (C) permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused."

22. A plain reading of the Sub-Rule shows that the Prosecutor is obliged, subject to Sub-Rule (C) to *permit the Defence to inspect* the items enumerated, and is not obliged to *disclose* them pursuant to the Sub-Rule. However, the Defence is only required to demonstrate one of the three conditions laid out under Sub-Rule (B) before the Chamber may grant permission to inspect the enumerated items (emphasis ours).

23. In order to be granted inspection of evidence under Rule 66 (B), the Defence is required to demonstrate the *prima fade* materiality of the evidence in question to the preparation of its case, as well as that the said evidence is in the custody or control of the Prosecution. The requirement that the documents are in the custody or control of the Prosecution implies that

> "Defence Counsel must make specific identification of any requested documentation, thus enabling the Trial Chamber to take action".[14]

24. In the instant case, the Chamber notes that the Prosecution does not deny possessing the documents requested as identified by the K-numbers enumerated. Rather, it essentially submits that the request is too vague, since it concerns 3,800 pages of documents, some of which are in Kinyarwanda. On its part, the Defence submits that it is unable to make a precise indication of the relevance of each of the documents it requests, given that it has not been able to peruse each one of them.

25. To demonstrate materiality of the requested documents to its case pursuant to Rule 66 (B), the Defence argues that said documents concern events in locations for which the Accused is alleged to have committed crimes, they concern his activities as an alleged leader of the *Interahamwe,* they concern his Co-Accused, and they may enlighten Counsel as to whether the Accused should testify or otherwise.

26. The Chamber notes that the Defence is unable to precisely specify the exact relevance of each and every piece of document it requests since it has not had the opportunity to peruse them. In the Chamber's opinion, this notwithstanding, the Defence has made a *prima facie* demonstration that the documents it requests may be material to the preparation of its case, in the sense that they concern Butare *préfecture*.

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[14] See also *Prosecutor v. Nyiramasuhuko et al*. Case Number ICTR-97-21-T, Deçision on the Defence Motion for the Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda, and al1 other Documents or Information Pertaining to the Judicial Proceedings in their Respect, of 18 September 2001 at para. 12; *Prosecutor v. Delalić et al*., Case N°IT-96-21-212, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, of 6 September 1996, at para. 11.

27. Accordingly, the Chamber orders the Prosecution, pursuant to Rule 66(B), to immediately permit the Defence to inspect the requested documents with K-numbers; K006-4772 to K006-5719, K007-5604 to K007-5629, K002-8277 to K002-8350 and K028-8207. Following such inspection, the Defence may indicate to the Prosecution the specific document(s) it considers to be material to the preparation of its case.

28. The Chamber also reminds the Parties of the provisions of Rule 67 (C).

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

ORDERS the Prosecution, pursuant to Rule 66 (B), to immediately permit the Defence to inspect the requested documents with the following K-numbers: K006-4772 to K005-5719, K007-5604 to K007-5629, K002-8277 to K002-8350, and K028-8207.

DENIES the Motion in all other respects.

Arusha, 31 January 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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Corrigendum to the Decision on Arsène Shalom Ntahobali's Motion to Amend his Witness List and to Reconsider the Decision of 26 August 2005 Titled: "Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali" Dated 27 January 2006
6 February 2006 (ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Joseph Kanyabashi, Elie Ndayambaje, Sylvain Nsabimana, Alphonse Nteziryayo, Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Schedule correction

International Instrument cited :

Rules of Procedure and Evidence, rule 7 ter

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

SIíTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEISED of the "*Demande de corrigendum à la décision intitulée* "Decision on Arsène Shalom Ntahobali's Motion to Amend his Witness List and to Reconsider the Decision of 26 August 2005 titled "Decision on the Defence Motion to Modify the List of Defence Witness for Arsène Shalom Ntahobali"", fded on 31 January 2006, (the "Motion");

NOTING the "Decision on Arsène Shalom Ntahobali's Motion to Amend his Witness List and to Reconsider the Decision of 26 August 2005 titled "Decision on the Defence Motion to Modify the List

of Defence Witness for Arsène Shalom Ntahobali", dated 27 January 2006 (the "Decision of 27 January 2006");

NOTING that in Paragraph 19 of the Decision of 27 January 2006 the Chamber ruled that the timeframe for the Defence for Ntahobali to file its Reply to the Prosecutor's Response, dated 12 December 2005, expired on 17 December 2005;

NOTING that as indicated by the Defence, 17 December 2006 was a Saturday and therefore, the tirneframe for the Defence for Ntahobali to file its Reply to the Prosecutor's Response dated 12 December 2005 expired on Monday 19 December 2005, pursuant to Rule 7 *ter* of the Rules of Procedure and Evidence. Accordingly, the Chamber considers that the aforementioned paragraph should be deleted from the Decision of 27 January 2006 ;

NOTING that neither the deletion of Paragraph 19 nor the consideration of the Defence for Ntahobali's Reply to the Prosecutor's Response dated 19 December 2006 affect in any other way the Decision of 27 January 2006.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

AGREES that the timeframe for the Defence for Ntahobali to file its Reply to the Prosecutor's Response dated 12 December 2005 expired on 19 December 2005, and not on 17 December 2005, as indicated in the 27 January 2006 Decision;

DELETES Paragraph 19 from the Decision of 27 January 2006;

REITERATES the Decision of 27 January 2006 in all other respects.

Arusha, 6 February 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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Decision on Arsène Shalom Ntahobali's Extremely Urgent Motion for Video Link Testimony of Defence Witness WDUSA in Accordance with Rule 71 (A) and (D) of the Rules of Procedure and Evidence
15 February 2006 (ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Video-Link Testimony, Alibi Witness, Witness unable to travel to Arusha to give evidence for medical reasons, Exceptional circumstances warranting that Witness testifies by video-conference from The Hague – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 71 (A), 71 (D), 73 (A) and 90 (A).

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on the Prosecutor's Application to Add Witness X to Its List of Witnesses and for Protective Measures, 14 September 2001 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Prosecution Motion for Special Protective Measures for Witness "A" pursuant to Rules 66 (C), 69 (A) and 75 of the Rules of Procedure Evidence, 5 June 2002 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Joseph Nzirorera, Decision on the Prosecutor's Motion for Special Protective Measures for Witnesses G and T and to Extend the Decision on Protective Measures for the Prosecutor's Witnesses in the Nzirorera and Rwamakuba Cases to Co-Accused Ngirumpatse and Karemera, and Defence Motion for Immediate Disclosure, 20 October 2003 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Prosecutor's Extremely Urgent Motion Requesting That the Extraordinarily Vulnerable Witnesses XI006 and 039 Testify by Closed Video Transmission Link With a Location at The Hague And Other Related Special Protective Measures Pursuant to Article 21 of the Statute and Rules 73 and 75, 4 June 2004 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko, Decision on the Confidential Prosecutor's Motion to Be Served with Particulars of Alibi Pursuant to Rule 67(A) (ii) (A), 1 March 2005 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko, Decision on Nyiramasuhuko's Strictly Confidential Ex-Parte – Under Seal – Motion for Additional Protective Measures for Defence Witness WBNM, 17 June 2005 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali, Rule 73 ter (E), Rules of Procedure and Evidence, 26 August 2005 (ICTR-98-42)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Duško Tadić, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, 25 June 1996 (IT-94-1) ; Trial Chamber, The Prosecutor v. Milorad Krnojelac, Order for Testimony via Video-Conference Link, 15 January 2001 (IT-97-25) ; Trial Chamber, The Prosecutor v. Slobodan Milošević, Order on Prosecution Motion for the Testimony of Nojko Marinovic visa Video-Conference Link, 19 February 2003 (IT-02-54) ; Trial Chamber, The Prosecutor v. Slobodan Milošević, Decision on Confidential with an ex parte Annexure Prosecution Motion for Video Conference Link and Protective Measures for Witness named Herein, 19 March 2003 (IT-02-54)

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

SITTING as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED OF the Defence's « Requête en extrême urgence de Arsène Shalom Ntahobali pour faire témoigner WDUSA par voie de vidéo conférence conformément à la Règle 71 (A) et (D) du Règlement de Procédure et de Preuve »,[1] filed on 31 January 2006 (the "Motion");

HAVING RECEIVED the "Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Video Conference Link Testimony of WDUSA" filed on 1 February 2006 (the "Response"); AND the Defence's "*Réplique à la Réponse du Procureur intitulée* 'Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Video Conference Link Testimony of WDUSA'" filed on 3 February 2006 (the "Defence's Reply");

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 71 (A) and (D) of the Rules;

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[1] Unofficial translation: "The Defence's Extremely Urgent Motion to Have Witness WDUSA Testify by Video Link in accordance with Rule 71 (A) and (D) of the Rules of Procedure and Evidence."

HEREBY DECIDES the Motion on the basis of the written submissions of the Parties, pursuant to Rule 73 (A) of the Rules.

Submissions of the Parties

The Defence

1. Defence Witness WDUSA, who is to testify on the alibi of the Accused, was added to the Defence witness list by Decision of 27 January 2006.[2] Following the grant of his addition to its list, the Defence submits that it would be in the interests of justice for WDUSA to testify via video conference from The Hague pursuant to Rule 71 (D).

2. The Defence relying on the Bagosora et al. Decisions of 8 October 2004,[3] and of 20 December 2004,[4] submits that WDUSA is unable to travel to Arusha to give testimony as a result of a heart surgery he underwent in 2002. In the same year, WDUSA was authorised to testify via video link from The Hague in the Cyangugu trial,[5] and to this date, he is unable to undertake long journeys.

3. The Defence submits that the testimony of WDUSA is important since he is the only alibi witness who is not related to the Accused who is expected to testify to having been in Cyangugu with the Accused during the events of 1994. Furthermore, the Defence reminds the Chamber of its Decision of 27 January 2006 where the importance of WDUSA's testimony was considered.

The Prosecutor

4. The Prosecution objects to the Motion submitting that the *Bagosora et al*. Decisions relied upon by the Defence are distinguishable from the current circumstances: WDUSA is not of advanced aged, no unredacted statement of the witness has been disclosed to the Prosecution and there is no medical evidence that the witness is unable to travel for medical reasons.

The Defence's Reply

5. Regarding the Prosecution's allusions to the fact that WDUSA is not of an advanced age, the Defence refers to the *Bagosora et al*. Decision of 20 December 2004 and the *Brdanin*[6] Order of the ICTY and submits that the Chamber does not need to consider the age of the witness rather it is required to consider the material inability of the witness to travel due to medical reasons.

6. Regarding the production of a medical report in support of its request, the Defence submits it had assumed it would not need to produce another certificate in this case since such a certificate was produced when WDUSA testified in the *Cyangugu* trial. Notwithstanding, the Defence produces a medical report dated 2 February 2006 annexed to its Reply.

Having deliberated

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[2] *Prosecutor v. Nyiramasuhuko et al*. ICTR-98-42-T, (TC) Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsene Shalom Ntahobali" of 27 January 2006, para 31.
[3] *Prosecutor v. Bagosora et al,* ICTR-98-41-T, (TC) Decision on Prosecution Request for Testimony of BT via Video-Link of 8 October 2004, paras. 5-7 (the "Bagosora Decision of 8 October 2004").
[4] *Prosecutor v. Bagosora et al*, ICTR-98-41-T, (TC) Decision on Testimony by Video-conference of 20 December 2004, para 4.
[5] *Prosecutor v. Ntagerura et al*., Oral Decision of 16 July 2002, p. 3.
[6] *Prosecutor v. Brdanin,* IT-99-36-T, (TC) Order to Allow Testimony via Video-Conference in Accordance with Rule 71 *bis*, 23 September 2003.

7. The Chamber underscores the general rule articulated in Rule 90 (A), that "witnesses shall, in principle, be heard directly by the Chamber." [7] The Chamber recalls its reasoning in the *Nyiramasuhuko et al* Decision of 1 March 2005 that,

> "[a]lthough the testimony of witnesses via video-link has been granted in other cases, such measure was granted under absolute necessity only and the Tribunal regularly recalled that it had a clear preference for testimony in court."[8]

8. Nonetheless, the Chamber recalls that it has discretion to grant the hearing of testimony by video-conference in lieu of physical appearance where it is in the interests of justice, based on an assessment of; (i) the importance of the testimony, (ii) the inability or unwillingness of the witness to attend, (iii) whether a good reason can be adduced for that inability and unwillingness. The burden of proof for authorising a witness' testimony to be taken by way of video-conference lies with the Party making the request.[9]

9. With respect to the first criterion, the Chamber recalls that in its Decision of 27 January 2006, it granted the addition of Witness WDUSA as an alibi witness whose expected testimony will be limited to the presence of the Accused in *Cyangugu*. Indeed his addition to the Defence list of witnesses indicates that the specific testimony Witness WDUSA proposes to give is sufficiently important. The Chamber also recalls that the unredacted will-say statement of the proposed testimony of Witness WDUSA was considered when the Chamber made its Decision of 26 August 2005 regarding the Defence Motion to modify its list of witnesses.[10]

10. Regarding the second and third criteria, the Chamber finds that on the basis of the medical report dated 2 February 2006, the Defence has established that Witness WDUSA is, for medical reasons, unable to travel to Arusha to give evidence.[11]

11. In the Chamber's opinion, the Defence has demonstrated exceptional circumstances warranting that Witness WDUSA testifies by video-conference from The Hague. For the above reasons and in the interests of justice, the Chamber grants the Defence Motion. Accordingly, the Chamber authorises Witness WDUSA to give his testimony via video conference from The Hague in lieu of his physical presence in Arusha.

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[7] *Prosecutor v. Tadic*, Case N°IT-94-1-T, (TC) Decision on the Defence Motion to Summon and Protect Defence Witnesses. And on the Giving of Evidence by Video-Link, of 25 June 1996 at para. 19

[8] *Prosecutor v. Nyiramasuhuko et al*. ICTR-98-42-T, (TC) Decision on Nyiramasuhuko's Strictly Confidential *ex-parte* under seal Motion for Additional Protective Measures for some Defence Witnesses of 1 March 2005 at para. 40 quoting: *Prosecutor v. Nahimana* ICTR-99-52-I, (TC) Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures of 14 September 2001 (the "*Nahimana* Decision of 14 September 2001"); *Prosecutor v. Bagosora*, ICTR-96-7-I, (TC) Decision on the Prosecution Motion for Special Protective Measures for Witness 'A' Pursuant to Rule 66(C), 69(A) and 75, of 5 June 2002; *Prosecutor v. Milosevic*, IT-02-54-T, (TC) Decision on Confidential with an ex parte Annexure Prosecution Motion for Video Conference Link and Protective Measures for Witness named Herein, of 19 March 2003; *Prosecutor v. Karemera*, ICTR-98-44-I, (TC), Decision on the Prosecutor's Motion for Special Protective Measures for Witness G and T and to Extend the Decision on Protective measures for the Prosecutor's Witnesses in the Nzirorera and Rwamakuba Cases and Co-Accused Ngirumpatse and Karemera, and Defence's Motion for Immediate Disclosure, of 20 October 2003; *Prosecutor v. Bizimungu et. al*., ICTR-99-50-T, (TC), Decision on Prosecutor's Extremely Urgent Motion Requesting a Location at The Hague and other Related Special Protective measures Pursuant to Article 21 of the Statute and Rules 73 and 75(C) of 4 June 2004. Also quoting: *Nahimana* Decision of 14 September 2001 at para. 37; *Bagosora* Decision of 8 October 2004 at para. 15;

[9] *Prosecutor v. Nyiramasuhuko et al*. ICTR-98-42-T, (TC) Decision on Nyiramasuhuko's Strictly Confidential *ex-parte* under seal Motion for Additional Protective Measures for Defence Witness WBNM of 17 June 2005, para. 9.

[10] *Prosecutor v. Nyiramasuhuko et al*. ICTR-98-42-T, (TC) Decision on the Defence Motion to Modify the List of Defence witnesses for Arsene Shalom Ntahobali, of 26 August 2005, para. 6; See also para. 8 of the Decision of 27 January 2006.

[11] The *Bagosora* Decision of 20 December 2004 at para. 5; *Brdanin* Decision; *Prosecutor v. Milosevic*, IT-02-54-T, (TC) Order on Prosecution Motion for the Testimony of Nojko Marinovic visa Video-Conference Link of 19 February 2003; *Prosecutor v. Krnojelac* (TC) Order for Testimony via Video-Conference Link of 15 January 2001.

12. To facilitate organisation for the taking of a testimony via video conference from The Hague, and recalling the Chamber's direction that the case for the Defence for Ntahobali be closed at the latest on 10 March 2006, the Chamber directs the Defence to liaise immediately with the Registry to facilitate the proceedings and the scheduling of the testimony of Witness WDUSA.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion and orders that Defence Witness WDUSA give his testimony via video conference from The Hague in lieu of his physical presence in Arusha.

DIRECTS the Registry to make all the necessary arrangements in respect of the testimony via video conference of Defence Witness WDUSA from The Hague;

DIRECTS the Defence to diligently assist the Registry with the necessary arrangements to ensure that the video conference testimony of Defence Witness WDUSA is taken without delay.

Arusha, 15 February 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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Decision on the Prosecutor's Motion for Reciprocal Inspection of Documents intended for use by the defence of Sylvain Nsabimana 1 March 2006 (ICTR-97-29-T, Joint case : ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Sylvain Nsabimana – Reciprocal Inspection of Documents – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 66 (B) and 67 (C)

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

SITTING as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the Prosecutor's "Motion for Reciprocal Inspection of Documents Intended for Use by the Defence of Sylvain Nsabimana", filed on 20 February 2006 (the "Motion");

NOTING the Prosecution's letter to the Defence for Nsabimana, dated 13 February 2006, and requesting that inspection and examination of evidence be made possible as quickly as possible;

NOTING that the Defence for Nsabimana did not respond to the Motion;

WHEREAS the Prosecution prays that the Defence for Sylvain Nsabimana be directed to make all the material it intends to use in its defence case immediately available for inspection, since the Defence for Nsabimana has already inspected the books, documents, photographs and tangible objects

in the Prosecution's custody or control which were intended for use during the presentation of the Prosecution case, pursuant to Rule 66 (B);[1]

WHEREAS the Prosecution recalls that according to the directions given by the Trial Chamber during the Status Conference on 8 February 2006, the Defence for Nsabimana is to commence immediately after the conclusion of the Defence case for Arsène Shalom Ntahobali, due to end by 10 March 2006,[2] thus rendering it vital that the Prosecution be granted the opportunity for reciprocal inspection in enough time to prepare itself adequately;[3]

HAVING DELIBERATED, the Chamber

RECALLS that Rule 67 (C) states that

> "[i]f the Defence makes a request pursuant to Rule 66 (B), the Prosecutor shall in turn be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the Defence and which it intends to use as evidence at the trial";

OBSERVES that according to the Prosecution letter addressed to the Defence for Nsabimana of 13 February 2006, it appears that the Defence has already availed itself of Rule 66 (B), and that this is not contested;

NOTES that if the Defence makes a request under Rule 66 (B), it triggers the reciprocal provision of Rule 67 (C);

FOR THIS REASON, THE CHAMBER

GRANTS the Motion;

DIRECTS the Defence for Nsabimana to comply with the provision of Rule 67 (C); and

DIRECTS the Parties to set up an appointment for the Prosecution to inspect any books, documents, photographs and tangible objects within the Defence for Nsabimana's custody or care and which it intends to use as evidence at trial, as soon as possible.

Arusha, 1 March 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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[1] The Motion, para. 2.
[2] The Motion, para. 4.
[3] The Motion, para. 5.

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Decision on Arsène Shalom Ntahobali's Extremely Urgent Strictly Confidential – Under Seal – Motion to have Witness NMBMP Testify via Video-Link 2 March 2006 (ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Testimony via Video-Link, Alibi Witness, Current immigration status of the witness : no good reason for not coming in Arusha to testify – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 71 (A), 71 (D), 73 (A) and 90 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on the Prosecutor's Application to Add Witness X to Its List of Witnesses and for Protective Measures, 14 September 2001 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Prosecution Motion for Special Protective Measures for Witness "A" pursuant to Rules 66 (C), 69 (A) and 75 of the Rules of Procedure Evidence, 5 June 2002 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Joseph Nzirorera, Decision on the Prosecutor's Motion for Special Protective Measures for Witnesses G and T and to Extend the Decision on Protective Measures for the Prosecutor's Witnesses in the Nzirorera and Rwamakuba Cases to Co-Accused Ngirumpatse and Karemera, and Defence Motion for Immediate Disclosure, 20 October 2003 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Prosecutor's Extremely Urgent Motion Requesting That the Extraordinarily Vulnerable Witnesses XI006 and 039 Testify by Closed Video Transmission Link With a Location at The Hague And Other Related Special Protective Measures Pursuant to Article 21 of the Statute and Rules 73 and 75, 4 June 2004 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 October 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko, Decision on the Confidential Prosecutor's Motion to Be Served with Particulars of Alibi Pursuant to Rule 67(A) (ii) (A), 1 March 2005 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko, Decision on Nyiramasuhuko's Strictly Confidential Ex-Parte – Under Seal – Motion for Additional Protective Measures for Defence Witness WBNM, 17 June 2005 (ICTR-98-42)

I.C.T.Y.: Trial Chamber, The Prosecutor v. Duško Tadić, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, 25 June 1996 (IT-94-1) ; Trial Chamber, The Prosecutor v. Slobodan Milošević, Decision on Confidential With an Ex-Parte Annexure Prosecution's Motion for Video-Conference Link And Protective Measures For Witness Named Herein, 19 March 2003 (IT-02-54)

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

SITTING as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEISED of the « Requête en extrême urgence de Arsène Ntahobali pour faire témoigner NMBMP par voie de vidéo conférence – strictement confidentiel et sous scellés (Art. 73 (A), 71 (D) et 71 (A) du Règlement de procédure et de Preuve », filed on 6 February 2006 (the "Motion");

CONSIDERING :

i. The "Prosecutor's Response to the "Requête en extrême urgence de Arsène Ntahobali pour faire témoigner NMBMP par voie de vidéo conférence – strictement confidentiel et sous scellés"", filed on 8 February 2006 (the "Prosecutor's Response");

ii. The "Réplique à la réponse du Procureur intitulée « Prosecutor's Response to the "Requête en extrême urgence de Arsène Ntahobali pour faire témoigner NMBMP par voie de vidéo conférence strictement confidentiel et sous scellés" », filed on 10 January 2006 (the "Defence Reply");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rules 71 (D) and 71 (A);

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

Submissions of the Parties

The Defence

1. The Defence moves the Chamber to allow Witness NMBMF to testify by means of a video-conference, pursuant to Rule 71 (D), from the United States, where she currently resides, specifically either from Boston or from the United Nations' Headquarters in New York City. Alternatively, the Defence submits that if this prayer fails, it seeks that a Presiding Officer be mandated to take Witness NMBMP's deposition, pursuant to Rule 71 (A).

2. The Defence submits that it is impossible for Witness NMBMF' to travel outside the United States before 28 March 2006, when she is due to appear before an Immigration Judge.[1] On 31 January 2006, the Defence received an e-mail from Mr McHaffey,[2] Witness NMBMF's immigration Counsel in the United States, enumerating various reasons for the witness' inability to travel outside the United States before 28 March 2006:[3]

- Witness NMBMP is currently on "removal proceedings"[4] and may not therefore travel without the prior permission known as "advance parole" from the Immigration service.[5] An "advance parole" can only be obtained from the Office of International Affairs in Washington, D.C.
- Second, a person subject to a "removal proceeding" who leaves the country without an "advance parole" will not be allowed to return. Further, an "advance parole" can be revoked while the beneficiary is outside the country, and the Court has no jurisdiction to review the decision of revocation.[6]
- Third, Witness NMBMP does not have a valid passport[7] which makes it impossible for her to travel, even if she were granted an "advance parole". Witness NMBMP is applying for political asylum in the United States, and any request for a passport from the Rwandan Embassy may negatively affect her application for asylum.

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[1] Paragraph 7 of the Motion. Annex G of the Motion.
[2] The said e-mail was attached to the Motion as Annex B.
[3] Paragraph 13 of the Motion.
[4] See Annex C of the Motion.
[5] See Annex D of the Motion.
[6] See Annex E of the Motion.
[7] See Annex F of the Motion.

- Fourth, Witness NMBMP is afraid of coming to Tanzania as she fears reprisals from the Rwandan government.
- Finally, Mr. McHaffey indicates that Witness NMBMP is still willing to testify for the Accused even though it is impossible for her to leave the United States for the reasons cited above.[8]

3. The Defence submits that as an alibi witness, Witness NMBMP's testimony is of great importance to Ntahobali's case.[9]

The Prosecution

4. The Prosecution submits that the Defence has failed to demonstrate that it has sought the assistance of the Witness and Victims Support Section (WVSS) in its endeavours to have Witness NMBMP testify in Arusha. WVSS has the ability to contact and facilitate the travel and related matters pertaining to witnesses with the relevant authorities of a country where the witness is residing. Fear of arrest or persecution is not a ground for a witness' refusal to appear in Arusha.

5. The Prosecution opposes the request for Witness NMBMP to testify under Rule 71 (A), given the importance being attributed to this witness by the Defence. If the witness is not able to come to Arusha, then she should testify via video-link, which would allow the Trial Chamber to assess her demeanour.

The Defence Reply

6. The Defence submits that WVSS has indicated that it cannot guarantee that the American authorities would allow Witness NMBMP to re-enter the country, if she leaves it.[10] In addition, even assuming that WVSS would be able to assist Witness NMBMP in obtaining all the requisite travel documents, including the "advance parole", it cannot guarantee that the "advance parole" will not be revoked while the witness is outside American territory.[11]

Having deliberated,

7. The Chamber underscores the general rule articulated in Rule 90 (A), that "witnesses shall, in principle, be heard directly by the Chamber."[12] The Chamber recalls its reasoning in the Nyiramasuhuko et al. Decision of 1 March 2005 that,

> "[a]lthough the testimony of witnesses via video-link has been granted in other cases, such measure was granted under absolute necessity only and the Tribunal regularly recalled that it had a clear preference for testimony in court."[13]

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[8] Paragraph 14 of the Motion.
[9] Paragraphs 30 and 40 of the Motion.
[10] Paragraph 6 of the Defence Reply.
[11] Paragraph 7 of the Defence Reply.
[12] *Prosecutor v. Tadić*, Case N°IT-94-1-T, (TC) Decision on the Defence Motion to Summon and Protect Defence Witnesses and on the Giving of Evidence by Video-Link, 25 June 1996, para.19.
[13] *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-T, (TC) Decision on Nyiramasuhuko's Strictly Confidential ex-parte under seal Motion for Additional Protective Measures for some Defence Witnesses of 1 March 2005 at para. 40 quoting: *Prosecutor v. Nahimana,* ICTR-99-52-1, (TC) Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures of 14 September 2001 (the "Nahimana Decision of 14 September 2001"); *Prosecutor v. Bagosora*, ICTR-96-74, (TC) Decision on the Prosecution Motion for Special Protective Measures for Witness 'A' Pursuant to Rule 66 (C), 69 (A) and 75, of 5 June 2002; *Prosecutor v. Milosevic*, IT-02-54-T, (TC) Decision on Confidential with an ex parte Annexure Prosecution Motion for Video Conference Link and Protective Measures for Witness named Herein, of 19 March 2003; *Prosecutor v. Karemera*, ICTR-98-44-1, (TC), Decision on the Prosecutor's Motion for Special Protective Measures for Witness G and T and ta Extend the Decision on Protective mesures for the Prosecutor's Witnesses in

8. Nonetheless, the Chamber recalls that it has discretion to grant the hearing of testimony by video-conference in lieu of physical appearance where it is in the interests of justice, based on an assessment of; (i) the importance of the testimony, (ii) the inability or unwillingness of the witness to attend, (iii) whether a good reason can be adduced for that inability and unwillingness.[14] The burden of proof for authorising a witness' testimony to be taken by way of video-conference lies with the Party making the request.[15]

9. With respect to the first criterion, after having reviewed Witness NMBMP's will-say statement,[16] the Chamber find that the Defence has demonstrated that Witness NMBMP's testimony is sufficiently important to the Accused's defence in that she is expected to challenge prosecution allegations that the Accused abducted and raped young girls at Hotel Ihuliro,[17] and in that she is an alibi witness.

10. With respect to the second and third criteria, the Chamber observes that it is submitted that Witness NMBMP is unable and also unwilling to come to testify at the Tribunal.

11. As far as her alleged inability is concerned, the Chamber is of the view that it has not been demonstrated that the witness's alleged current immigration status or the requisite immigration procedure she may be pursuing render her unable to travel outside the United States. The Chamber therefore concludes that no good reason has been adduced to support Witness NMBMP's alleged inability to testify at the Tribunal.

12. With respect to Witness NMBMP's unwillingness, the Chamber has noted Annex B, a copy of an e-mail purportedly sent by Mr McHaffey Witness' immigration counsel in the email, the Witness is alleged to be unwilling to travel to Arusha in order to give testimony because of alleged fears of some sections of the Rwandan government. According to the Tribunal jurisprudence, the applicable test is "real fear underscored by an objective basis", and that "subjective fear is insufficient."[18] in the instant case, the Chamber notes that the Defence merely submits that the Witness fears to come to Tanzania, while her application for political asylum is pending. She is further alleged to fear reprisals from certain sections of the Rwandan Government without demonstrating the objective basis in support of her alleged fears. The Chamber recalls that the Witness is already subject of protective measures. The Chamber therefore find that the Defence has failed to demonstrate that there is a real fear underscored by an objective basis preventing Witness NMBMP from testifying in Arusha and that her "unwillingness to attend" is not supported by any good reason.

13. In light of the above, the Defence request to have Witness NMBMP testify via video-link is therefore denied.

14. As for the alternative prayer under Rule 71 (A), the Chamber considers that given the alleged importance of the witness' testimony, it would be more appropriate to hear the witness in court. The Chamber therefore also denies the Defence request in that respect.

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the Nzirorera and Rwamakuba Cases and *Co*-Accused Ngirumpatse and Karemera, and Defence's Motion for Immediate Disclosure, of 20 October 2003; *Prosecutor v. Bizimungu et al.,* ICTR-99-50-T, (TC), Decision on Prosecutor's Extremely Urgent Motion Requesting a Location at The Hague and other Related Special Protective measures Pursuant to Article 21 of the Statute and Rules 73 and 75 (C) of 4 June 2004. Also quoting: *Nahimana* Decision of 14 September 2001 at para. 37; *Bagosora* Decision of 8 October 2004 at para. 15.

[14] *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on prosecution Request for testimony of Witness BT via Video-Link, 8 October 2004, para.6.

[15] *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-T, (TC) Decision on Nyiramasuhuko's Strictly Confidential ex-parte under seal Motion for Additional Protective Mesures for Defence Witness WBNM of 17 June 2005, para. 9.

[16] See Annex A of the Motion.

[17] Paragraph 36 of the Motion.

[18] *Prosecutor v. Nyiramuhuko et al.,* ICTR-98-42-T, Decision on Nyiramasuhuko's Strictly Confidential-Ex-Parte-Under seal-Motion for Additional protective Measures for Some Defence Witneswes, 1 March 2005, para. 26.

15. The Chamber urges the Defence to liaise with WVSS to have Witness NMBMP testify as soon as possible.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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Decision on Arsène Shalom Ntahobali's Request for a Corrigendum to the "Decision on Arsène Shalom Ntahobali's Motion for Disclosure of Documents" of 31 January 2006
3 March 2006 (ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Corrigendum – Motion denied

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

HAVING RECEIVED the "*Demande de* Corrigendum *à la Décision intitulée* "Decision on Arsène Shalom Ntahobali's Motion for Disclosure of Documents", filed on 10 February 2006, (the "Request for a Corrigendum");

WHEREAS the Defence seeks clarification as to whether its request made at Paragraph 16 and in the prayers to the Motion of 1 December 2005[1] was granted, since this request formed part of the object of the Motion and since the Decision of 31 January 2006[2] is not clear as to whether those K-number referred to at paragraph 16 and in the prayers to the Motion of 1 December 2005 were granted or otherwise;

NOTING the Defence submissions that, whereas the Chamber discussed the entirety of its prayers to the Motion of 1 December 2005 when it considered its Decision of 31 January 2006, the Chamber omitted to grant inspection of the same in its order;

WHEREAS the Defence prays the Chamber to correct the mistake it made in the order to its Decision of 31 January 2006 by issuing a corrigendum ordering inspection of all the documents in the

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[1] Requête de Arsène Shalom Ntahobali en communication de documents (Art. 66, 68 et 73, Règlement de Procédure et de Preuve)", filed on 1 December 2005

[2] *Prosecutor v. Nyiramasuhuko et al,* ICTR-98-42-T (TC), Decision on Arsene Shalom Ntahobali's Motion for Disclosure of Documents (Rules 66, 68 and 73 of the Rules) of 31 January 2006 (the "Decision of 31 January 2006")

K-numbers specified in the prayer to the Motion of 1 December 2005 and also reproduced in this Request for a Corrigendum;[3]

HAVING RECEIVED the Prosecutor's Response to the Request for a *Corrigendum*, wherein the Prosecution submits that it does not object to the inclusion into the Chamber's Decision of 31 January 2006, an order for inspection of the K-Numbers listed in the Request for a *Corrigendum*;

HAVING DELIBERATED;

1. The Chamber recalls its Decision of 31 January 2006 in which it granted the Defence request to inspect the documents with K-numbers mentioned at Paragraph 7 of the Motion of 1 December 2005.[4]

2. The Chamber notes that when it considered the above-mentioned Motion, it was not in a position to know what the list of K-numbers in the final Defense prayer referred to as Paragraph 16 therein did not specifically list the K-numbers which it alluded to nor was the letter of 14 November 2005, which allegedly listed that series of K-numbers, attached to the Motion.

3. In the Chamber's opinion, a party's prayer should logically be presented and supported in the body of the motion, which was not how it was done in the instant case. There was therefore, no basis upon which to grant the Defence request for a *corrigendum* with respect to the remaining K-numbers listed in its final prayer to the Motion of 1 December 2005, apart from those listed at Paragraph 7 of the said Motion.

4. Accordingly, the Chamber denies the Defence request for it to issue a *corrigendum*. The Chamber therefore reiterates its Decision of 31 January 2005 which should read as it stands.

5. However, since the Prosecution does not object to the inspection of the requested documents indicated by K-numbers, the Parties may make arrangements to facilitate that inspection.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Defence request; and

REITERATES its Decision of 31 January 2006.

Arusha, 3 March 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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[3] K006 3003-K006 3008; K006 3043-K006 3061; K006 3107-K006 3278; K006 3266-K006 3547; K006 4353-K006 4355; K006 4381-K006 4393; K006 4459-K006 4462; K006 4510-K006 4511; K006 4726-K006 4734; K006 5746-K006 5774; K006 5876-K006 5902; K006 5955-K006 5964; K006 6048-K006 6552; K007 5025-K007 5604; K007 5629-K007 5649; K008 2499-K008 2624; K008 2625-K008 2647; K008 6647-K008 6649; and K009 3796-K009 4714.

[4] K006 4772-K006 5719; K007 5604-K007 5629; K002 8277-K002 8350 and K028 8207.

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Decision on Arsène Shalom Ntahobali's Extremely Urgent Motion for Greater Access to the Accused at the UNDF
3 March 2006 (ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Access to the Accused at the UNDF, Registrar responsible for the servicing and administration of the Tribunal, Commanding Officer responsible for the administration of visits of accused at the UNDF, Visit request to be directed to the Commanding Officer and/or the Registrar not to the Chamber – Motion premature and inadmissible

International Instruments cited :

Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, art. 61 (i), 61 (ii) and 65 ; Rules of Procedure and Evidence, rules 33 (A), 46 and 73 (A) ; Statute, art. 19 and 20

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

SITTING as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED OF the Defence's « Requête en extrême urgence de Arsène Shalom Ntahobali afin d'obtenir un accès élargi aux membres de son équipe de Défense (Art. 19 et 20 du Statut) », filed on 17 February 2006 (the "Motion");

HAVING RECEIVED

i. the "Prosecutor's Response to Ntahobali's Motion for Counsel to have Access to UNDF until 22:00 Everyday," filed on 20 February 2006 (the "Prosecution Response");
ii. the « Réplique de Arsène Shalom Ntahobali à la Réponse du Procureur à sa Requête en accès prolongé à son équipe de Défense », filed on 21 January 2006 (the « Defence Reply »)
iii. the « Observations du Greffier en vertu de l'Article 33 (B) du Règlement de procédure et de preuve suite à la " Requête en extrême urgence de Arsène Shalom Ntahobali afin d'obtenir un accès élargi aux membres de son équipe de Défense (Art. 19 et 20 du Statut)" », filed on 21 February 2006 (the « Registrar's Submissions »)

CONSIDERING the Statute of the Tribunal (the "Statute"), in particular Articles 19 and 20 and the Rules of Procedure and Evidence (the "Rules");

HEREBY DECIDES the Motion on the basis of the written submissions of the Parties, pursuant to Rule 73 (A) of the Rules.

Submissions of the Parties

The Defence

1. On 23 January 2006, the Chamber granted the Defence request to facilitate its access to the Accused at the UNDF and directed the Registry to assist.[1] From the date of the *Memorandum* sent by the Registry to this effect, members of the Defence Team were given access to the Accused without much difficulty.

2. The Defence recalls that during the Status Conference of 8 February 2006, it was directed to indicate, by 17 February 2006, whether the Accused would testify. The Defence submits that this situation is legally and factually new and has created an immediate need to have greater access to the Accused.

3. On Sunday 12 February 2006, Lead Counsel for the Accused was denied access to the Accused. After consulting with the Deputy Commanding Officer of the UNDF, he was allowed access to the Accused until 01.00 p.m. only.

4. This issue was raised in court on Monday 13 February 2006, unsuccessfully thus far.

5. The Defence met with Ms. Ngum of DCDMS and an agreement was reached. A general request for access to the Accused every evening and week-end for the duration of presentation of its case, i.e., until 10 March 2006 should be made. The Defence then wrote a letter to the Commanding Officer of the UNDF, copying it to Ms. Ngum to this effect. On 13, 14 and 15 February 2006, the Defence had access to the Accused until 06:30 p.m. On 16 February 2006, members of the Defence were granted access to the Accused until 06:15 p.m., regardless of its request for longer access.

6. The Defence recalls that the Defence of the Accused Nyiramasuhuko was given larger access to its client when it was presenting its defence. Relying on the provisions of Article 19 and 20 of the Statute, the Defence submits that through their discriminatory attitude, the UNDF authorities have infringed upon the rights of the Accused.

7. The Defence notes that it is of great importance that the schedule should not be interrupted unnecessarily. The Defence thereby relies on the jurisprudence of the ICTY in the *Tadic* Appeal Chamber Judgment of 15 July 1999 at para. 52[2] and requests that it be granted greater access to the Accused so that an order to the authorities of the UNDF is issued directing that access shall be granted every day of the week until 10:00 p.m. including week-ends.

The Prosecution

8. The Prosecution argues that the Defence request for access to the Accused until 10:00 p.m. every day of the week is "not practicable." It argues that the Motion is without basis as it seeks to deny the Registrar and UNDF Commanding Officer of all discretion.

9. The Prosecution submits that under Rules 61 and 65 of the Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal (the "Detention Rules"), visits to detained persons, including the Accused are regulated by the Commanding Officer by prior arrangement and they shall therefore be under such restrictions and supervision as the Commanding Officer, in consultation with the Registrar, may deem necessary.

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[1] T. 23 January 2006, p… (ICS)

[2] Said Para provides, "It follows that the Chambers shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with t request by a party for assistance in presenting its case." (Emphasis by the Defence of Ntahobali)

The Defence's Reply

10. In its Reply, the Defence maintains that the Prosecution has no legitimate legal interest in the Motion and therefore its Response should be dismissed.

The Registrar's Submissions

11. The Registrar submits that the Commanding Officer of the UNDF consents to provide the Defence Team of Ntahobali with exceptional access to the Detention Facilities depending on staffing and security issues. Until the end of the Accused's testimony, visits to the Accused outside of normal visiting hours, i.e., on Fridays up to 05.00 p.m. and on Saturdays from 09.00 a.m. up to 05:00 p.m. are allowed. Sunday visits cannot be allowed due to lack of staff. Any requests for visits outside the prescribed time frames should be made at least 24 hours prior to such visit.

12. The Registrar submits that for a number of years, the Defence Team of Ntahobali has been given the same facilities to access its client as other teams. Additionally, the Defence Team of Ntahobali has recently been given extra facilities to access its client as a result of its Defence stage and the imminent testimony of the Accused.

13. The Registrar observes that since October 2001, Mr. Marquis has billed over 8,000 hours of preparation of the case and the examination-in-chief of its client was already on going in January 2005. For the past five years, the Defence has had ample time to prepare Ntahobali's defence.

14. Finally, the Registrar points out that Mr Marquis filed this Motion without waiting for the DCDMS's response to his correspondence dated 13 February 2006 in order to find an amicable arrangement.

Having Deliberated

15. The Chamber has taken note of the submissions of the Parties as well as those of the Registrar.

16. The Chamber notes that the Registrar is responsible for the servicing and administration of the Tribunal under Rule 33 (A) of the Rules and that the administration of visits of accused at the UNDF by the Defence is a matter falling squarely within the ambit of the Commanding Officer, as provided for under Rules 61 (i) and (ii) and 65 of the Detention Rules. The Chamber recalls that Rule 65 stipulates that

> "all visits shall be made by prior arrangement with the commanding officer as to the time and duration of the visit and shall be subject to the same security controls as are imposed under Rule 61."

Therefore, any visit request should be directed to the Commanding Officer and/or the Registrar and not to the Chamber.

17. The Chamber underscores that matters such as those raised in the Motion fall squarely within the Registrar's competence, and therefore, it can only be seized of them when all available avenues have been exhausted.

18. The Chamber notes that the Defence seized the Chamber of the said matter before it received an answer to its correspondence of 13 February 2006, from the Registrar. The Motion is therefore premature and inadmissible.

19. The Chamber is of the considered opinion that the Motion is frivolous and that in future, conduct like this may attract sanctions under Rule 46.

FOR THE ABOVE REASONS, THE CHAMBER

DISMISSES the Defence Motion.

Arusha, 3 March 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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Decision on Ntahobali's strictly Confidential Motion to Recall Witnesses TN, QBQ, and QY, for Additional Cross-Examination
Rule 54, 73 (A), 90 (G), Rules of Procedure and Evidence
3 March 2006 (ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Joseph Kanyabashi, Sylvain Nsabimana and Arsène Shalom Ntahobali – Ndindiliyimana et al. proceedings – Additional Cross-Examination, Recall of witnesses regarding inconsistencies in the instant proceedings and in a different case, Threshold for a recall for further cross-examination, Contradiction between two testimonies of a witness, Minor and/or self-evident inconsistencies, Omission of the Defence to examine the Witness on a point – Later assessment of witnesses' credibility, Demonstration of good cause, Right to be tried without undue delay, Judicial economy – Motion granted regarding Witness QY

International Instrument cited :

Rules of Procedure and Evidence, rules 54, 73 (A) and 90 (G) ; Statute, art. 19 and 20

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Clément Kayishema and Obed Ruzindana, Decision on the Defence Motion for the Re-examination of Defence Witness DE, 19 August 1998 (ICTR-95-1) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses, 16 December 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Elie Ndayambaje, Decision on Defence Motion Requesting the Recall of Witness "TO" Based on the Decision of the Appeals Chamber in the Matter of Proceedings Under Rule 15 bis (D), 6 May 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Elie Ndayambaje and Alphonse Nteziryayo, Decision on Elie Ndayambaje's and Alphonse Nteziryayo's Request for the Recall of Witness FAG Following the Disclosure of a New Confessional Statement, 18 June 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Aloys Simba, Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination, 28 October 2004 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 September 2005 (ICTR-98-41)

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

SITTING as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the Defence for Ntahobali's strictly confidential "Requête de Arsène Shalom Ntahobali pour faire rappeler les témoins TN, QBQ, QY, pour un contre-interrogatoire supplémentaire (Art. 54, 73 (A), 90 (G) du Règlement de Procédure et de Preuve et Art. 20 (2) (e) du Statut)", filed on 9 January 2006 (the "Motion");

NOTING the Defence for Ntahobali's additional filing of documents in support of this Motion on 2 February 2006 (the "Additional Documents");

HAVING RECEIVED the following responses and replies by the Parties:

(i) Kanyabashi's strictly confidential "Réponse de Joseph Kanyabashi à la Requête de Arsène Shalom Ntahobali pour faire rappeler les témoins TN, QBQ, QY, pour un contre-interrogatoire supplémentaire", filed on 16 January 2006 ("Kanyabashi's Response");
(ii) The confidential "Prosecutor's Response to the Motion of Arsène Shalom Ntahobali to Recall Witnesses TN, QBQ, QY for a Supplementary Cross-Examination", filed on 16 January 2006 ("Prosecutor's Response");
(iii) The "Réponse de Sylvain Nsabimana à la Requête de Arsène Shalom Ntahobali datée du 6 Janvier 2006 aux fins de rappel des témoins "TN, QBQ, QY" pour un contre-interrogatoire supplémentaire", filed on 18 January 2006 ("Nsabimana's Response");
(iv) Kanyabashi's strictly confidential "Réponse supplémentaire de Joseph Kanyabashi à la Requête de Arsène Shalom Ntahobali pour faire rappeler les témoins TN, QBQ, QY, pour un contre-interrogatoire supplémentaire", filed on 24 January 2006 ("Kanyabashi's Additional Response");
(v) Ntahobali's strictly confidential "Réplique à la Réponse supplémentaire de Joseph Kanyabashi à la Requête de Arsène Shalom Ntahobali pour faire rappeler les témoins TN, QBQ, QY, pour un contre-interrogatoire supplémentaire", filed on 30 January 2006 ("Ntahobali's Reply");

RECALLING the Chamber's

(i) "Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali"of 26 August 2005 (the "Decision on the Modification of Witnesses");
(ii) "Decision on Arsène Shalom Ntahobali's Notice of Intention to File on the Record Written Statements of Witnesses and the Transcripts of their Testimony before the ICTR in lieu of Oral Testimony" of 30 August 2005 (the "92 *bis* Decision");
(iii) "Decision on Arsène Shalom Ntahobali's Motion to have Perjury committed by Prosecution Witness QY Investigated" of 23 September 2005 (the "Perjury Decision");

CONSIDERING the provisions of the Statute of the Tribunal (the "Statute"), in particular its Articles 19 and 20, and of the Rules of Procedure and Evidence (the "Rules"), in particular Rules 73 (A), 90 (G) of the Rules.

Submissions by the parties

Defence for Ntahobali

1. The Defence for Ntahobali brings its Motion pursuant to Art. 20 (2) (e) of the Statute and Rules 54, 73 (A), and 90 (G) of the Rules. The Defence seeks leave to recall Prosecution Witnesses TN, QY, and QBQ in the instant proceedings, for further cross-examination. The Defence argues that all three witnesses have, after their testimony in this case, testified in other proceedings before the Tribunal or

given supplementary statements which the Defence alleges to be "in flagrant contradiction"[1] to their initial testimonies in the instant proceedings.[2]

2. The Defence recalls that it had moved the Chamber for leave to add Witnesses QY and QBQ to its list of witnesses, as well as to file their testimonies in other proceedings before this Tribunal *in lieu* of oral testimony, but that these motions were denied.[3] Rather, this Chamber had indicated that "the Parties may therefore wish to make the proper application to recall the witnesses for further cross-examination on the alleged specific issues that may have arisen from either the additional statements and/or the testimony given in the *Muvunyi* proceedings".[4] Therefore, the Defence has included Witness TN in the present Motion, rather than following the same procedure it used regarding Witnesses QY and QBQ.[5]

3. The Defence submits that according to the Tribunal's jurisprudence, the condition for recalling a witness for additional cross-examination is to show good cause, i.e. "a substantial reason amounting in law to a legal excuse for failing to perform a required act".[6] In assessing this, the Chamber "must carefully consider the purpose of the proposed testimony as well as the party's justification for not offering such evidence when the witness originally testified".[7] Regarding the specific case where a witness has given statements after his or her testimony, it has been held in *Bagosora et al.* that the Defence may move the Chamber to recall a witness who has made statements inconsistent with his or her testimony, if prejudice can be shown from the Defence's inability to put these inconsistencies to the witness.[8] Finally, the Defence recalls that there has also been an oral decision in *Bagosora et al.* to recall Witness DO for additional cross-examination regarding alleged inconsistencies.[9]

Witness TN

4. The Defence submits that additional cross-examination of Witness TN is necessary for the defence strategy and will allow it to exercise its right to a full defence.[10] Witness TN has no credibility whatsoever in the eyes of the Defence, and this alleged lack of credibility becomes all the more obvious when confronted with this witness' testimony in the *Ndindiliyimana et al.* proceedings.[11] The Defence refers to the following examples:

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[1] The Motion, para. 14.
[2] The Motion, paras. 1-7, 14, 17-18, 24.
[3] The Motion, paras. 17, 20-22.
[4] The Motion, paras. 21-22, quotes Decision on the Modification of Witnesses, para. 71, reiterated in the 92 *bis* Decision, para. 20.
[5] The Motion, para. 26.
[6] The Motion, para. 33, quote *Prosecutor v. Bagosora et al.*, TC I, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 September 2005, para. 2; *Prosecutor v. Simba*, TC I, Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination, 28 October 2004, para. 5;
Prosecutor v. Bagosora et al., TC I, Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004, para. 6.
[7] The Motion, para. 33, quote *Prosecutor v. Bagosora et al.*, TC I, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 September 2005, para. 2; *Prosecutor v. Simba*, TC I, Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination, 28 October 2004, para. 5;
Prosecutor v. Bagosora et al., TC I, Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004, para. 6.
[8] The Motion, para. 34, quotes *Prosecutor v. Bagosora et al.*, TC I, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 September 2005, para. 3; *Prosecutor v. Bagosora et al.*, TC I, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses, 16 December 2003, para. 8
[9] The Motion, para. 35, quotes *Prosecutor v. Bagosora et al.*, TC I, Transcriptions d'audience du 14 octobre 2004, p. 26.
[10] The Motion, para. 36.
[11] The Motion, para. 37.

a. Witness TN testified that on 21 April [1994], she witnessed the arrival of members of the presidential guard, soldiers, and Arsène Shalom Ntahobali, in a Toyota.[12] During her testimony in the *Ndindiliyimana et al*. trial, the witness stated that on 21 April, she saw the arrival of Shalom Ntahobali in a Hilux, bearing the inscription "Police", together with members of the presidential guard.[13] The Defence submits that it would be in the interests of the Accused to confront the witness with this new affirmation, all the more because according to the Defence, there was no vehicle bearing the inscription "Police" in Rwanda in 1994.[14]
b. Witness TN testified in the present proceedings that when she and other girls arrived at Arsène Shalom Ntahobali's home, they were told by the Accused to have sexual intercourse with him, and that those who refused would be killed. These words were spoken in a compound, and the girls were then led to a house and its doors were bolted.[15] However, in *Ndindiliyimana et al*., Witness TN stated that the girls were led into the house and the Accused immediately bolted the doors, whereupon he threatened the girls with killing their parents.[16] According to the Defence, this demonstrates that there are two versions of the words attributed to Arsène Shalom Ntahobali.[17]
c. Witness TN in *Ndindiliyimana et al*. also referred to a second house, different from the one in which she was locked up, and where she was led in the context of sexual violence committed against her,[18] whereas in the instant proceedings, she did not mention a second house next to the one in which she was locked up.[19]
d. According to the Defence, there are also discrepancies between Witness TN's descriptions of the first time she was allegedly raped in the present proceedings and in *Ndindiliyimana et al*. In the present proceedings, Witness TN stated that after having raped her, Arsène Shalom Ntahobali introduced the handle of a scraper [into her vagina], causing great pain and bleeding.[20] According to the Defence, there is no mention of a scraper in the witness' testimony in *Ndindiliyimana et al*.[21]
e. The Defence further submits that there are inconsistencies regarding the witness' arrival at Munagano refugee camp in Burundi. Whereas Witness TN testified in the present proceedings that when she arrived there, a soldier called Alexis ordered her to have sexual intercourse with three soldiers,[22] in *Ndindiliyimana et al*. she stated that Alexis described her as his Tutsi wife, whom he had taken by force. He said to other persons he knew that he could do what he liked to the witness, and so could they. He then asked them to sleep with the witness, or they asked the witness to sleep with them. They were four.[23]

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[12] The Motion, para. 39, quotes *Prosecutor v. Nyiramasuhuko et al*., TC II, *Transcriptions d'audience du 3 avril 2002, p. 155* (English Transcripts of 3 April 2002, p. 132).
[13] The Motion, para. 40, quotes *Prosecutor v. Ndindiliyimana et al*., TC II, *Transcriptions d'audience du 20 septembre 2005, p. 6* (English Transcripts of 20 September 2005, p. 4).
[14] The Motion, para. 41.
[15] The Motion, para. 43, quotes Prosecutor v. Nyiramasuhuko et al., TC II, Transcriptions d'audience du 3 avril 2002, pp. 176-177 (English transcripts of 3 April 2002, p. 151).
[16] The Motion, para. 42, quotes *Prosecutor v. Ndindiliyimana et al*., TC II, *Transcriptions d'audience du 20 septembre 2005, p. 19* (English transcripts of 20 September 2005, p. 15).
[17] The Motion, para. 44.
[18] The Motion, para. 45, quotes *Prosecutor v. Ndindiliyimana et al*., TC II, *Transcriptions d'audience du 20 septembre 2005, p. 20* (English transcripts of 20 September 2005, p. 16).
[19] The Motion, para. 46, quotes *Prosecutor v. Nyiramasuhuko et al*., TC II, *Transcriptions d'audience du 3 avril 2002, pp. 181-190* (English Transcripts of 20 September 2005, pp. 155-162).
[20] The Motion, para. 47, quotes *Prosecutor v. Nyiramasuhuko et al*., TC II, *Transcriptions d'audience du 3 avril 2002, pp. 182-184* (English transcripts of 3 April 2002, pp. 156-158).
[21] The Motion, para. 48, quotes *Prosecutor v. Ndindiliyimana et al*., TC II, *Transcriptions d'audience du 20 septembre 2005, p. 21* (English transcripts of 20 September 2005, pp. 17-18).
[22] The Motion, para. 49, quotes *Prosecutor v. Nyiramasuhuko et al*., TC II, *Transcriptions d'audience du 3 avril 2002, p. 192* (English transcripts of 3 April 2002, p. 163).
[23] The Motion, para. 50, quotes *Prosecutor v. Ndindiliyimana et al*., TC II, *Transcriptions d'audience du 20 septembre 2005, p. 27* (English transcripts of 20 September 2005, p. 22).

f. Witness TN also stated in the present proceedings that the first person she had been able to contact upon her return to Rwanda was her brother.[24] However, in *Ndindiliyimana et al*., she said that she had first met the son of her uncle, and that she later fetched her brothers and sisters from Nyanza.[25]
g. The Defence further stresses that when testifying in *Ndindiliyimana et al*., Witness TN stated that although her mother had sent her home, she could not go there because Arsène Shalom Ntahobali took her to the *bureau de secteur*.[26] The same witness testified in the instant proceedings that she had gone home and that she was arrested there to be taken to the *bureau de secteur*.[27]
h. In the same context, Witness TN testified in the present proceedings that she had been taken to the *bureau de secteur* after the Accused had killed Rwabugili[28] and Philippe.[29] The Defence submits, however, that this is an inconsistency, because in *Ndindiliyimana et al*., the same witness stated that she first saw Rwabugili some moments before he was killed.[30]
i. Witness TN also stated in the *Ndindiliyimana et al*. proceedings that she had not been told that she was being led to Shalom's house, but that she deduced it was his from the circumstances.[31] The Defence submits that this contradicts her testimony in the present proceedings, where she testified that she had been told that it was the house of the Accused.[32]

5. Apart from these alleged inconsistencies, the Defence submits that there are also a number of absurdities in Witness TN's testimonies. For instance, Witness TN stated that in spite of being illegally confined for five days with six other young girls, she did not learn the names of those she had not known before[33] and that she did not speak to them.[34] Besides, Witness TN affirmed that none of the confined girls felt the need to urinate during the time they were being held.[35]

6. Further, the Defence submits that it would be in the interests of the Accused Ntahobali to be able to confront the witness with her statement that she went to the HCR bureau in Munagano camp,[36]

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[24] The Motion, para. 51, quotes *Prosecutor v. Nyiramasuhuko et al.,* TC II, *Transcriptions d'audience du 3 avril 2002, p. 193* (English transcripts of 3 April 2002, p. 164).
[25] The Motion, para. 52, quotes *Prosecutor v. Ndindiliyimana et al.,* TC II, *Transcriptions d'audience du 20 septembre 2005, p. 28* (English transcripts of 20 September 2005, p. 23).
[26] The Motion, para. 55, quotes *Prosecutor v. Ndindiliyimana et al.,* TC II, *Transcriptions d'audience du 20 septembre 2005, pp. 52-54* (English transcripts of 20 September 2005, pp. 45-47).
[27] The Motion, para. 55, quotes *Prosecutor v. Nyiramasuhuko et al.,* TC II, *Transcriptions d'audience du 3 avril 2002, p. 162* (English transcripts of 3 April 2002, p. 139).
[28] The Chamber notes that this person's name is spelled in different ways (see, for example, *Prosecutor v. Nyiramasuhuko et al*., French Transcripts of 3 April 2002, p. 162; *Prosecutor v. Ndindiliyimana et al*., French Transcripts of 20 September 2005, p. 57; English Transcripts of 20 September 2005, pp. 49-50, 139; French Transcripts of 21 September 2005, pp. 6-7 (CS); English Transcripts of 21 September 2005, p. 6 (CS)), but for clarity's sake will refer to Rwabugili throughout.
[29] The Motion, para. 55, quotes *Prosecutor v. Nyiramasuhuko et al*., TC II, *Transcriptions d'audience du 3 avril 2002, p. 162* (English transcripts of 3 April 2002, p. 139).
[30] The Motion, para. 57, quotes *Prosecutor v. Ndindiliyimana et al.,* TC II, *Transcriptions d'audience du 20 septembre 2005, p. 57* (English transcripts of 20 September 2005, pp. 49-50).
[31] The Motion, para. 56, quotes Prosecutor v. Ndindiliyimana et al., TC II, Transcriptions d'audience du 20 septembre 2005, pp. 67-68 (English transcripts of 20 September 2005, p. 59).
[32] The Motion, para. 56, refers to Prosecutor v. Ndindiliyimana et al., TC II, Transcriptions d'audience du 20 septembre 2005, pp. 67-68 (English transcripts of 20 September 2005, p. 59), quote Prosecutor v. Nyiramasuhuko et al., TC II, Transcriptions d'audience du 3 avril 2002, p. 168 (English transcripts of 3 April 2002, p. 145).
[33] The Motion, para. 59, quotes Prosecutor v. Ndindiliyimana et al., TC II, Transcriptions d'audience du 20 septembre 2005, p. 65.
[34] The Motion, para. 60, quotes *Prosecutor v. Ndindiliyimana et al.,* TC II, *Transcriptions d'audience du 21 septembre 2005, p. 4 (huis clos)*; English transcripts of 21 September 2005, p. 4 (CS). The Chamber notes that the indicated reference does not bear this out; rather, the portion of transcripts with the designated evidence would be found in the English transcripts of 20 September 2005, at p. 56.
[35] The Motion, para. 60, quotes *Prosecutor v. Ndindiliyimana et al*., TC II, Transcripts of 21 Septembre 2005, p. 4 (CS).
[36] The Motion, para. 62, quotes Prosecutor v. Ndindiliyimana et al., TC II, Transcriptions d'audience du 20 septembre 2005, pp. 28, 75-81, as well as pp. 82-83 (huis clos) and Transcriptions d'audience du 21 septembre 2005, pp. 5-6 (huis clos)

since Exhibit D 60, filed in *Ndindiliyimana et al*., is a letter from HCR affirming that in April 1994, there was no HCR structure at Munagano, where there was no functional camp.[37] The Defence has filed a letter from UNHCR, dated 21 March 2003 and indicating "there was no camp at Munagano. However, there were (*sic*) a camp at Mugano. The Mugano camp was not operational in April 1994 and the UNHCR did not have any structure there".[38]

7. Finally, whilst Witness TN has testified that the Accused Ntahobali had killed Philippe and Rwabugili, the transcripts of proceedings in *Ndindiliyimana et al*. show that a certain Jean-Baptiste Nzisabira has been found guilty of their deaths by the Butare *Chambre spécialisée, section conseil de guerre*.[39]

8. The Defence submits that it has not been able to raise these issues during Witness TN's testimony in the instant proceedings, because this testimony was given on 3 and 4 April 2002, whereas the same witness testified in the *Ndindiliyimana et al*. case on 20 and 21 April 2005. The Judgment against Jean-Marie Nzisabira has been rendered on 30 December 2002 and confirmed on appeal on 8 April 2004. The Defence has filed two Rwandan decisions in Kinyarwanda, issued on these dates.[40] The Defence submits that it has obtained them only very recently and that they were inexistent and could not be addressed at the moment of Witness TN's testimony before this Chamber.[41]

9. As to the showing of prejudice, the Defence submits that it will not be able to question Witness TN's credibility if it is not able to confront the witness with the alleged contradictions. Further, it is part of the right to a full defence that the Accused may demonstrate that Prosecution Witnesses, who have personally accused him, do not have any credibility.[42]

Witness QY

10. As regards Witness QY, the Defence submits that it is necessary to confront her with her testimony in the *Muvunyi* proceedings.[43] The Defence raises the following inconsistencies:

a. Witness QY indicated in her statements of 11 and 13 March 1998 and of 24 July 2000, and in her testimony in the present proceedings, that she was raped at EER by a person she named.[44] However, in *Muvunyi*, the witness stated that she had been raped at EER twice in the course of one evening,[45] that she did not know the perpetrator's name[46] and that the person she had identified as the perpetratror of the rapes at EER in the instant proceedings had raped her at the prefectural office, but not at EER.[47]

(English transcripts of 20 September 2005, pp. 22, 67-71, as well as pp. 73-74 (ICS) and Transcripts of 21 September 2005, p. 5 (ICS)).

[37] The Motion, para. 61-62, quotes Prosecutor v. Ndindiliyimana et al., TC II, Transcriptions d'audience du 20 septembre 2005, p. 79 and Transcriptions d'audience du 21 septembre 2005, p. 15 (huis clos) (English transcripts of 20 September 2005, p. 70 and of 21 September 2005, p. 14 (ICS)).

[38] Additional documents, annex 10, p. 1.

[39] The Motion, paras. 63-64, quotes Prosecutor v. Ndindiliyimana et al., TC II, Transcriptions d'audience du 21 septembre 2005, pp. 6-7 (huis clos) (English transcripts of 21 September 2005, p. 6 (ICS)).

[40] Additional documents, annexes 8 and 9.

[41] The Motion, paras. 65-59.

[42] The Motion, paras. 70-71.

[43] The Motion, para. 72.

[44] The Motion, paras. 73, 75, quotes *Prosecutor v. Nyiramasuhuko et al*., TC II, *Transcriptions d'audience du 24 mars 2003, pp. 19-20 and p. 58 (huis clos)* (English transcripts of 24 March 2003, pp. 19-20 and pp. 57-58 (CS)). The Chamber notes that this is partly omitted in the English version of the transcripts (see T. 24 March 2003, p. 57, and the French original of the same date, p. 58 (CS)).

[45] The Motion, para. 74, quotes *Prosecutor v. Muvunyi*, TC II, *Transcriptions d'audience du 8 juin 2005, pp. 18* and following (English transcripts of 8 June 2005, pp. 18-19).

[46] The Motion, para. 76, quotes *Prosecutor v. Muvunyi*, TC II, Transcripts of 8 June 2005, p. 19.

[47] The Motion, para. 77, quotes *Prosecutor v. Muvunyi*, TC II, *Transcriptions d'audience du 14 juin 2005, pp. 16-17 (huis clos*) (English transcripts of 14 June 2005, pp. 17-19 (ICS)).

b. Witness QY testified in the instant proceedings that she was raped at Gikongoro in April 1994, before fleeing to Butare and being raped there.[48] However, in *Muvunyi*, the same witness testified that she had not gone to Gikongoro.[49]
c. Witness QY has testified twice and inconsistently to her presence at Kibeho. In the present proceedings, she testified to having gone to Kibeho to visit her parents, accompanied by her sister.[50] However, in *Muvunyi*, she stated that she had not gone to Kibeho.[51]

11. The Defence submits that it is evident from the instances cited that Witness QY contradicts herself and that if her testimonies in the present proceedings and in the *Muvunyi* case are compared, the witness has given contradictory versions of the events she allegedly witnessed.[52] The Defence further submits that the reason why these issues were not raised when Witness QY testified before this Chamber is the same as for Witness TN, namely, that her testimony of 8 and 13-15 June 2005 in *Muvunyi* is posterior to the one in the present proceedings, on 19, 20, and 24-26 March 2003.[53]

12. According to the Defence, the Accused Ntahobali would suffer prejudice if he were not allowed to put the alleged inconsistencies to the witness, because the Chamber will only be able to evaluate the witness' credibility adequately if it has all her statements made in the *Muvunyi* proceedings.[54] Besides, Witness QY has personally accused Arsène Shalom Ntahobali, and the Defence submits that it is thus fundamental that he be allowed to defend himself and to demonstrate to the Chamber that this witness does not have any credibility.[55]

Witness QBQ

13. The Defence submits that Witness QBQ has contradicted her testimony in the present proceedings in a statement signed later – on 2 September 2004 – and divulged in *Bizimungu et al*.[56] Whereas in the present proceedings, as well as in an earlier statement of 6 May 1999, the witness indicated that she had not been raped on a certain night because she was carrying an injured baby and thus not picked by the *Interahamwe*,[57] the statement of 2004 stated that she had been raped on that night.[58]

14. The Defence submits that it is undeniable that the witness has lied under oath and that she must thus be confronted with her contradicting statements so the record reflects that she is not credible.[59] The Defence further argues that this is fundamental in order to guarantee the Accused's right to a full defence, since from the moment that a witness makes a wrong statement regarding a particular event, it is submitted that this taints the remainder of the testimony with the same falsehood.[60]

15. According to the Defence, these inconsistencies could not have been raised during the cross-examination of Witness QBQ in the present proceedings because the contradicting declaration was

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[48] The Motion, para. 80, quotes *Prosecutor v. Nyiramasuhuko et al*., TC II, English Transcripts of 24 March 2003, p. 21.
[49] The Motion, para. 81, quotes *Prosecutor v. Muvunyi*, TC II, English Transcripts of 13 June 2005, p. 33 (ICS).
[50] The Motion, para. 80, quotes *Prosecutor v. Nyiramasuhuko et al*., TC II, *Transcriptions d'audience du 24 mars 2003, pp. 72-73 (huis clos)* (English transcripts of 24 March 2003, pp. 70-71 (CS)).
[51] The Motion, paras. 84-85, quotes *Prosecutor v. Muvunyi*, TC II, English Transcripts of 14 June 2005, pp. 5, 35-36 (ICS).
[52] The Motion, paras. 86-87.
[53] The Motion, paras. 3, 5, 88-90.
[54] The Motion, paras. 91-93.
[55] The Motion, para. 94.
[56] The Motion, paras. 95-99.
[57] The Motion, paras. 97, 101 quotes witness' declaration of 6 December 1999, p. 5.
[58] The Motion, para. 100 quotes witness' declaration of 2 September 2004, p. 5.
[59] The Motion, paras. 102-103.
[60] The Motion, para. 104.

made after the witness' appearance before this Chamber.[61] The reasons applicable to Witnesses TN and QY also apply to Witness QBQ, all the more since she has stated in the 2004 declaration that what she had testified to under oath was wrong. Thus, according to the Defence, it is fundamental for the Accused to be able to confront the witness with her declaration.[62] This will also enable the Chamber to evaluate the credibility of Witness QBQ by disposing of all the relevant elements, which are also necessary for the defence of the Accused.[63]

Prosecution's Response

16. The Prosecution does not contest that Witnesses TN, QY, and QBQ have testified in the *Butare* case and, subsequently, in the *Ndindiliyimana et al*. and *Muvunyi* proceedings, or have given a new statement.[64] However, the Prosecution submits that the alleged contradictions in the testimony/statements of the witnesses are not substantial enough to warrant their recall. In support of this, the Prosecution cites the example of the inscription "Police" on a vehicle transporting the presidential guards.[65]

17. The Prosecution stresses that it was held in a decision in the *Bagosora* case that "if there is no need for the witness's explanation of the inconsistency, because the inconsistency is minor or its nature is self-evident, then the witness will not be recalled".[66]

18. The Prosecution further submits that should the recall of these witnesses be allowed for a supplementary cross-examination, the limits of this cross-examination must be clearly delineated so that there is no unnecessary lengthy questioning of the witnesses. Accordingly, the cross-examination should be limited to the alleged contradictions, ensuring the speedy resolution of this matter.[67]

19. The Prosecution also submits that the full transcripts of the relevant parts of the witnesses' testimonies in the *Muvunyi* and *Ndindiliyimana et al*. proceedings ought to be available to the Chamber, so as to ensure that that these testimonies are not taken out of context or misquoted. The Prosecution refers to two instances mentioned in the Motion to illustrate this point. First, contrary to the impression conveyed in the Motion at para. 60 that Witness TN did not urinate in five days, the full transcripts of that day in the *Ndindiliyimana et al*. case make it clear that she did urinate, but on herself.[68] Secondly, the rape of Witness QY at EER could be considered as one rape because it happened on a single day, or as two rapes, because she was raped in two different locations at EER, but on the same day.[69]

Kanyabashi's Response

20. The Defence for Kanyabashi stresses that it received the Motion on 12 January 2006, but without any annexes.[70] It submits that it does not object to Witnesses QY and QBQ being recalled for the purposes of additional cross-examination, as long as this is strictly limited to the contradictions alleged in the Motion.[71]

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[61] The Motion, paras. 105-108.
[62] The Motion, paras. 109-110.
[63] The Motion, para. 111.
[64] Prosecutor's Response, para. 2.
[65] Prosecutor's Response, para. 3.
[66] Prosecutor's Response, para. 4, quotes *Prosecutor v. Bagosora*, TC I, 16 December 2003, para. 8.
[67] Prosecutor's Response, para. 5.
[68] Prosecutor's Response, para. 6, quotes *Prosecutor v. Ndindiliyimana et al*., Transcript of 21 September 2005, p. 4 (ICS).
[69] Prosecutor's Response, para. 6.
[70] Kanyabashi's Response, para. 2.
[71] Kanyabashi's Response, paras. 11-12.

21. The Defence for Kanyabashi recalls that regarding Witnesses QY and QBQ, it has filed several responses in August 2005.[72] In these responses, it has already indicated that it would not object to the tendering into evidence of the statements made by Witnesses QY and QBQ on 2 September 2004, because they are succinct. This is not the case, however, for the transcripts of these witnesses' testimonies, which cover many issues.[73] Therefore, the Defence submits that should the witnesses be recalled, they may be questioned with regard to the alleged contradictions. However, the possible tendering of the transcripts must be limited to the question of credibility, and they must not be assessed as evidence of the different allegations they contain.[74]

22. The Defence for Kanyabashi is of the opinion that if the statements and/or transcripts are tendered, they should only have probative value as regards credibility concerning the issues that will have been raised during the additional cross-examination.[75] Further, since the additional cross-examination should be limited, it is not the totality of the transcripts or statements that may be of relevance at this stage.[76]

Nsabimana's Response

23. The Defence for Nsabimana submits that it received the Motion on 13 January 2006. It does not object to the recall of the witnesses[77] and reserves its right to cross-examine them as well.[78] However, it points out that the Defence for Ntahobali has not served it with all the documents or other evidence on which it plans to base the additional cross-examination,[79] and that the scope of this cross-examination has not been delineated clearly in the Motion.[80]

24. Accordingly, the Defence for Nsabimana requests that the Chamber grant the Motion and take note of the Defence for Nsabimana's intention of cross-examining the witnesses as well, should this be necessary.[81] However, it also requests that the Chamber direct the Defence for Ntahobali to disclose the points that are to be raised in the additional cross-examination of Witnesses QY, QBQ, and TN before their possible recall.[82]

Kanyabashi's Additional Response

25. In its Additional Response, the Defence for Kanyabashi stresses that it has received the relevant transcripts of Witness TN's testimony on 18 and 20 January 2006[83] and that it is now able to respond to all the prayers contained in the Motion. It requests that the Chamber therefore allow it to file its additional response,[84] which only addresses Witness TN.[85]

26. The Defence for Kanyabashi submits that it is for the Chamber to decide whether Ntahobali's allegations warrant Witness TN's recall.[86] Were the Chamber to grant the Motion, the Defence submits that Witness TN's additional cross-examination should be strictly limited to the issues raised in the

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[72] Kanyabashi's Response, para. 8.
[73] Kanyabashi's Response, para. 14.
[74] Kanyabashi's Response, para. 15.
[75] Kanyabashi's Response, para. 15.
[76] Kanyabashi's Response, para. 16.
[77] Nsabimana's Response, para. 4.
[78] Nsabimana's Response, para. 13.
[79] Nsabimana's Response, para. 11.
[80] Nsabimana's Response, paras. 6-9.
[81] Nsabimana's Response, paras. 14, 16.
[82] Nsabimana's Response, para. 15.
[83] Kanyabashi's Additional Response, para. 5.
[84] Kanyabashi's Additional Response, para. 6.
[85] Kanyabashi's Additional Response, para. 7.
[86] Kanyabashi's Additional Response, para. 8.

Motion.[87] As already stated with regard to Witnesses QY and QBQ, the Defence submits that the possible tendering of the transcripts of Witness TN's testimony must be limited to the issues addressed in cross-examination and to the question of credibility, and that the transcripts must not be assessed as evidence of the different allegations they contain.[88]

27. The Defence for Kanyabashi recalls that is has not yet been served with the *Nzisabira* Judgement referred to in the Motion. In order not to delay proceedings, it does not oppose a possible use of this Judgement to suggest to Witness TN that the death of Philippe and Rwabugili has been perpetrated by Nzisabira. However, should a wider use be envisaged by the Defence for Ntahobali, the Defence submits that the Judgement should have been filed together with the Motion.[89] It therefore requests that the use of the *Nzisabira* Judgement be strictly limited to the death of Philippe and Rwabugili, and conducted only to address credibility, rather than any question of fact. The Defence further requests that the Chamber orders the immediate disclosure of this Judgement and, subsidiarily, allow the Defence for Kanyabashi to reply to the relevant part of the Motion within ten days after its receipt.[90]

Ntahobali's Reply

28. In its Reply, the Defence for Ntahobali indicates that it only intends to use the files of the *Nzisabira* proceedings to suggest to Witness TN that Nzisabira is responsible for Philippe's and Rwabugili's deaths, rather than Arsène Shalom Ntahobali, as stated by Witness TN.[91]

29. The Defence also submits that should its Motion succeed, it will communicate a copy of the *Nzisabira* Judgement to the Defence for Kanyabashi in a timely manner and before its cross-examination.[92]

Deliberations

30. As a preliminary matter, the Chamber notes that the Defence for Kanyabashi's request to file its additional response has become moot, because it has not been filed out of time, as is borne out by the e-mail sent to the Parties by the Registry on 13 January 2006.

31. The Chamber underscores that it will assess the witnesses' credibility at a later stage and that at this point, it will only address the matters raised in the Motion, namely, the possible recall of the three witnesses for further cross-examination with regard to the specific instances of alleged inconsistencies raised by the Parties.

32. The Chamber notes that since the Decision on the recall of witnesses in *Kayishema and Ruzindana* proceedings, the Tribunal's jurisprudence allows the recall of witnesses if good cause has been shown.[93] It observes that previous jurisprudence has defined good cause to be a substantial reason amounting in law to a legal excuse for failing to perform a required act.[94] In assessing good cause, a

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[87] Kanyabashi's Additional Response, para. 9.
[88] Kanyabashi's Additional Response, para. 10.
[89] Kanyabashi's Additional Response, paras. 11-12.
[90] Kanyabashi's Additional Response, p. 4.
[91] Ntahobali's Reply, para. 6.
[92] Ntahobali's Reply, para. 7.
[93] *Prosecutor v. Kayishema and Ruzindana*, TC II, Decision on the Defence Motion for the Re-examination of Defence Witness DE, 19 August 1998, para. 14, reiterated in *Prosecutor v. Bagosora et al.*, TC I, Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004, para. 6; *Prosecutor v. Simba*, TC I, Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination, 28 October 2004, para. 5; *Prosecutor v. Bagosora et al.* TC I, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 September 2005, para. 2.
[94] *Prosecutor v. Kayishema and Ruzindana*, TC II, Decision on the Defence Motion for the Re-examination of Defence Witness DE, 19 August 1998, para. 14, reiterated in *Prosecutor v. Bagosora et al.*, TC I, Decision on the Prosecution Motion

Chamber must carefully consider the purpose of the proposed testimony as well as the party's justification for not offering such evidence when the witness originally testified.[95] The right to be tried without undue delay as well as concerns of judicial economy demand that recall should be granted only in the most compelling of circumstances where the evidence is of significant probative value and not of a cumulative nature.[96] The Chamber sees no reason to depart from this jurisprudence and notes that in the instant proceedings, the additional testimony of recalled witnesses has been strictly limited.[97]

33. The Chamber also notes that according to the Tribunal's jurisprudence, the Chamber's attention may be drawn to

> inconsistencies between testimony of witnesses before this Chamber and any declarations obtained subsequently. If prejudice can be shown from its inability to put these inconsistencies to the witness, the Defence may submit motions for their recall; if there is no need for the witness's explanation of the inconsistency, because the inconsistency is minor or its nature is self-evident, then the witness will not be recalled.[98]

34. The Chamber will address the questions relating to the Witnesses TN, QY and QBQ's testimonies in turn.

Witness TN

35. The Chamber notes that some of the alleged inconsistencies between Witness TN's testimonies in the instant proceedings and in a different case may be explained when the transcripts of the latter's testimony are read as a whole, rather than in isolation.[99] This applies to the witness' testimony regarding the alleged rape by Arsène Shalom Ntahobali (para. 4 (d) above). While it is true that the rape with the handle of an instrument is not immediately mentioned in the context of forced sexual intercourse in the *Ndindiliyimana et al*. proceedings,[100] the witness mentions on the same page of the transcripts that Arsène Shalom Ntahobali also raped her "with a piece of wood", "it was the handle of a broom – the broom that is used for sweeping".[101] The Chamber is of the view that even if there was a contradiction between TN's two testimonies, it would not warrant the witness' recall for further cross-examination on this issue.

36. As to the alleged discrepancy between Witness TN's first meeting with her brother or her cousin when she returned to Rwanda (para. 4 (f) above), the Chamber notes that the witness explains

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to Recall Witness Nyanjwa, 29 September 2004, para. 6; *Prosecutor v. Simba*, TC I, Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination, 28 October 2004, para. 5; *Prosecutor v. Bagosora et al*. TC I, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 September 2005, para. 2.

[95] *Prosecutor v. Bagosora et al*., TC I, Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004, para. 6, reiterated in *Prosecutor v. Simba*, TC I, Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination, 28 October 2004, para. 5; *Prosecutor v. Bagosora et al*. TC I, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 September 2005, para. 2.

[96] *Prosecutor v. Bagosora et al*., TC I, Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004, para. 6, reiterated in *Prosecutor v. Simba*, TC I, Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination, 28 October 2004, para. 5; *Prosecutor v. Bagosora et al*. TC I, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 September 2005, para. 2.

[97] See, for example, *Prosecutor v. Ndayambaje*, Decision on Defence Motion Requesting the Recall of Witness "TO" Based on the Decision of the Appeals Chamber in the Matter of Proceedings Under Rule 15 *bis* (D), 6 May 2004, para. 10, and *Prosecutor v. Ndayambaje and Nteziryayo*, Decision on Elie Ndayambaje's and Alphonse Nteziryayo's Request for the Recall of Witness FAG Following the Disclosure of a New Confessional Statement, 18 June 2004, paras. 10-11.

[98] *Prosecutor v. Bagosora et al*. TC I, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses, 16 December 2003, para. 8.

[99] See also Prosecutor's Response, para. 6.

[100] The Motion, para. 48, quotes *Prosecutor v. Ndindiliyimana et al*., TC II, *Transcriptions d'audience du 20 septembre 2005, p. 21* (English transcripts of 20 September 2005, pp. 17-18).

[101] *Prosecutor v. Ndindiliyimana et al*., TC II, English Transcripts of 20 September 2005, p. 18.

this by saying that the relative she had met first upon her return to Rwanda was the son of her paternal uncle, but that "back home we say – we refer to him – I will refer to him as my brother, but he was the son of my paternal uncle". Asked by Counsel if he could be referred to as "brother/cousin, as you refer to him in your country", the witness replied, "yes, that is true".[102] Accordingly, the Chamber is of the view that even if there was a contradiction between TN's two testimonies, it would not warrant the witness' recall for further cross-examination on this issue.

37. Further, as to the witness' testimonies that she had been taken to the *bureau de secteur* after the Accused had killed Philippe and Rwabugili,[103] and that she first saw Rwabugili some moments before he was killed[104] (para. 4 (h) above), the Chamber is of the view that even if there was a contradiction between TN's two testimonies, it would not warrant the witness' recall for further cross-examination on this issue.

38. The Chamber observes that the following alleged inconsistencies in Witness TN's testimonies may be minor and/or self-evident:

- whether the vehicle in which Arsène Shalom Ntahobali arrived bore the inscription "Police" (para. 4 (a) above);
- whether the Accused addressed Witness TN and the other girls in the compound or in the house and threatened their parents (para. 4 (b) above);
- whether there was a second house next to the one in which the witness was locked up (para. 4 (c) above);
- whether she was able to go home before being arrested and taken to the *bureau de secteur* (para. 4 (g) above);
- and whether she had been told that she was in Arsène Shalom Ntahobali's house or deduced it from the circumstances (para. 4 (i) above).

The Chamber is of the view that even if there were contradictions between TN's two testimonies, they would not warrant the witness' recall for further cross-examination on these issues.

39. As to the alleged absurdities regarding the witness' detention (para. 5 above), the Chamber notes that "absurdities" may be a matter for comment or submissions at the end of the trial but do not justify the recall of a witness.

40. The Chamber notes that the remaining instances of alleged inconsistency in Witness TN's testimonies before this Tribunal relate to the responsibility of the Accused Ntahobali or that of Jean-Baptiste Nzisabira for two killings (para. 7 above); the presence or not of a HCR camp at Munagano (para. 6 above); and whether Witness TN was raped by three or four soldiers, apart from Alexis, in Munagano camp (para. 4 (e) above).

41. The Chamber observes that the first two alleged discrepancies arise from documents that were not produced by the witness. Witness TN's evidence in *Ndindiliyimana et al*. has been that she does not know anything about the *Nzisabira* Judgement[105] and that there was an HCR bureau in Munagano camp.[106] The Chamber is satisfied that these matters do not constitute a valid basis for a recall and additional cross-examination. As to her alleged rapes in Munagano camp by three or four soldiers, the Chamber is of the opinion that this disparity, if at all, does not warrant the recall of the witness.

42. The Motion is accordingly denied with respect to the recall of Witness TN.

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[102] *Ndindiliyimana et al*., TC II, English transcripts of 20 September 2005, p. 71.
[103] *Prosecutor v. Nyiramasuhuko et al*., TC II, English Transcripts of 3 April 2002, p. 139.
[104] *Prosecutor v. Ndindiliyimana et al*., TC II, English Transcripts of 20 September 2005, pp. 49-50.
[105] *Prosecutor v. Ndindiliyimana et al*., TC II, English Transcripts of 21 September 2005, p. 6 (CS).
[106] *Prosecutor v. Ndindiliyimana et al*., TC II, English Transcripts of 20 September 2005, pp. 22, 67-71, as well as pp. 73-74 (CS) and Transcripts of 21 September 2005, p. 5 (CS).

Witness QBQ

43. The Chamber notes that Witness QBQ's two statements of 6 May 1999 and 2 September 2004 may be contradictory as to her rape on a certain night by the *Interahamwe*. The Chamber observes, however, that the relevant passage in the witness' 1999 statement was read to the witness on three occasions in the instant proceedings. Yet Witness QBQ was never questioned and did not testify to rapes perpetrated against her on the night in question, although sexual violence committed against other persons was addressed at this time.[107] The Chamber notes that Counsel had the opportunity to raise this matter with the witness, but did not do so. This omission does not constitute a basis for recall for further cross-examination. As for the witness' alleged statement of 2004, there is no evidence that she has confirmed it in any proceedings. The Chamber is therefore not convinced that the alleged change has an impact on her testimony in the instant proceedings and therefore, this matter does not warrant the witness' recall for further cross-examination.

44. Motion is accordingly denied with respect to the recall of Witness QBQ.

Witness QY

45. The Chamber notes that Witness QY, in the instant proceedings, confirmed giving an earlier statement in which she had named the man who allegedly raped her once[108] at the EER.[109] In the *Muvunyi* case, however, Witness QY indicated that she was raped at EER twice in the course of one evening by a person whose identity she did not know[110] and that the man whose identity she had confirmed in the Butare proceedings as being the perpetrator's, had not raped her at EER, but at the prefectural office.[111] The Chamber notes the Prosecution's submissions that the sexual violence perpetrated against Witness QY at EER could be considered as one rape because it happened on a single day, or as two rapes, because she was raped in two different locations at EER, but on the same day.[112] The Chamber is of the opinion that while there may be discrepancies in the witness' testimonies regarding the number of times that she was allegedly raped at the EER, they do not seem to relate directly to the Accused. The Chamber therefore considers that this point does not warrant the witness' recall.

46. As to the identity of the perpetrator of the alleged sexual violence against the witness at EER, however, the Chamber finds that the discrepancy between Witness QY's testimonies on this point reaches the threshold for a recall for further cross-examination, strictly limited to this issue.

47. With regard to Witness QY's presence at Gikongoro and Kibeho, the Chamber notes that while the witness in the instant proceedings acknowledged an earlier statement in which she had indicated that she was in Gikongoro, and raped there, before fleeing to Butare,[113] she also stated that she went to Kibeho,[114] but did not reach Gikongoro.[115] In the *Muvunyi* proceedings, however, the witness denied having been in Gikongoro[116] or Kibeho.[117] The Chamber observes while some of these differences may be explained by the fact that there is a Kibeho *secteur* in Mubuga *commune*,

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[107] *Prosecutor v. Nyiramasuhuko et al.*, English transcripts of 3 February 2004, pp. 64, 67.
[108] *Prosecutor v. Nyiramasuhuko et al.*, English transcripts of 24 March 2003, p. 20.
[109] *Prosecutor v. Nyiramasuhuko et al.*, French transcripts of 24 March 2003, p. 58 (CS). The Chamber notes that this passage is omitted from the transcripts' English version.
[110] *Prosecutor v. Muvunyi*, English transcripts of 8 June 2005, pp. 18-19.
[111] *Prosecutor v. Muvunyi*, English transcripts of 14 June 2005, pp. 18-19 (CS).
[112] Prosecutor's Response, para. 6.
[113] *Prosecutor v. Nyiramasuhuko et al.*, English transcripts of 24 March 2003, p. 21.
[114] *Prosecutor v. Nyiramasuhuko et al.*, English transcripts of 19 March 2003, p. 7.
[115] *Prosecutor v. Nyiramasuhuko et al.*, English transcripts of 24 March 2003, pp. 70-71 (CS).
[116] *Prosecutor v. Muvunyi*, English transcripts of 13 June 2005, p. 33 (CS).
[117] *Prosecutor v. Muvunyi*, English transcripts of 14 June 2005, pp. 35-36 (CS).

Gikongoro *préfecture*,[118] these are nonetheless discrepancies that meet the threshold for the recall of a witness for further cross-examination, strictly limited to her presence in Kibeho and Gikongoro.

48. The Motion is therefore granted with regard to the recall of Witness QY for cross-examination on the issues specified above.

FOR THESE REASONS, THE CHAMBER

DENIES the Motion with regard to Witnesses TN and QBQ;

GRANTS IN PART the Motion with regard to Witness QY;

ORDERS the recall of Witness QY for further cross-examination on the identity of the perpetrator of sexual violence committed against the witness at EER, mentioned in the French transcripts of proceedings held in closed session in the instant case on 24 March 2003, p. 58, as well as her presence at Kibeho and Gikongoro between April and July 1994.

DIRECTS the Registry to undertake all necessary steps for the recall of Witness QY.

Arusha, 3 March 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

[118] Gikongoro carte de base, published by IMU/Equipe de P.R.D.R. Gikongoro, [Kigali] November 1998.

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Decision on Motion for Disqualification of Judges 7 March 2006 (ICTR-98-42-T)

(Original : English)

The Bureau

Judges : Erik Møse ; Khalida Rachid Khan

Joseph Kanyabashi, Elie Ndayambaje, Sylvain Nsabimana, Alphonse Nteziryayo, Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Disqualification of Judges, Presumption of impartiality of the judges, Moving party bears the burden of displacing that presumption, Grounds for the reasonable suspicion of bias on the basis of decisions in the case – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rules 15 (A), 23 (A) and 90 (F) ; Statute, art. 12 and 20

International and National Cases cited :

E.C.H.R. : Incal v. Turkey, 9 June 1998, n°22678/93

I.C.T.R. : Trial Chamber, The Prosecutor v. Gratien Kabiligi, Decision on the Defence's Extremely Urgent Motion for Disqualification and Objection Based on Lack of Jurisdiction, 4 November 1999 (ICTR-97-34) ; The Bureau, The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali, Determination of the Bureau in Terms of Rule 15 (B), 7 June 2000 (ICTR-98-42) ; The Bureau, The Prosecutor v. Joseph Nzirorera et al., Re. Application for the Disqualification of Judge Mehmet Güney, 26 September 2000 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Elie Ndayambaje et al., Decision on the Prosecutor's Motion to Modify the Sequence of Appearance of Witnesses on Her Witness List 27 February 2004 (ICTR-98-42) ; The Bureau, The Prosecutor v. Edouard Karemera, Decision on Motion by Karemera for Disqualification of Judges, 17 May 2004 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora, Decision on Motion to Compel Accused to Testify Prior to other Defence Witnesses, 11 January 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Elie Ndayambaje et al., Scheduling Order, 5 August 2005 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Elie Ndayambaje et al., Decision on Prosecutor's Motion Pursuant to Rules 54, 73, and 73 ter to Proceed with the Evidence of the Accused Nyiramasuhuko as a Witness on 15 August 2005 or in the Alternative to Proceed with the Defence Case of the Accused Ntahobali, 19 August 2005 (ICTR-98-42)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Dario Kordić et Mario Čerkez, Decision on Prosecutor's Motion on Trial Procedure, 19 March 1999 (IT-95-14/2) ; The Bureau, The Prosecutor v. Radoslav Brđanin and Momir Talić, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge, 18 May 2000 (IT-99-36) ; Appeals Chamber, The Prosecutor v. Anto Furundžija, Judgement, 21 July 2000 (IT-95-17/1) ; The Bureau, The Prosecutor v. Vidoje Blagojević et al., Decision on Blagojević's Application Pursuant to Rule 15 (B), 19 March 2003 (IT-02-60) ; Appeals Chamber, The Prosecutor v. Zejnil Delalić, Judgment, 8 April 2003 (IT-96-21)

Special Court for Sierra Leone : Appeals Chamber, The Prosecutor v. Issa Hassan Sesay*, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004 (SCSL-04-15)*

United Kingdom : R. v. Sussex Justices (1923), [1924] 1 K.B. 256, 259 (Lord Hewart)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as the Bureau, composed of Judge Erik Møse, President of the Tribunal, and Judge Khalida Rachid Khan, Presiding Judge of Trial Chamber III, in accordance with Rule 23 (A) of the Rules of Procedure and Evidence ("the Rules");

BEING SEIZED of the "Requête Devant le Bureau de Arsène Shalom Ntahobali en Récusation des Juges de la Chambre de Première Instance II", filed by the Defence for Ntahobali on 2 March 2006;

CONSIDERING the Prosecution's "Submissions to Ntahobali's Motion for Recusal of Judges", filed on 6 March 2006;

HEREBY DECIDES the motion.

Introduction

1. In his motion, Arsène Shalom Ntahobali requests the disqualification of all three judges hearing his trial, Judges Sekule, Ramaroson and Bossa, on the basis of an alleged lack of impartiality pursuant to Rule 15 (B).

2. During a Status Conference on 8 February 2006, the Presiding Judge addressed a number of scheduling matters concerning the few witnesses remaining to be called for the Nyiramasuhuko and Ntahobali defence. In this context, he invited Counsel for Mr. Ntahobali to indicate, for the sake of planning, whether he intended to testify on his own behalf. The Presiding Judge noted that as the testimony for the Ntahobali Defence case was expected to be concluded by 10 March 2006 at the latest, arrangements would have to be made to facilitate this testimony as soon as practicable.[1] The Judge further expressed his expectation that proceedings would resume on 13 February 2006 and requested the Defence to work towards ensuring a continuous flow of witnesses so as to enable continuous testimony of the remaining few witnesses.[2] Despite this, a number of trial days were lost in the days that followed as a result of a lack of Defence witnesses.[3]

3. In a letter to the Trial Chamber of 17 February 2006, the Defence indicated that Mr. Ntahobali was still not ready to give a definitive answer as to his intention to testify on his own behalf, but that in any event, he would be testifying as the last witness. On 20 February 2006, the Presiding Judge directed that if Mr. Ntahobali does intend to testify, he should be ready to start his testimony on 2 March 2006.[4]

4. On 2 March 2006, Defence Counsel, rather than presenting the evidence of Mr. Ntahobali, instead announced that the present motion for disqualification had been filed before the Bureau. In response, the Presiding Judge adjourned the proceedings pending resolution of the matter by the Bureau.[5]

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[1] T. 8 February 2006, page 4.
[2] T. 8 February 2006, pp. 4, 21-22 ("We'll resume on … 13th of February to continue with the next witness. And we will urge the Defence of Ntahobali, in collaboration with the witness protection unit, to work to ensure that these other witnesses who are scheduled … arrive and … the Chamber is kept informed of progress … so that we are able to continue next week and … ultimately, conclusively, that all the witnesses are heard as planned").
[3] See e.g. T. 13 February 2006, 20 February 2006 and 23 February 2006 (unanticipated adjournments sought due either to allegedly inadequate preparation time, or witness illness or unavailability).
[4] T. 20 February 2006, pp. 5-6.
[5] *Id.*, pp. 6-7.

Submissions

5. In its motion, the Defence submits that the modalities adopted by the Trial Chamber to ascertain whether Mr. Ntahobali intended to testify in his own defence and to schedule this testimony gives rise to the need for disqualification of the entire bench. Other decisions taken in the course of the trial are also alleged to give rise to a reasonable apprehension of bias on the part of the Chamber, which similarly ought to result in disqualification.

6. The Prosecution opposes the motion for disqualification on the basis that it fails either to demonstrate how any such alleged errors would be attributable to a pre-disposition against Mr. Ntahobali or that the Judges were animated by any concern other than the relevant legal issues in rendering their decisions.

Deliberations

7. Judges Ramaroson and Sekule, who, pursuant to Rule 23 (A), are normally members of the Bureau in their capacity as Vice-President of the Tribunal and Presiding Judge of Trial Chamber II respectively, have recused themselves from consideration of the current motion. The Bureau is therefore presently composed of Judges Møse and Khan.

8. Rule 15 (A) provides that a Judge may not "sit in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality". This provision has been interpreted broadly to permit any ground of impartiality to be raised before the Bureau as a basis for disqualification.[6] The Appeals Chamber in *Furundžija* has found that the requirement of impartiality is violated not only where the decision-maker is actually biased, but also where there is an appearance of bias.[7] An appearance of bias is established if (a) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of the case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved; or (b) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[8]

9. The apprehension of bias test reflects the maxim that "justice should not only be done, but should manifestly and undoubtedly be seen to be done".[9] Although the standpoint of the Accused is a relevant consideration, the decisive question is whether a perception of lack of impartiality is objectively justified.[10] Thus, a mere feeling or suspicion of bias by the Accused is insufficient; what is required is an objectively justified apprehension of bias, based on knowledge of all the relevant circumstances.[11] Judges of this Tribunal enjoy a presumption of impartiality, based on their oath of

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[6] Rule 15 (A) has been interpreted as "co-terminous with the statutory requirement of impartiality and thus as including within its scope all possible bases of disqualification" on the basis of lack of impartiality: *Blagojević et al*., Decision on Blagojević's Application Pursuant to Rule 15 (B), 19 March 2003, para. 10; see also *Bagosora et al*., Determination of the Bureau Pursuant to Rule 15 (B), 20 February 2002, paras. 9-11; *Nahimana et al*., T. 19 September 2000 p. 6.

[7] *Furundžija*, Judgment (AC), 21 July 2000, paras. 181-88. See also *Brđanin and Talić*, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge (TC), 18 May 2000, paras. 9-14.

[8] *Furundžija*, Judgment (AC), 21 July 2000, para. 189.

[9] *R. v. Sussex Justices* (1923), [1924] 1 K.B. 256, 259 (Lord Hewart); quoted in *Furundžija*, Judgment (AC), 21 July 2000, para. 195; *Brđanin and Talić*, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge (TC), 18 May 2000, para. 9; *Prosecutor v. Sesay*, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber (Sierra Leone AC), 13 March 2004, para. 16.

[10] This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must be reasonable in the circumstances of the case. (*Furundžija*, Judgment (AC), 21 July 2000, para. 185). See also *Incal v. Turkey*, (2000) 29 E.H.R.R. 449 (E Ct HR), para. 71: "In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified".

[11] The objective test has, in substance, been adopted in a number of decisions before this Tribunal: *Karemera,* Decision on Motion by Karemera for Disqualification of Judges (Bureau), 17 May 2004, para. 9; *Nzirorera et al*., Re. Application for the Disqualification of Judge Mehmet Güney (Bureau), 26 September 2000, paras. 8-9; *Nahimana et al*., Oral Decision (TC), T.

office and the qualifications for their selection in Article 12 of the Statute. The moving party bears the burden of displacing that presumption.[12]

10. The motion does not allege that any interest or association of the Judges gives rise to an apprehension of bias. Rather, it contends that Mr. Ntahobali has grounds for the reasonable suspicion of bias on the basis of decisions in the case itself.

11. In *Karemera,* the Bureau considered the issue of judicial impartiality as evidenced through a Chamber's decisions.[13] It relied on the reasoning of the Bureau of the International Criminal Tribunal for the Former Yugoslavia in *Blagojević*, where that Bureau, although not entirely ruling out the possibility that decisions rendered by a Judge or Chamber in the course of trial could by themselves suffice to establish actual bias, observed that they would only serve to do so in the most exceptional of cases.[14]

12. Where such allegations are made, the Bureau has a duty to examine the content of the judicial decisions cited as evidence of bias. The purpose of that review is not to detect error, but rather to determine whether such errors, if any, demonstrate that the judge or judges are actually biased, or that there is an appearance of bias based on the objective test described above. Error, if any, on a point of law is insufficient: what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant, and not genuinely related to the application of law (on which there may be more than one possible interpretation) or to the assessment of the relevant facts.[15]

13. The motion alleges impropriety on numerous grounds. Firstly, it alleges that upon being requested to indicate whether or not Mr. Ntahobali intended to testify in his defence, Counsel were improperly impeded from making legal submissions concerning the right of the Accused not to be compelled to testify.[16] It submits that the Chamber thus failed to consider the Accused's arguments, having already pre-determined the matter.[17] However, the Presiding Judge did no more than remind Counsel that the present hearing was a status conference to address issues of planning, inviting Counsel instead to file a motion should the Defence wish to make detailed submissions of law.[18] Further, the Judge fully acknowledged the Accused's right not to be compelled to testify, and his intention was clearly to seek information for planning purposes:

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19 September 2000, p. 10; *Nyiramasuhuko and Ntahobali*, Determination of the Bureau in Terms of Rule 15 (B) (Bureau), 7 June 2000, p. 5; *Kabiligi*, Decision on the Defence's Extremely Urgent Motion for Disqualification and Objection Based on Lack of Jurisdiction (TC), 4 November 1999, p. 8.

[12] *Delalić*, Judgment (AC), para. 707. The reason for this threshold is that while any real appearance of bias on the part of a judge undermines confidence in the administration of justice, it would be equally a threat to the interests of the impartial and fair administration of justice where judges to be disqualified on the basis of unfounded and unsupported allegations of apparent bias. See *id.:* "It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially and without prejudice, rather than that he will decide the case adversely to one party ... Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of apparent bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

[13] *Karemera,* Decision on Motion by Karemera for Disqualification of Judges (Bureau), 17 May 2004, para. 12.

[14] *Blagojević et al*., Decision on Blagojević's Application Pursuant to Rule 15 (B), 19 March 2003, para. 14. Allegations of bias based on the content of judicial proceedings have also been considered by the United States Supreme Court, where it has been emphasised that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. … Almost invariably; they are proper grounds for appeal, not for recusal. … [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings … do not constitute a basis for a bias or partiality motion unless they display a deep-seated favouritism or antagonism that would make fair judgment impossible" (*Liteky v. United States*, 510 U.S. 540, 555 (1994)).

[15] *Karemera,* Decision on Motion by Karemera for Disqualification of Judges (Bureau), 17 May 2004, para. 13.

[16] Motion, paras. 37 *et seq*.

[17] *Id*., para. 47.

[18] T. 8 February 2006, pp. 12, 22.

> [W]ith regard to the indication, if any … whether or not the Accused will give evidence on his own behalf[, t]he legal position is very clear. The Accused has the right to choose to testify on his own behalf. He cannot be compelled… It is his … or her prerogative, but the Trial Chamber which … controls the proceedings, must plan. … We would expect the Defence of the Accused Ntahobali to indicate to the Trial Chamber so that it's able to plan ahead whether or not the Accused intends to give testimony [s]o that we can plan his testimony with a view of seeing how best it will fit … in the Trial Chamber's plan to complete this Defence in a given time. ... [W]e would [therefore] invite the … the Defence of Ntahobali to indicate by the end of next week so that we can plan how best, where his testimony, if he is going to testify, is going to be placed. Things cannot be left … open-ended.[19]

14. There is no indication that the Chamber's request was based on incorrect legal reasoning or influenced by improper considerations. Under these circumstances, it cannot reasonably be apprehended as arising from bias against the Accused.

15. Defence Counsel indicated, in a letter to the Trial Chamber of 17 February 2006, a provisional intention on the part of Mr. Ntahobali to testify. The motion alleges that the Chamber thereafter improperly ordered the Accused to begin his testimony on 2 March 2006 as opposed to allowing him to choose the timing of his testimony.[20]

16. The Bureau observes that on 20 February 2006, Defence Counsel had requested a further adjournment, citing lack of preparedness to commence the examination in chief of Witness WCMNA and indicating probable delays also with regard to the next witness to testify.[21] The Prosecution then renewed its protest against being, once again, unaware as to which witness would testify and when. It averred that if in future a further unforeseen adjournment was forced due to the non-availability of other Defence witnesses, then Mr. Ntahobali himself should testify.[22] The Presiding Judge directed that

> if the Accused intends to testify on his behalf, he should be ready to start his testimony on the 2nd of March in all circumstances … So from the 2nd of March … [the Accused's] testimony is expected, if he still intends to start his testimony. So *if there is no witness or a witness is not available, he will begin*. If that … witness will not have been done by then, he should be ready to start his testimony on that date and day.[23]

17. The Defence alleges that this attempt by the Chamber to direct the timing of the Accused's testimony contravenes the Accused's rights under Article 20 of the Statute.[24] This Tribunal has already determined that no mention of the timing of an appearance of the Accused is to be found in Articles 19 or 20 of the Statute whereas, under Rule 90 (F), the Chamber has the obligation and authority to

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[19] T. 8 February 2006, pp. 22-23. See also *id*., pp. 7 (Defence submissions concerning the need to indicate a date of commencement for the Nsabimana defence) and 17 (OTP concern to be allowed sufficient notice so as to facilitate preparation). It appears that a similar approach to the scheduling of future testimony was adopted *vis-à-vis* the Nyiramasuhuko defence during the same hearing. See *id*., p. 22: "We do take due note that the Defence of Nyiramasuhuko is considering … whether or not to call the remaining expert witness. That is their prerogative. But we cannot … leave it at that, there must be some specific timeframe in order that the Chamber can plan for the next stage. So, we do invite the Defence of Nyiramasuhuko … to inform the Chamber on this particular issue by the end of next week so that … the Trial Chamber itself and all the parties can plan ahead."

[20] Motion, *inter alia* paras. 55, 71.

[21] T. 20 February 2006, p. 3.

[22] *Id*., pp. 3-4.

[23] *Id*., pp. 5-6 (emphasis added. It should be noted that the Chamber ruled that in the event another witness was available, the testimony of Mr. Ntahobali could be deferred in order to hear that witness). See also T. 28 February 2006, p. 72 ("*La Chambre a informé à temps les parties de ce que si l'Accusé Shalom a l'intention de déposer, il devrait commencer la déposition jeudi, c'est-à-dire le ... dans deux jours. De l'avis de la Chambre, cette décision reste valable. ... Si un témoin arrivait la semaine prochaine ou la semaine d'après, nous ne pouvons que retarder la déposition de l'Accusé et prendre ce témoin. Mais nous devons commencer la déposition l'Accusé le jeudi*.")

[24] Motion, paras. 45-46, citing *Kordić and Čerkez,* Decision on Prosecutor's Motion on Trial Procedure (TC), 19 March 1999.

"exercise control over the mode and order of interrogating witnesses…".[25] The consistent practice before the international tribunals has been that Accused who testify have chosen the timing of their testimony which, in most cases, has been given at or near the end of the Defence case.[26] However, Chambers have also considered the interests of justice and questions of judicial economy in ordering a particular sequence of witnesses.[27] In the present case, the Chamber appears to have afforded Mr. Ntahobali the opportunity to choose the timing of his testimony, subject to the Chamber's duty to efficiently manage trial proceedings and to avoid undue prejudice to other parties stemming from uncertainty and delay.[28] The Chamber's direction on 20 February 2006 that Mr. Ntahobali, should he wish to testify, be ready to do so from 2 March 2006 onwards was motivated by the need to exercise proper control over proceedings and cannot be said to evince bias on the part of the Chamber toward the Accused.

18. The Defence further submits that a perception of bias emerges from alleged double standards in decisions by the Chamber against Mr. Ntabohali.[29] As evidence of bias, the motion cites the differing outcomes of numerous other motions brought by the Ntahobali Defence and Prosecution, respectively.[30]

19. The Bureau notes that such decisions are rendered on a case by case basis and form part of the inherent discretion and duty of the Chamber to control the proceedings in order to ensure an expeditious and fair trial.[31] The Defence has failed to demonstrate that in rendering these decisions, the Judges were animated by any concern other than the relevant legal issues.[32] Accordingly, there is no basis for an apprehension of bias in an objective observer, fully apprised of the relevant circumstances, in the instant case.

20. For instance, the Defence alleges that contrary to the treatment afforded to him, the co-Accused Ms. Nyiramasuhuko was on 16 June 2005 granted a one month adjournment in order to permit her to testify last.[33] In fact, this adjournment was found by the Chamber to be justified in order to allow adequate preparation time in relation to an expert witness.[34] Regarding the timing of Ms. Nyiramasuhuko's testimony, despite her preference to testify last, the Chamber rendered an order substantially similar to the direction it had given on 20 February 2006.[35] The basis of this decision was

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[25] *Bagosora,* Decision on Motion to Compel Accused to Testify Prior to other Defence Witnesses (TC), 11 January 2005, para. 4.
[26] *Id*., para. 5, citing *Kordić and Čerkez,* Decision on Prosecutor's Motion on Trial Procedure (TC), 19 March 1999. By contrast, national practice on this issue appears to diverge significantly (*id*., para. 6).
[27] *Id*., citing *Ndayambaje et al*., Decision on the Prosecutor's Motion to Modify the Sequence of Appearance of Witnesses on Her Witness List (TC), 27 February 2004.
[28] See *supra,* note 23.
[29] Motion, paras. 74 *et seq*.
[30] See *e.g*. Motion, paras. 91-122 (discussing the Chamber's rejection of the Accused's Certification motion *vis-à-vis* its acceptance of an allegedly similar motion from the Prosecution) and 87-91 (allegation of bias in the Chamber's ordering the Accused to testify whilst pending decisions remained before the Chamber).
[31] *Nzirorera,* Decision on Motion by Nzirorera for Disqualification of Trial Judges, paras. 5, 16, 24 and 27 (finding, in response to allegations of unequal treatment, that apparently differential outcomes reflect the Chamber's view on the merits of the matters before it).
[32] *Id*., paras. 16 and 27 (finding that the timing of decisions was not probative of bias, real or reasonably perceived: "Many factors affect the timing of decisions. The Defence's attempt to show bias based upon [an] analysis of the time required to render decisions of a particular type … is misguided.")
[33] Motion, para. 75.
[34] T. 16 June 2005, p. 3: "In view of the fact that that witness and, indeed, the last - the expert witness cannot be available within a reasonable time to come and testify before the Trial Chamber during the remaining period of this session, and in view of the fact that the Defence of the Accused Shalom Ntahobali could not step in - there is one witness who could possibly testify, but it is not very certain as to when he or she could be available, the Trial Chamber sees that it would be best in the circumstances to adjourn these proceedings to enable adequate preparations being made in preparation for the continuation of the proceedings when we resume next session."
[35] See *Ndayambaje et al*., Scheduling Order (TC), 5 August 2005 (instructing counsel for Ms. Nyiramasuhuko to put the Accused on the stand to begin her testimony on a particular date or any date thereafter in the event that a preceding witness

further elucidated by the Chamber in a decision of 19 August 2005.[36] It is therefore difficult to view the Chamber's directive of 20 February 2006 as prejudicial *vis-à-vis* the treatment accorded to Mr. Ntahobali's co-Accused. Accordingly, no objective perception of bias arises in this context.

21. The Bureau concludes that the motion has failed to establish that a reasonable apprehension of bias could arise on the basis of the arguments advanced by the Defence, whether viewed individually or cumulatively.

FOR THE ABOVE REASONS, THE BUREAU

DENIES the motion.

Arusha, 7 March 2006.

[Signed] : Erik Møse ; Khalida Rachid Khan

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was unavailable to testify for any reason). The Defence for Ms. Nyiramasuhuko, in a letter to the Registrar dated 25 July 2005, had indicated its intention to call her last.

[36] See *Ndayambaje et al.*, Decision on Prosecutor's Motion Pursuant to Rules 54, 73, and 73 *ter* to Proceed with the Evidence of the Accused Nyiramasuhuko as a Witness on 15 August 2005 or in the Alternative to Proceed with the Defence Case of the Accused Ntahobali (TC), 19 August 2005, paras. 28-33 ("The Defence alleges inconveniences that will result from tendering its witnesses out of the originally conceived sequence. However, the Chamber finds that the Defence does not provide a cogent argument why the Accused should not testify before Witness WBNM, should the need arise, nor does it demonstrate the prejudice it would suffer. The Chamber is of the opinion that the Defence has had ample opportunity to prepare the testimony of the Accused. ... The Chamber underscores that when seeking to give effect to an Accused's rights under Article 20, it has a duty to ensure that there is a balance between the competing and respective rights of all the Parties in the case. The Chamber thus finds that it would not facilitate fairness to the other Parties and/or serve the interests of justice, to postpone the trial merely to allow the Accused to testify at her own convenience. Accordingly, the Chamber rules that should Witness WBNM be unable to commence his testimony as scheduled, on 29 August 2005, for any justifiable reason, the Defence for Nyiramasuhuko should be prepared to call the Accused Nyiramasuhuko to give testimony on her own behalf. … The Chamber accordingly finds no merit in the submissions of the Defence.")

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Decision on Arsène Shalom Ntahobali's Motion for Certification to Appeal the "Decision on Ntahobali's Strictly Confidential Motion to Recall Witness TN, QBQ, and QY for Additional Cross-Examination" 4 April 2006 (ICTR-97-21-T ; Joint Case : ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Arsène Shalom Ntahobali – Certification to appeal, Confusion of the Defence of the grounds of appeal and the grounds of certification to appeal – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A), 73 (B) and 73 (C)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible', 18 March 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Defence Motion for Certification to Appeal the 'Decision on Defence Motion for a Stay of Proceedings and Abuse of Process', 19 March 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Prosecutor's Motion for Certification to Appeal the Decision of the Trial Chamber dated 30 November 2004 on the Prosecution Motion for Disclosure and Evidence, 4 February 2005 (ICTR-98-42)

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

SITTING as Trial Chamber II "*Requête d'Arsène Shalom Ntahobali afin d'obtenir la certification d'appel de la decision intitulée* 'Decision on Ntahobali's Strictly Confidential Motion to Recall Witness TN, QBQ, and QY for Additional Cross-Examination'", filed on 8 March 2006 but dated 7 September 2005 (the "Motion");

CONSIDERING the "Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Certification to Appeal the Decision to Recall Witnesses TN, QBQ, and QY for Further Cross-Examination", filed on 14 March 2006 (the "Prosecutor's Motion");

CONSIDERING the "*Réplique de Arsène Shalom Ntahobali à la* 'Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Certification to Appeal the Decision to Recall Witnesses TN, QBQ, and QY for Further Cross-Examination'", filed on 20 March 2006 (the "Defence Reply");

NOTING the "Decision on Ntahobali's Strictly Confidential Motion to Recall Witness TN, QBQ, and QY for Additional Cross-Examination", issued on 4 March 2006 (the "Impugned Decision");

NOTING the facsimile titled : "In matter of the *Prosecutor vs. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko et al*.", issued by the Registry on 9 March 2006 ;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 73 (B) and (C);

NOW DECIDES the matter, pursuant to Rule 73 (A), on the basis of the written submissions of the Parties.

Submissions of the Parties

The Defence

1. The Defence moves the Chamber for certification to appeal the Impugned Decision of 4 March 2006. The certification is sought with respect to the denial of the request to recall Witnesses TN and QBQ.

2. In relation to Witness TN, the Defence submits that the contradictions between her testimony in the instant proceedings and her testimony in the *Ndindiliyimana et al*. proceedings are not minor[1] and could cast doubt on her credibility[2].

3. The Defence further asserts that in depriving the Defence of the possibility to confront Witness TN with some new elements, notably the letter from UNHCR and the Jean-Baptiste Nzisabira Judgment, the Chamber indirectly ruled upon witness' credibility without hearing her on these pertinent issues[3]. The fairness and the outcome of the trial are seriously affected as the Accused is denied the right to present exculpatory evidence.[4]

4. The Defence asserts that the immediate resolution of the matter by the Appeals Chamber at this stage would materially advance the proceedings in the sens that a debate under Rule 115 would be avoided on appeal, were the Accused convicted on the basis of allegations made by Witness TN.[5]

5. In relation to Witness QBQ, the Defence alleges that the Chamber issued an erroneous conclusion in the Impugned Decision which resulted in the denial of the recall of this witness. According to the Defence, the recall is solely aimed at establishing the fact that Witness QBQ made a subsequent out of court statement which is incompatible with the testimony that she has given in the instant proceedings : it is not aimed at demonstrating whether the aforementioned out of court statement is true or not.[6] The Defence submits that the fairness or outcome of the Trial is seriously affected because it is not allowed to confront Witness QBQ with her out of court statement in which she admits having told lies under oath.[7]

6. Finally, the Defence asserts that the immediate resolution of the matter by the Appeals Chamber at this stage would materially advance the proceedings in the sens that a debate under Rule 115 would be avoided on appeal, were the Accused convicted on the basis of the allegations made by Witness QBQ.

The Prosecution

7. The Prosecution submits that the Defence has failed to meet the criteria under Rule 73 (B)[8] and attemps to argue the appeal it is seeking certification for.[9]

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[1] Paragraph 12 of the Motion.
[2] Paragraph 13 of the Motion.
[3] Paragraphs 17-20 of the Motion.
[4] Paragraphs 33-34 of the Motion.
[5] Paragraph 43 of the Motion.
[6] Paragraph 60 of the Motion.
[7] Paragraph 66 of the Motion.
[8] Paragraph 10 of the Prosecution Response.
[9] Paragraphs 3, 12, 16 and 29 of the Prosecution Response.

8. The Prosecution contends that the Motion deals at considerable length with the issues already decided by the Chamber in its Impugned Decision.[10]

9. The Prosecution submits that it is the Chamber's responsibility to address the admissibility of evidence, including whether there are factors necessitation the recall of witnesses TN, QBQ, and QY for further cross-examination and the scope of Witness QY's cross-examination.[11] The Chamber has a duty to assess the materiality of the evidence that the proposed witnesses are expected to give.[12]

10. The Prosecution argues that there has been no compelling demonstration as to how the denial of the motion to recall witnesses would actually affect the fair and expeditious conduct of the proceedings.[13] The Motion only claims an alleged violation of the right of the Accused to a fair trial.[14] The Prosecution submits that contrary to the Defence assertions, the recalling of the witnesses will inordinately and significantly affect the fair and expeditious conduct of the proceedings in an adverse manner.[15]

Witness TN

11. The Prosecution submits that the Chamber fully considered the alleged discrepancies in the testimonies of Witness TN, before deciding that the issues are not significant enough to justify the recall of the witness.[16]

12. The Prosecution argues that the references to the *Ndindiliyimana et al*. proceedings and the Nzisabira Judgment can be dealt with by alternative procedures to tender documents, without the need to recall the witnesses.[17]

13. With respect to the evidence on the UNHCR camp at Munagano, the Prosecution submits that the document was not tendered by Witness TN, there is no direct link between the document and the witness and the Defence can use other procedures to produce legally admissible evidence in relation to the camp in lieu of recalling the witness.[18]

14. The Prosecution submits that the Defence relies extensively on the *Ndindiliyimana et al*. proceedings in its submissions while contending, at the same time, that the Chamber erred in law by basing its Impugned Decision on evidence from another case which is not part of the evidence in this case.[19]

15. The Prosecution submits that the Defence argument that the Chamber has been unfaire lacks merit and its misconceived as the Defence has not attempted to produce the evidence in question other than through the cross-examination of Witness TN.[20] It is speculative to assume that documents like the Nzisabira Judgement and the UNHCR documentation can be used to confront TN or any other witness in cross-examination without laying the proper legal foundation at appropriate time.[21]

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[10] Paragraphs 3, 12 and 29 of the Prosecution Response.
[11] Paragraph 6 of the Prosecution Response.
[12] Paragraph 8 of the Prosecution Response.
[13] Paragraphs 9 and 27 of the Prosecution Response.
[14] Paragraph 9 of the Prosecution Response.
[15] Paragraph 11 of the Prosecution Response.
[16] Paragraph 17 of the Prosecution Response.
[17] Paragraph 18 of the Prosecution Response.
[18] Paragraph 19 of the Prosecution Response.
[19] Paragraph 20 of the Prosecution Response.
[20] Paragraph 21 of the Prosecution Response.
[21] Paragraph 21 of the Prosecution Response.

16. The Prosecution submits that the Defence has narrowly construed the Impugned Decision to mean the exclusion of the evidence, whereas the Prosecution reiterates that it is not essential to recall Witness TN for the documents sought to be admitted.[22]

Witness QBQ

17. In relation to the Defence argument that it was unfair of the Chamber to deny it the opportunity to use an 'extra-judicial' statement to impeach the credibility of Witness QBQ, the Prosecution reiterates that the Chamber has the discretion to admit or exclude evidence and has the right to assess evidence and to determine issues of credibility.[23] The use of extra-judicial statements is determined by the Chamber on a case-by-case basis and it is not bound by what transpires in other proceedings.[24] This Chamber has consistently held that statements of witnesses as opposed to their actual testimonies before the Chamber are not evidence in these proceedings.[25]

The Defence Reply

18. The Defence submits that the Prosecution Response of 14 March 2006 was filed out of time and should be dismissed. According to the Defence, the time frame of five days within which the Prosecution should have filed its response expired on 13 March 2006.

Having Deliberated

19. As a preliminary matter, the Chamber finds that the Prosecution Response was filed on time, as the Registry's notification of 9 March 2006 specifies that "the Parties have five (5) days to file their responses *after* receipt of this notification" [emphasis added]. The Chamber notes that the Prosecution acknowledged receipt of the notification on 9 March 2006 and the time frame for its response therefore ran from 10 March 2006. Accordingly, the Chamber rejects the Defence request for dismissal of the Prosecution response.

20. The Chamber recalle Rule 73 (B), which stipulates :

> Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

21. The Chamber notes that decisions rendered on Rule 73 motions are without interlocutory appeal, except that the Chamber has direction to grant certification in the very limited circumstances stipulated in Rule 73 (B). The Chamber may grant certification to appeal if both conditions of Rule 73 (B) are satisfied. Under the firest limb of Rule 73 (B), the applicant must show how the Impugned Decision involves an issue that would significantly affect (a) the fair and expeditious conduct of the proceedings, or (b) the outcome of the trial. Under the second limb, the applicant has the burden of convincing the Chamber that an "immediate resolution by the Appeals Chamber may materially advance the proceedings". Both of these conditions require a specific demonstration, and are not met through a general reference to the submissions on which the Impugned Decision was rendered.[26]

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[22] Paragraph 22 of the Prosecution Response.
[23] Paragraphs 25-26 of the Prosecution Response.
[24] Paragraph 26 of the Prosecution Response.
[25] Paragraph 26 of the Prosecution Response.
[26] *Prosecutor v. Nyiramasuhuko,* Case N°ICTR-97-21-T, "Decision on Prosecutor's Motion for Certification to Appeal the Decision of the Trial Chamber dated 30 November 2004 on the Prosecution Motion for Disclosure and Evidence", 4

22. The Chamber notes the Defence submissions and observes that the reasons invoked by it constitue grounds of appeal, rather than grounds to support a motion for certification. The Chamber therefore concludes that the Defence has failed to meet the requirements provided for by Rule 73 (B).

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion in its entirety.

Arusha, 04 April 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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February 2005, para. 11 ; *Prosecutor v. Nyiramasuhuko,* Case N°ICTR-97-21-T, "Decision on Defence Motion for Certification to Appeal the "Decision on Defence Motion for a Stay of Proceedings and Abuse of Process", 19 March 2004, paras. 12-16 ; *Prosecutor v. Nyiramasuhuko,* Case N°ICTR-97-21-T, " Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 18 March 2004, paras. 14-17.

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Decision on Arsène Shalom Ntahobali's Motion for Certification to Appeal the "Decision on Arsène Ntahobali's Extremely Urgent Strictly Confidential-Under Seal-Motion to Have Witness NMBMP Testify by Video-Link" 4 April 2006 (ICTR-97-21-T ; Joint Case : ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Arsène Shalom Ntahobali – Certification to appeal, Confusion of the Defence of the grounds of appeal and the grounds of certification to appeal – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A), 73 (B) and 73 (C)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible', 18 March 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Defence Motion for Certification to Appeal the 'Decision on Defence Motion for a Stay of Proceedings and Abuse of Process', 19 March 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Prosecutor's Motion for Certification to Appeal the Decision of the Trial Chamber dated 30 November 2004 on the Prosecution Motion for Disclosure and Evidence, 4 February 2005 (ICTR-98-42)

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the "*Requête d'Arsène Ntahobali afin d'obtenir la certification d'appel de la décision intitulée* 'Decision on Arsène Shalom Ntahobali's Extremely Urgent-Strictly Confidential-Under Seal-Motion to Have Witness NMBMP Testify via Video-Link'", filed on 8 March 2006 but dated 7 September 2005 (the "Motion");

CONSIDERING the "Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Certification to Appeal the Decision on the Motion to Have Witness NMBMP Testify via Video-Link", filed on 14 March 2006 (the "Prosecution Response");

CONSIDERING the "*Réplique de Arsène Shalom Ntahobali à la* 'Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Certification to Appeal the Decision to Have Witness NMBMP Testify via Video-Link'", filed on 20 March 2006 (the "Defence Reply");

NOTING the "Decision on Arsène Shalom Ntahobali's Extremely Urgent- Strictly Confidential-Under Seal-Motion to Have Witness NMBMP Testify via Video-Link", issued on 2 March 2006 (the "Impugned Decision");

NOTING the facsimile titled: "In the matter of *the Prosecutor vs. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko et al*.", issued by the Registry on 9 March 2006;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 73 (B) and (C);

NOW DECIDES the matter, pursuant to Rule 73 (A), on the basis of the written submissions of the Parties.

Submissions of the Parties

The Defence

1. The Defence moves the Chamber for certification to appeal the Impugned Decision of 2 March 2006. The Defence submits that the Chamber erred in fact and in law in two respects: firstly, when the Chamber evaluated the burden imposed on the Defence;[1] secondly, when it evaluated the evidence adduced in support of the Motion and when it evaluated the legal consequences of Witness NMBMP's status in relation to the procedure she is pursuing before the Immigration Committee of the United States.[2]

2. The Defence submits that Witness NMBMP's testimony might affect the outcome of the trial as she is expected to give alibi evidence and to challenge the charge of rape against the Accused.[3] Furthermore, the Defence argues that the fairness of the trial would be significantly affected if the Defence were to withdraw NMBMP from its witness list due to her inability to travel out of her country of residence.[4]

3. The Defence submits that the Chamber erroneously concluded that the Defence failed to show that Witness NMBMP is actually unable to travel outside the United States, despite the production of supplementary documents by the Defence in support of the Motion which show this and which the Chamber has not challenged.[5]

4. The Defence argues that it is obvious that the immediate resolution of the matter by the Appeals Chamber at this stage would materially advance the proceedings in the sense that a debate under Rule 115 would be avoided on appeal, were the Accused convicted on the basis of facts that Witness NMBMP could challenge at first instance.[6]

The Prosecution

5. The Prosecution submits that rather than focus on the criteria for certification in Rule 73 (B) (ii), the Defence dwells extensively on irrelevant considerations, and attempts to re-litigate issues already decided by the Chamber in its Impugned Decision.[7] The Prosecution asserts that the submissions and implicit threats in the Motion regarding Rule 115 are both irrelevant to a motion for certification and premature.[8] The Prosecution alleges that the Defence has essentially relied on submissions contained in its motion to have Witness NMBMP testify by video-link, including submissions on the witness' immigration status, which the Chamber has considered and accorded due

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[1] Paragraph 12 of the Motion.
[2] Paragraph 13 of the Motion.
[3] Paragraph 15 of the Motion.
[4] Paragraph 17 of the Motion.
[5] Paragraph 20 of the Motion.
[6] Paragraph 35 of the Motion.
[7] Paragraphs 5 and 22 of the Prosecution Response.
[8] Paragraph 21 of the Prosecution Response.

weight to.[9] The Prosecution further argues that the Motion deals extensively with the grounds of appeal, rather than addressing the certification criteria.[10]

6. The Prosecution submits that the Defence has failed to demonstrate that the Impugned Decision involves an issue that would significantly affect the expeditious conduct of the proceedings.[11]

7. The Prosecution asserts that the Defence has failed to sufficiently demonstrate why an appeal is warranted on a matter falling squarely within the Chamber's discretion.[12]

8. The Prosecution submits that according to the Defence there are procedures allowing persons in circumstances comparable to Witness NMBMP's to leave the country in question, but that the Defence has not established that these procedures have been exhausted.[13] The Prosecution further argues that it is rather speculative and hypothetical for the Defence to submit that the witness may not be allowed to return to her country of residence if she applies for and obtains an advance parole.[14]

9. The Prosecution submits that the arguments of the Defence do not raise 'serious doubts as to the correctness of the legal principles at issue'.[15] The legal principles alluded to relate to United States' immigration law, which the Chamber is not bound to accept.[16] Consequently, a resolution of the matter by the Appeals Chamber may not materially advance the proceedings.[17]

10. The Prosecution argues that the Chamber has not denied the Accused the right to call Witness NMBMP as an alibi witness, but has decided that the testimony should not be given by video-link.[18] The Prosecution further submits that the Defence intends to call other witnesses to provide alibi evidence, including the Accused himself, his spouse, and Witness NMBMB, who has already testified.[19]

The Defence Reply

11. The Defence submits that the Prosecution Response of 14 March 2006 was filed out of time and should be dismissed. According to the Defence, the time frame of five days within which the Prosecution should have filed its response expired on 13 March 2006.

Having deliberated,

12. As a preliminary matter, the Chamber finds that the Prosecution Response was filed on time, as the Registry's notification of 9 March 2006 specifies that "the Parties have five (5) days to file their Responses *after* receipt of this notification" [emphasis added]. The Chamber notes that the Prosecution acknowledged receipt of the notification on 9 March 2006 and the time frame for it to file its response therefore ran from 10 March 2006. Accordingly, the Chamber rejects the Defence request for dismissal of the Prosecution response.

13. The Chamber recalls Rule 73 (B), which stipulates:

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[9] Paragraphs 10 and 16 of the Prosecution Response.
[10] Paragraphs 5 and 23 of the Prosecution Response.
[11] Paragraph 15 of the Prosecution Response.
[12] Paragraph 16 of the Prosecution Response.
[13] Paragraph 17 of the Prosecution Response.
[14] Paragraph 18 of the Prosecution Response.
[15] Paragraph 19 of the Prosecution Response.
[16] Paragraph 19 of the Prosecution Response.
[17] Paragraph 19 of the Prosecution Response.
[18] Paragraph 20 of the Prosecution Response.
[19] Paragraph 20 of the Prosecution Response.

> Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

14. The Chamber notes that decisions rendered under Rule 73 motions are without interlocutory appeal, except that the Chamber has discretion to grant certification in the very limited circumstances stipulated in Rule 73 (B). The Chamber may grant certification to appeal if both conditions of Rule 73 (B) are satisfied. Under the first limb of Rule 73 (B), the applicant must show how the Impugned Decision involves an issue that would significantly affect (a) the fair and expeditious conduct of the proceedings, or (b) the outcome of the trial. Under the second limb, the applicant has the burden of convincing the Chamber that an "immediate resolution by the Appeals Chamber may materially advance the proceedings". Both of these conditions require a specific demonstration, and are not met through general reference to the submissions on which the Impugned Decision was rendered.[20]

15. The Chamber takes note of the Defence submissions and points out that it did not deny the Defence the opportunity to call Witness NMBMP in the Impugned Decision; rather, it found that the legal requirements to allow NMBMP to testify via video-link were not met. Furthermore, the Chamber is of the view that the reasons invoked by the Defence constitute grounds of appeal, rather than grounds to support a motion for certification. The Chamber therefore concludes that the Defence has failed to meet the requirements provided for by Rule 73 (B).

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion in its entirety.

Arusha, 04 April 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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[20] *Prosecutor v. Nyiramasuhuko*, Case N°ICTR-97-21-T, "Decision on Prosecutor's Motion for Certification to Appeal the Decision of the Trial Chamber dated 30 November 2004 on the Prosecution Motion for Disclosure and Evidence", 4 February 2005, para. 11; *Prosecutor v. Nyiramasuhuko,* Case N°ICTR-97-21-T, "Decision on Defence Motion for Certification to Appeal the "Decision on Defence Motion for a Stay of Proceedings and Abuse of Process", 19 March 2004, paras. 12-16; *Prosecutor v. Nyiramasuhuko,* Case N°ICTR-97-21-T, "Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 18 March 2004, paras. 14-17.

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Decision on Nyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings
Rules 82 (B) and 72 (D) Rules of Procedure and Evidence
7 April 2006 (ICTR-97-21-T ; Joint Case : ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Severance of trial, Discretionary power of the Chamber to order a separate trial, Definition of the legally recognized conflict of interests that might cause serious prejudice to the accused, No conflict of interests when one accused shifts blame to another joint accused – Length of the Trial, Possible acceleration of proceedings by severance not necessarily compatible with the good administration of justice – Conduct of Counsel, Counsel's conduct in re-litigating issues priory resolved is an attempt to obstruct proceedings, Counsel warned – Motion denied

International Instruments cited :

Code of Professional Conduct for Defence Counsel, art. 5 (a) and 6 ; Rules of Procedure and Evidence, rules 46 (A), 72 (D), 73 (F), 82 (A) and 82 (B) ; Statute, art. 19, 19 (1), 20 and 20 (4) (c)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Aloys Ntabakuze et al., Decision on the Defence Motion Requesting an Order for Separate Trial, 25 March 1998 (ICTR-97-30) ; Trial Chamber, The Prosecutor v. Aloys Ntabakuze and Gratien Kabiligi, Decision on the Defence Motion Requesting an Order for Separate Trials, 1 October 1998 (ICTR-97-34 ; ICTR-97-30) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Prosecutor's Request for Leave to Amend the Indictment, 23 September 1999 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Mathieu Ngirumpatse et al., Decision on Prosecutor's Motion for Joinder of Accused and on the Prosecutor's Motion for Severance of the Accused, 29 June 2000 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Augustin Bizimana et al., Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Joseph Nzirorera, 12 July 2000 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Décision relative à la requete de la Défense en exclusion de preuve et remise de biens saisis, 12 October 2000 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses, 9 September 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Arsène Shalom Ntahobali, Decision on Ntahobali's Motion for Separate Trial, 2 February 2005 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Severance by Accused Kabiligi, 24 March 2005 (ICTR-98-41)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Zejnil Delalić, Decision on Motions for Separate Trial Filed by the Accused Zejnil Delalić and the Accused Zdravko Mucić, 25 September 1996 (IT-96-21) ; Trial Chamber, The Prosecutor v. Kovacević, Decision on Motion for Joinder of Acuused and Concurrent Presentation of Evidence, 14 May 1998 (IT-97-24) ; Trial Chamber, The Prosecutor v. Radoslav Brđanin and Momir Talić, Decision on Motions By Momir Talić for a Separate Trial and for Leave to File a Reply, 9 March 2000 (IT-99-36) ; Appeals Chamber, The Prosecutor v. Radoslav Brđanin, Decision on Request to Appeal, 16 May 2000 (IT-99-36) ; Trial Chamber, The Prosecutor v.

Vojislav Šešelj, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, 9 May 2003 (IT-03-67)

ECHR : Neumeister v. Austria, 27 June 1968, n° 1936/63 ; König v. Germany, 28 June 1978, n° 6232/73 ; Eckle v. Germany, 15 July 1982, n° 8130/78 ; Foti and others v. Italy, 10 December 1982, Series A, No. 56 ; Zimmermann and Steiner v. Switzerland, 13 July 1983, Series A, n° 66

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

SITTING as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the Defence for Nyiramasuhuko's "Requête de Pauline Nyiramasuhuko pour procès séparé, nouveau procès et arrêt des procédures (Art. 82 (D) et 72 (D) du Règlement de Procédure et de Preuve", filed on 17 February 2006 (the "Motion");

HAVING RECEIVED the following responses and replies from the Parties:

(i) Nteziryayo's "Réponse de l'Accusé Alphonse Nteziryayo à la Requête de Pauline Nyiramasuhuko pour procès séparé, nouveau procès et arrêt des procédures déposée le 17 février 2006", filed on 22 February 2006 ("Nteziryayo's Response");
(ii) The "Prosecutor's Response to Nyiramasuhuko's Motion for Separate Trial, New Trial and Termination of Proceedings", filed on 23 February 2006 ("Prosecutor's Response") and the Addendum thereto, filed on 28 February 2006 ("Prosecutor's Addendum");
(iii) The "Réplique de Pauline Nyiramasuhuko à la Réponse du Procureur à sa Requête pour procès séparé, nouveau procès et arrêt des procédures et demande reconventionnelle de l'application de l'Article 73 (F) à l'endroit du Procureur", filed on 27 February 2006 ("Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses");
(iv) Ntahobali's "Réponse de Arsène Shalom Ntahobali à la Requête de Pauline Nyiramasuhuko pour procès séparé, nouveau procès et arrêt des procédures et Requête pour suspendre le témoignage de l'Accusé Arsène Shalom Ntahobali", filed on 27 February 2006 ("Ntahobali's Response");
(v) Kanyabashi's "Réponse de Joseph Kanyabashi à la Requête de Pauline Nyiramasuhuko pour procès séparé, nouveau procès et arrêt des procédures", filed on 27 February 2006 ("Kanyabashi's Response");
(vi) Nyiramasuhuko's "Réplique de Pauline Nyiramasuhuko à la Réponse de Joseph Kanyabashi à sa Requête pour procès séparé, nouveau procès et arrêt des procédures", filed on 3 March 2006 ("Nyiramasuhuko's Reply to Kanyabashi's Response");
(vii) Nyiramasuhuko's "Réplique de Pauline Nyiramasuhuko à l'addendum du Procureur à sa Requête pour procès séparé, nouveau procès et arrêt des procédures", filed on 6 March 2006 ("Nyiramasuhuko's Reply to the Prosecutor's Addendum");

Recalling

1. The "Decision on the Prosecutor's Motion for Joinder of Trials" of 5 October 1999 ("Decision on Joinder");
2. The "Decision on the Defence Motion Seeking a Separate Trial for the Accused Sylvain Nsabimana" of 8 September 2000 ("Decision on Nsabimana's Motion for Severance");
3. The "Decision on the Defence Motion for Separate Trial" of 25 April 2001 ("Decision on Ndayambaje's Motion for Severance");
4. The "Decision on the Motion for Separate Trials" of 8 June 2001 ("Decision on Ntahobali's Motion for Severance");
5. The "Decision on Defence Motion for a Stay of Proceedings and Abuse of Process" of 20 February 2004 ("Decision on Nyiramasuhuko's Motion for Stay of Proceedings");

6. The "Decision in the Matter of Proceedings Under Rule 15 *bis* (D)" of 15 July 2003 ("15 *bis* Decision");
7. The "Decision on Defence Motion for Certification to Appeal the "Decision on Defence Motion for a Stay of Proceedings and Abuse of Process"" of 19 March 2004 ("Decision on Nyiramasuhuko's Motion for Certification to Appeal");
8. And the "Decision on Ntahobali's Motion for Separate Trial" of 2 February 2005 ("Decision on Ntahobali's Motion for Separate Trial");

CONSIDERING the provisions of the Statute of the Tribunal (the "Statute"), in particular Articles 19 and 20, and the Rules of Procedure and Evidence (the "Rules"), in particular Rules 82 (B) and 72 (D).

Submissions by the parties

DEFENCE FOR NYIRAMASUHUKO

1. The Defence for Nyiramasuhuko brings its Motion pursuant to Rules 82 (B)[1] and 72 (D) of the Rules. The Defence prays for severance of proceedings, for a new trial, and for the stay of proceedings. It argues that Pauline Nyiramasuhuko has suffered serious and irrevocable prejudice caused by a conflict of interests that results from joint proceedings conducted with two other Accused, Sylvain Nsabimana and Joseph Kanyabashi. Nsabimana's and Kanyabashi's defence strategies, according to the Defence, are contradictory to Nyiramasuhuko's, and incriminate her.[2] Further causes of prejudice are the delays which have become "totally unreasonable"[3] and are contrary to the interests of justice. Accordingly, both criteria under Rule 82 (B) have been met.

Applicable Law and Jurisprudence

2. The Defence recalls the provisions of Rule 82, arguing that it limits the possible prejudice an accused may suffer from a joint trial,[4] since it allows the accused to be tried separately if there is a conflict of interests that might cause serious prejudice to an accused or if it is necessary to protect the interests of justice.[5] The Defence submits that the possibly inevitable prejudice resulting from joint proceedings must remain minimal[6] and may not adversely affect an accused to the point of depriving him or her of a full defence and a fair trial.[7]

3. The Defence submits that considerations in favour of joint proceedings – such as possible savings in expense and time, greater transparency in justice, more consistent and detailed presentation of the evidence, better protection for victims and witnesses who will have to testify only once, and a reduced risk of contradictions in the decisions, when related and indivisible facts are examined – must

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[1] Rule 82 (B) stipulates: "The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice."
[2] The Motion, paras. 47, 52.
[3] The Motion, para. 47.
[4] The Motion, paras. 63-65, 68.
[5] The Motion, para. 68, quotes *Archbold International Criminal Courts, Practice, Procedure and Evidence*, Carswell, Toronto 2003, pp. 206-207, para. 8-7a, quoting *Prosecutor v. Ngirumpatse et al.*, Decision on Prosecutor's Motion for Joinder of Accused and on the Prosecutor's Motion for Severance of the Accused, 29 July 2000, paras. 22-24.
[6] The Motion, para. 67, quotes *Archbold International Criminal Courts, Practice, Procedure and Evidence*, Carswell, Toronto 2003, pp. 206-207, para. 8-6b, 8-7a, quoting *Prosecutor v. Delalic et al.*, Decision on the Motion by Defendant Delalic Requesting Procedures for Final Determination of the Charges Against Him, 1 July 1998, para. 35.
[7] The Motion, para. 53.

be balanced against the rights of the accused to a trial without undue delay and any prejudice to the accused that may be caused by joinder.[8]

4. In this context, the Defence recalls that the Chamber has assured Nyiramasuhuko that it would always be vigilant with regard to fair proceedings, respecting the rights of each accused in a joint trial, so that no co-accused loses the rights he or she would have been guaranteed if tried separately.[9]

5. The Defence contends that whilst both the wording of Rule 82 (B) and the cited jurisprudence demonstrate that it is sufficient for an accused to show either the existence of a conflict of interests which might cause serious prejudice resulting from joint proceedings, or that the interests of justice are compromised,[10] it will demonstrate that both elements are met in the present case.

Conflict of Interest that Might Cause Serious Prejudice to Pauline Nyiramasuhuko

6. The Defence submits that while the evaluation of prejudice resulting from a conflict of interests between co-accused demands a case-by-case-analysis, certain decisions indicate the limits of this prejudice.[11] In Kovacevic, it was held that the emergence of a conflict of interests between the accused in the context of their respective defence strategies could concern their right to a fair trial.[12] In Ngirumpatse et al., the Trial Chamber recalled the elements of a conflict of interests which might cause serious prejudice, such as the "concurrent presentation of evidence of the proposed co-accused".[13]

7. The Defence points out that while there is jurisprudence stating that the existence of antagonistic and accusing defence strategies in joint proceedings does not prima facie render Rule 82 (B) applicable,[14] these decisions, too, refer to the possibility of demonstrating that there is a conflict of interests.[15]

8. The Defence submits that there is a real and not hypothetical conflict of interests between Nyiramasuhuko's defence strategy and Kanyabashi's and Nsabimana's defence strategies,[16] which accuse Nyiramasuhuko. This conflict has been present throughout the trial,[17] became evident during Nsabimana's and Kanyabashi's cross-examination of Prosecution witnesses,[18] and has intensified during Nyiramasuhuko's defence case, reaching a point where it would be unjust and unfair to continue her trial in the joint proceedings, thus rendering Rule 82 (B) applicable.[19]

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[8] The Motion, para. 67, quotes *Archbold International Criminal Courts, Practice, Procedure and Evidence*, Carswell, Toronto 2003, pp. 206-207, para. 8-6b, 8-7a, quoting *Prosecutor v. Bagosora et al.*, Decision on the Prosecutor's Motion for Joinder, 29 June 2000, paras. 145-156.
[9] The Motion, para. 86.
[10] The Motion, paras 87-88.
[11] The Motion, para. 69.
[12] The Motion, paras. 70-71, quoting Prosecutor v. Kovacevic, Décision relative à la requête aux fins de jonction d'instances et à la présentation simultanée des éléments de preuve, 14 May 1998, para. 10. The Defence also relies on Prosecutor v. Bagosora et al., Decision on Prosecution's Motion for Joinder, 29 June 2000, paras. 57-58.
[13] The Motion, para. 75. The Chamber notes that while the Defence seems to be quoting an ICTR decision, there is no reference to the case name or the date on which it was rendered.
[14] The Motion, para. 83.
[15] The Motion, paras. 84-85, quotes Prosecutor v. Brdin and Talic, Requête de Momir Talic aux fins de disposition d'instances et aux fins d'autorisation de dépôt d'une Réplique, 9 March 2000.
[16] The Motion, para. 90.
[17] The Motion, paras. 91, 93.
[18] The Motion, paras. 94, 96, 97, quotes *Prosecutor v. Nyiramasuhuko et al.*, French Transcripts of 12 October 2004, pp. 7-9.
[19] The Motion, paras. 92, 95, 96.

9. The Defence contends that the conflict of interests is caused by a strategy aiming firstly at attacking Nyiramasuhuko with regard to allegations contained in her Indictment, and secondly at implicating her as a former minister and MRND member.[20]

10. With regard to the first aim, the Defence submits that these allegations have no relevance to the allegations raised against Kanyabashi and Nsabimana, even if they figure in their Indictments, since some of the factual allegations mentioned there do not implicate these Accused.[21] This situation is one of the factors which might cause serious prejudice to an accused.[22] Since Kanyabashi is not implicated by these allegations, if he fears contamination by the evidence presented against the other accused in his trial, he should take the appropriate steps, rather than interfere in Nyiramasuhuko's defence.[23]

11. The Defence submits that the facts of which Nyiramasuhuko and her co-accused are accused are often completely distinct. Nyiramasuhuko has had to answer factual allegations particular to her status as a government minister from April 1992 to July 1994, notably as regards the evidence presented by Prosecution Expert Witnesses Des Forges and Guichaoua.[24] Further, Nsabimana and Kanyabashi try to impute responsibility for the events in Butare to the MRND and to hold Nyiramasuhuko responsible for the MRND and for its alleged youth wing, the *Interahamwe*.[25] In this context, the Defence points out that Kanyabashi and Nsabimana were both civil administrators in Butare and members of the PSD opposition party.[26] Further, even though the counts are more or less the same for all the Accused, this is not the case for the factual allegations which support these counts.[27] Apart from the very vague and general paragraphs related to the count of conspiracy to commit genocide, the allegations are distinct.[28] As to the allegations of acts committed in Butare *préfecture*, the large majority would have been committed in different places, against different victims, and at different times, thus the only thing they have in common is the region delineated by this *préfecture*.[29]

12. The Defence submits that the strategy also aims at attacking Nyiramasuhuko via her status as member of the MRND and of the interim government, in charge, allegedly, of organising and executing massacres at Butare, in order to discharge PSD members, including Kanyabashi and Nsabimana.[30] A conflict of interests between administrators and members of an opposition party, on the one hand, and a MRND minister, on the other, constitutes – according to the jurisprudence cited – a factor leading to the conclusion that there is a conflict of interests that might cause serious prejudice to an accused.[31]

13. In support of the purported serious conflict of interests between Nyiramasuhuko's and Nsabimana's defence strategies, the Defence refers to passages of transcripts.[32] These reputedly show that Nsabimana's defence strategy is "totally irreconcilable" with Nyiramasuhuko's, and clearly demonstrate the former's intention of accusing Nyiramasuhuko of being one of "the authorities in

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[20] The Motion, paras. 109-112.
[21] The Motion, paras. 109-110, 112, quotes paras. 1.28, 3.10, 5.10, 6.10-6.16, 6.20, 6.24 of Kanyabashi's and Nsabimana's Indictments.
[22] The Motion, para. 111.
[23] The Motion, paras. 112-114, quotes *Prosecutor v. Bagosora et al.*, Decision on Prosecution's Motion for Joinder, 29 June 2000.
[24] The Motion, para. 76.
[25] The Motion, para. 77.
[26] The Motion, para. 78.
[27] The Motion, para. 79.
[28] The Motion, para. 80.
[29] The Motion, para. 82.
[30] The Motion, para. 115.
[31] The Motion, para. 116.
[32] The Motion, para. 98, quotes *Prosecutor v. Nyiramasuhuko et al.*, French Transcripts of 12 October 2004, pp. 7-9; English Transcripts pp. 5-9.

charge of the killings".[33] The Defence submits that its own defence strategy has always been to demonstrate that neither she nor the government of which she was a member, has ever planned, organised, or executed killings at any time.[34] Further, it is extremely important that when Nsabimana asked the questions which incriminated Nyiramasuhuko, the latter's cross-examination was already concluded. Therefore, she was unable to address the subject again with the witness, which resulted in an additional prejudice to her, caused by the conflict of interests.[35]

14. As to the conflict of interests between Kanyabashi and Nyiramasuhuko, the Defence contends that a portion of the transcripts underlines the importance of Nyiramasuhuko's status as a government minister and a MRND member, in contrast to Kanyabashi and Nsabimana's status as PSD members.[36]

15. The Defence also submits that generally, the cross-examinations of Nyiramasuhuko's Defence witnesses conducted by Nsabimana's and Kanyabashi's Defences were aimed at discrediting them.[37] This also applies to the Defence for Kanyabashi's cross-examination of Expert Witness Eugène Shimamungu, which tried by all means to damage the witness' credibility.[38] These examples demonstrate that the conflict of interests has existed during Nyiramasuhuko's whole defence case but that it has been accentuated in the course of her own testimony.[39] The Chamber therefore cannot deny that such conflict of interests exists between Nyiramasuhuko and Nsabimana and Kanyabashi.[40] The Defence adds that the existence of a conflict of interests is so flagrant that it is by now recognised and commented upon by the media which follow the proceedings.[41]

16. The Defence submits that Nsabimana and Kanyabashi reinforce each other and support the Prosecution's theory as to the MRND's, and therefore Nyiramasuhuko's, implication in the events unfolding at Butare.[42] The conflict of interests sustained by Nyiramasuhuko is advantageous to the Prosecution, which sees a good part of its theory used against Nyiramasuhuko by her co-accused. This exceptional situation cannot but seriously damage Nyiramasuhuko's fundamental rights.[43] A conflict of interests which is caused by antagonistic defence strategies pursued by co-accused per se might cause serious prejudice.[44]

17. The Defence submits that while the conflict of interests has been foreseeable since before the opening of proceedings, the Chamber's decisions to order Nyiramasuhuko to cross-examine Prosecution witnesses and to present her defence first, have amplified the prejudice.[45] This is why Nyiramasuhuko submitted the problem of the conflict of interests at the pre-trial conference,

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[33] The Motion, para. 98.
[34] The Motion, para. 99.
[35] The Motion, para. 100. The Defence also submits that the Chamber subsequently forbade the Prosecutor to read out extrajudiciary declarations made by Jean Kambanda. The Defence submits that the Chamber should have considered the prejudice this decision would cause Nyiramasuhuko, since the precise reference, attributed to Ndindabahizi, could not be given, which allowed the Defence for Nsabimana to cover this subject by way of suggestions, without referring to or reading out this part of the report, *see* the Motion, para. 101.
[36] The Motion, paras. 102-103, quotes *Prosecutor v. Nyiramasuhuko et al.*, French Transcripts of 31 October 2005, pp. 1-18; English Transcripts pp. 3-12.
[37] The Motion, para. 105, quotes *Prosecutor v. Nyiramasuhuko et al.*, French Transcripts of 21 February 2005, pp. 30-32; English Transcripts pp. 26-28.
[38] The Motion, para. 106.
[39] The Motion, para. 107.
[40] The Motion, para. 108.
[41] The Motion, paras. 117-118, quotes Agence de Presse Hirondelle, Les équipes de défense dans le procès des six de Butare étalent leurs divisions, 28 October 2005.
[42] The Motion, para. 104, quotes *Prosecutor v. Nyiramasuhuko et al.*, French Transcripts of 25 October 2005, pp. 60-62; English Transcripts pp. 53-55. The Chamber notes that no page numbers had been indicated by the Defence. It also quotes *Prosecutor v. Nyiramasuhuko et al.*, French Transcripts of 27 October 2005, pp. 19-31; English Transcripts pp. 21-24.
[43] The Motion, para. 119.
[44] The Motion, paras. 120-121, quotes Prosecutor v. Ngirumpatse, Décision relative à la requête aux fins de jonction d'instances et à la presentation simultanée des éléments de preuve, 14 May 1998, para. 3.
[45] The Motion, para. 54.

requesting that she be allowed to cross-examine last, or at least after Nsabimana.[46] This submission was not heeded by the Chamber,[47] as was the case on numerous other occasions.[48]

Prejudice Sustained by Nyiramasuhuko

18. The Defence submits that there is evidence of a conflict of interests that has prejudiced Nyiramasuhuko, pursuant to Rule 82 (B). This prejudice will only be aggravated during the defence cases of Kanyabashi and Nsabimana.[49] The conflict of interests has seriously infringed Nyiramasuhuko's right to a fair trial, including her rights to a full defence, to equality before this Tribunal, to be judged on an equal footing with her co-accused, to be informed in a timely and detailed manner about the allegations raised against her, as well as her right to have the necessary time and means for the preparation of her defence.[50] The Defence submits that the sustained prejudice is already irreparable and must lead to the immediate severance of her trial.[51]

19. As to Nyiramasuhuko's right to a full defence, it is submitted that even if the conflict of interests was noted during the presentation of her defence case, the Defence could not have known in advance, in a precise, specific and detailed manner, the nature of the attacks or the methods used against her by Kanyabashi and Nsabimana, nor could it, as a result, prepare for these.[52] Further, recalling the equality of all the accused before this Tribunal, the Defence contends that Nyiramasuhuko, who had to present her defence first, does not have the same opportunities as Kanyabashi and Nsabimana, who may prepare and adjust their respective defences after having heard her defence case.[53] The Defence submits that Nyiramasuhuko therefore has not had a full defence, because she did not know and still does not know what further incriminating evidence will be presented by Nsabimana and Kanyabashi, who have already heard her defence case and may still amend their list of witnesses and even redirect their defence, if they deem it necessary.[54]

20. The Defence contends that while this situation may be inevitable in joint proceedings, it is still inadmissible in a case where a conflict of interests causes serious violations to the fundamental rights of an accused, pursuant to Articles 19 and 20.[55] The exceptional circumstances of the case have forced Nyiramasuhuko to present her defence without knowing the evidence that has been used and will yet be used in the course of Nsabimana's and Kanyabashi's defences, preventing her from conducting investigations in order to adequately prepare her defence case.[56] This very serious prejudice is now irrevocable and irreversible. Even if the Chamber permitted a reopening of evidence to Nyiramasuhuko in order to counter the different allegations made by and forms of evidence used by Nsabimana and Kanyabashi, this would not be sufficient to limit the serious prejudice already sustained.[57]

21. The Defence submits that to conduct the necessary investigations would take time, since it would be necessary to retrace several witnesses, obtain the necessary information and documents, convince some witnesses to come and testify again, and to convince other witnesses, who the Defence has met with but for whom the Chamber denied testimony via video-link, to come.[58] This remedy

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[46] The Motion, para. 55.
[47] The Motion, para. 56.
[48] The Motion, para. 58.
[49] The Motion, paras. 122-125.
[50] The Motion, para. 127.
[51] The Motion, para. 126.
[52] The Motion, para. 128.
[53] The Motion, para. 129.
[54] The Motion, para. 130.
[55] The Motion, para. 132.
[56] The Motion, paras. 131-132.
[57] The Motion, para. 134.
[58] The Motion, para. 135.

would therefore aggravate the violation of Nyiramasuhuko's right to be tried without undue delay and would be contrary to the considerations which have led to the joinder of trials.[59]

22. The Defence submits that Nyiramasuhuko's right to a fair trial is also violated by the fact that the defences for Kanyabashi and Nsabimana may be considered to be additional "Prosecution cases", and that this would not be the case if she was tried separately.[60] This exceptional situation has caused serious prejudice.[61] If this joint trial is pursued, the already irreversible prejudice would be further aggravated, because Kanyabashi and Nsabimana would add evidence to that of the Prosecution, concerning allegations which are not made against them.[62] Accordingly, the existence of a conflict of interests, together with Nyiramasuhuko's obligation to present her defence case before Nsabimana's and Kanyabashi's, has undeniably caused prejudice to her rights, a situation that renders Rule 82 (B) applicable.[63]

23. The Defence also contends that the prejudice caused by the conflict of interests is further aggravated by the Chamber's decision that there is no obligation of prior communication to the Defence of documents that a Party intends to use when cross-examining a witness, even an accused witness.[64] The Defence quotes a portion of transcripts in support of this argument and submits that it also demonstrates Kanyabashi's intention to implicate the MRND and the Interahamwe for the 1994 events in Rwanda, and can thus be added to the extracts which have already been cited to show the existence of the conflict of interests.[65]

24. The Defence therefore argues that although the Chamber has stated that "what is important is that the other party must be informed before cross-examination about the documents that will be used during cross-examination, according to habitual practice", this has not been applied on numerous occasions during cross-examinations conducted by Nsabimana and Kanyabashi, not to mention the Prosecution.[66] This non-communication of the documents further aggravated the already serious prejudice to Nyiramasuhuko and has seriously and irrevocably infringed upon her right to a fair trial.[67] Thus, the Chamber permitted Kanyabashi to put suggestions to Nyiramasuhuko when she was testifying in her own defence, although it was obvious that her defence did not know the origin, nature, or contents of the document used in questioning, even though a decision had been rendered on timely communication. Allowing such questions to be put to the Accused aggravated the pre-existing prejudice caused by the conflict of interests.[68]

25. Finally, the Defence submits that it has several times advised the Chamber of the danger of a conflict of interests, as well as of the existence of this conflict, and of the prejudice this conflict would cause or has already caused.[69] This was done during the pre-trial conference, has been done throughout

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[59] The Motion, paras. 136-137.
[60] The Motion, para. 138.
[61] The Motion, para. 139.
[62] The Motion, para. 140.
[63] The Motion, para. 141.
[64] The Motion, para. 142, quotes *Prosecutor v. Nyiramasuhuko et al.*, French Transcripts of 7 November 2005, pp. 14 and following; the Chamber notes that the Defence did not indicate the end of the quote and that the portion mentioned is not contained in the Transcripts of Proceedings for that date. The Defence also quotes French Transcripts of 7 November 2005, pp. 36-39; English Transcripts pp. 29-31.
[65] The Motion, para. 143, quotes *Prosecutor v. Nyiramasuhuko et al.*, French Transcripts of 7 November 2005, pp. 36-39; English Transcripts pp. 29-31.
[66] The Motion, para. 144, quotes *Prosecutor v. Nyiramasuhuko et al.*, French Transcripts of 10 November 2005, pp. 72-74, English Transcripts pp. 57-60; French Transcripts of 14 November 2005, pp. 30-33, English Transcripts pp. 22-25.
[67] The Motion, para. 145, quotes *Prosecutor v. Nyiramasuhuko et al.*, French Transcripts of 7 November 2005, pp. 43-46, English Transcripts pp. 34-37; French Transcripts pp. 50 and following, English Transcripts pp. 40-42). The Chamber notes that the Defence does not indicate the end of the quote.
[68] The Motion, para. 146.
[69] The Motion, para. 147.

trial, and was repeated with regard to Nsabimana's contradictory defence strategy.[70] The Defence also submitted arguments on this point on 18 October 2004, before Nyiramasuhuko's defence case started.[71] Besides, it has seized the Chamber several times during Nyiramasuhuko's defence case, in order to alert it to the serious prejudice Nyiramasuhuko sustained because of the conflict of interests caused by the contradictory and accusing defence strategies of Kanyabashi and Nsabimana.[72]

26. The Defence submits that it even requested the Chamber during Nyiramasuhuko's defence case to stop the "haemorrhage" of prejudice, in other words, the constant aggravation of prejudice which the latter sustained because of the conflict of interests, which only worsened in the course of the defence case.[73] The Defence refers to an incident where it objected to the use of an unidentified document by the Defence for Kanyabashi, submitting that this was yet another incident with an aggravating effect.[74] Even when the Defence requested the Chamber at least to order the communication of documents used against her by Kanyabashi in a timely fashion, this remedy was not granted, unlike before.[75]

27. The Defence recalls the Chamber's reassurance: "[T]he Chamber will always remain alive to the need for a fair trial with due considerations given to the rights of the accused within a joint trial, in order to ensure that he or she would not lose the rights that he or she would have if he or she was tried alone."[76]

28. In the present circumstances, the Defence submits that Nyiramasuhuko has lost her right to a fair trial and requests that the Chamber order the only remedy that will enable her to fully exercise her rights pursuant to Articles 19 and 20.[77] She therefore demands that her trial be separated from Nsabimana's and Kanyabashi's.[78]

Interests of Justice

29. The Defence submits that whilst the conditions of the first element in Rule 82 (B), the conflict of interests causing serious prejudice, have already been demonstrated, the interests of justice equally demand severance of Nyiramasuhuko's trial.[79] It relies on a decision rendered in Ngirumpatse et al. which recalls that the 'elements of justice' criterion has three elements, namely, the right to be tried fairly, the right to be tried without undue delay, as well as the consideration of the complexity of a case in evaluating the necessary delays.[80] The Defence submits that none of these elements is observed in the instant proceedings.[81]

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[70] The Motion, para. 148, quotes *Prosecutor v. Nyiramasuhuko et al.*, French Transcripts of 20 June 2001, pp. 10-11; English Transcripts, pp. 10-12. The Defence recalls that Kanyabashi at this point had not yet revealed his defence strategy, see the Motion, para. 148.
[71] The Motion, para. 149, quotes *Prosecutor v. Nyiramasuhuko et al.*, French Transcripts of 18 October 2004, p. 17 (HC), English Transcripts pp. 11-17 (CS).
[72] The Motion, paras. 150-152, quotes *Prosecutor v. Nyiramasuhuko et al.*, French Transcripts of 1 March 2005, pp. 6-13, English Transcripts pp. 5-10. The Chamber notes that the Defence did not indicate either the date or pages of this portion of the Transcripts.
[73] The Motion, para. 153.
[74] The Motion, para. 154, quotes *Prosecutor v. Nyiramasuhuko et al.*, French Transcripts of 7 November 2005, pp. 15-26, English Transcripts, pp. 13-21; see also the Motion, para. 156, which quotes *Prosecutor v. Nyiramasuhuko et al.*, French Transcripts of 8 November 2005, pp. 68-69, English Transcripts pp. 53-55. The Chamber notes that the Defence quoted the draft Transcripts and that the page numbers mentioned do not correspond.
[75] The Motion, para. 155.
[76] The Motion, para. 159, quotes Prosecutor v. Nyiramasuhuko et al., Décision relative à la requête de Ntahobali en séparation de procès, 2 February 2005, para. 39.
[77] The Motion, paras. 160-161.
[78] The Motion, para. 161.
[79] The Motion, para. 163.
[80] The Motion, paras. 74, 164, quoting *Prosecutor v. Ngirumpatse et al.*, Decision on Prosecutor's Motion for Joinder of Accused and on the Prosecutor's Motion for Severance of the Accused, 29 June 2000, paras. 25-26, 31.
[81] The Motion, para. 165.

30. The Defence submits that it is in the interests of justice that each accused be accorded the same rights in joint proceedings as if they were tried separately. When assessing judicial economy and efficiency, the accused's right to a trial without undue delay under Article 21 (4) (c) has to be assessed in light of the same rights of the other accused.[82] Further elements for consideration include whether the factual allegations against all the accused are similar,[83] because this will further judicial efficiency.[84]

31. As to the first element, the right to a fair trial, the Defence relies on a decision in *Prosecutor v. Kovacevic*,[85] where the Trial Chamber did not join proceedings because this might have infringed upon the Accused's right to a fair trial, as it might cause a conflict of interests among them.[86] The Defence submits that it has already shown the existence of a conflict of interests, as well as the resulting irreversible violation of Nyiramasuhuko's right to a fair trial. Therefore, the first element of the 'interests of justice' criterion has not been observed.[87]

32. As to the second element, the right to be tried without undue delay, the Defence submits that it has not been observed either, reiterating the arguments in its Motion for Stay of Proceedings, filed on 25 June 2003.[88] The Defence recalls all the arguments contained in this earlier Motion,[89] referring to the circumstances of Nyiramasuhuko's arrest and detention; alleged violations of her right to be informed in a timely manner about the charges levelled against her; alleged violations of her procedural rights, especially with regard to excessive delays; and the prejudice suffered by Nyiramasuhuko in consequence, particularly with regard to the conditions in detention. The Defence contends that the arguments, jurisprudence and doctrine contained in its earlier Motion must be fully applied at this stage[90] and that the Defence is justified in pleading again the contents of its earlier Motion because there is a new fact, namely another two and a half years of detention.[91] The trial against Nyiramasuhuko will not be concluded anytime soon, since the defence case of the second of the six Accused is not yet over. Yet Nyiramasuhuko was arrested eight and a half years ago and her trial started four and a half years ago. These delays have become completely unreasonable with regard to Article 20 (4) (c) and can no longer be justified.[92] The Defence recalls that Nyiramasuhuko will have to go through four more defence cases before the Chamber will hear the final pleadings, deliberate and render judgement, without counting the delays of an appeal, if any.[93]

33. As to the third element, the Defence contends that the complexity of the case cannot anymore justify the delays sustained to this day, since the experience of this trial has clearly shown that the joinder has unduly prolonged proceedings and rendered them more complex than if each Accused had been tried separately.[94] If this had been the case, their trial would have been concluded a long time ago, as is demonstrated by those persons who have been tried as single accused.[95] The Defence further

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[82] The Motion, para. 82, quotes *Prosecutor v. Bizimana et al.*, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Joseph Nzirorera, 12 July 2000.
[83] The Motion, para. 75. The Chamber notes that while the Defence seems to be quoting an ICTR decision, there is no reference to the case name or the date on which it was rendered.
[84] The Motion, para. 82, quotes *Prosecutor v. Bizimana et al.*, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Joseph Nzirorera, 12 July 2000.
[85] The Motion, para. 166, quotes Prosecutor v. Kovacevic, Décision relative à la requête aux fins de jonction d'instances et à la présentation simultanée des éléments de preuve, 14 May 1998.
[86] The Motion, para. 166.
[87] The Motion, para. 167.
[88] The Motion, paras. 168, 174; see annex to the Motion.
[89] The Motion, paras. 168, 174 specifically refers to paras 44-218 of the Motion for Stay of Proceedings of 25 June 2004.
[90] The Motion, para. 175.
[91] The Motion, para. 176.
[92] The Motion, paras. 177-178.
[93] The Motion, para. 179.
[94] The Motion, para. 169.
[95] The Motion, para. 170.

submits that the application and interpretation of international criminal law must adapt and evolve, and the Tribunal, which guarantees this law, must interpret and apply it in the context of the present case.[96] Therefore, exceptional circumstances also demand that Nyiramasuhuko's trial be separated in the interests of justice.[97]

Conclusion

34. The Defence recalls the Chamber's observation that "there are remedies that are always available should anything of prejudice arise within the course of the trial. There is cross-examination, there are other facilities that can be devoted to, and the Trial Chamber will be open to any – as the case develops, to any issues that can be raised before it".[98] The Defence requests the Chamber to apply the appropriate remedy, namely, Rule 82 (B), and separate Nyiramasuhuko's trial to allow her to exercise again her fundamental right to a fair trial.[99] The Defence also submits that even if severed, her trial cannot be continued, because its unfairness has clearly become irreversible during the presentation of her case.[100] Therefore, the Chamber would have to order new proceedings for her to exercise her rights again.[101]

35. However, whilst severance is the only way to end the conflict of interests, this reparation must necessarily be followed by the termination of proceedings against Nyiramasuhuko, because her right to be tried without undue delay has already been violated, a violation which increases with every trial day and which renders any additional delay unacceptable.[102] It would be unfair, unreasonable and contrary to her right to be tried without undue delay if Nyiramasuhuko had to have her trial at least nine years after being arrested and detained. Therefore, Nyiramasuhuko requests the Chamber to stop proceedings against her, after having ordered the severance of her trial.[103]

Nteziryayo's Response

36. The Defence for Nteziryayo submits that he does not wish to participate in the discussion on whether there should be a separation of the trial, but only on the consequences a decision might have on his rights.[104] As to the phrase contained in the Motion, "evidence against one accused is not evidence against another accused", the Defence argues that in a joint trial this is incomplete, since as a general rule all evidence presented by a party can be used for or against every party and the Prosecutor. It might be the case, however, that some elements of evidence are admissible only against one accused and that certain elements are admissible only for one, and not all, purposes.[105] A different interpretation would necessitate the recall of all witnesses.[106]

37. The Defence questions the consequences for Nteziryayo's trial if Nyiramasuhuko's Motion was granted, such as who will be tried with whom, and who will take these decisions.[107] Accordingly, the Defence prays that if the Motion is granted in part or in all respects, all parties be heard, the Prosecutor first, regarding to the continuation of the trials.[108]

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[96] The Motion, para. 171.
[97] The Motion, para. 172.
[98] The Motion, para. 181, quotes *Prosecutor v. Nyiramasuhuko et al.*, French Transcripts of 18 October 2004, p. 17; English Transcripts p. 16 (CS).
[99] The Motion, paras. 48, 59, 182.
[100] The Motion, para. 183.
[101] The Motion, paras. 49, 184.
[102] The Motion, paras. 50, 60.
[103] The Motion, para. 188.
[104] Nteziryayo's Response, paras. 1-2.
[105] Nteziryayo's Response, paras. 8-9.
[106] Nteziryayo's Response, para. 10.
[107] Nteziryayo's Response, paras. 17-19.
[108] Nteziryayo's Response, paras. 22-24.

Ntahobali's Response

38. The Defence for Ntahobali submits that it "totally agrees" with the points raised in Nteziryayo's Response.[109]

PROSECUTOR'S RESPONSE AND ADDENDUM

39. The Prosecutor submits that Nyiramasuhuko's Motion is a disguised appeal on an issue that Nyiramasuhuko has already appealed twice, is therefore inadmissible and should be dismissed.[110] The Motion is frivolous and the Chamber should deny fees.[111]

40. On the merits, the Prosecutor contends that severance can be granted if a moving party can prove serious prejudice, which is a high standard and even higher when considering that the trier of fact is a panel of three judges, rather than a jury.[112] Rule 82 (B) is permissive, rather than obligatory.[113] As to the decision in *Kovacevic et al*. cited by Nyiramasuhuko, the Prosecutor submits that it is distinguishable, because it denied a joinder, rather than granting severance. The weighing of interests inherent to the granting of joinder has already been done by this Chamber in 1999. Further, the alleged serious prejudice was not the sole reason of denying the joinder, since "confusion of issues and evidence" was also referred to.[114] The Prosecutor submits that the Motion fails to demonstrate concrete prejudice, let alone serious prejudice, caused by Nsabimana and Kanyabashi's cross-examination of Nyiramasuhuko's witnesses, and stresses that incriminating evidence is not per se seriously prejudicial within the meaning of Rule 82 (B). As to the non-disclosure of documents used in cross-examination, the Prosecutor points out that Nyiramasuhuko has not appealed these decisions by the Chamber.[115]

41. The Prosecutor also submits that Nyiramasuhuko has the right to re-examine and to move for recall, rebuttal or rejoinder of witnesses if she so chooses, and that she may appeal any judgment against her that improperly considers evidence.[116]

42. Further, the Prosecutor stresses that mutually antagonistic defences are not prejudicial *per se*,[117] that even those that do cause prejudice do not mandate severance, and that remedies to ensure a fair trial are within the discretion of the trial court.[118]

43. The Prosecutor concurs with Nteziryayo's view that all Parties may rely on all admitted evidence to prove or disprove their cases, save where a court admits evidence but expressly limits its use or scope, including against a particular accused.[119]

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[109] Ntahobali's Response, para. 17.
[110] Prosecutor's Response, paras. 6-7.
[111] Prosecutor's Response, paras. 25-26.
[112] Prosecutor's Response, para. 8.
[113] Prosecutor's Response, para. 13, quotes *Prosecutor v. Brđanin and Talic*, Decision on Request to Appeal, 16 May 2000.
[114] Prosecutor's Response, para. 15, quotes *Prosecutor v. Kovacevic et al*., Decision on Motion for Joinder of Accused and Concurrent Presentation of Evidence, 14 May 1998, para. 10.
[115] Prosecutor's Response, para. 16.
[116] Prosecutor's Response, para. 17.
[117] Prosecutor's Response, paras. 21-23, quotes *Prosecutor v. Blagoje Simic et al*., Decision on Defence Motion to Sever Defendants and Counts, 15 March 1999; *Prosecutor v. Delalic et al*., Decision on Motion by Defendant Delalic Requesting Procedures for Final Determination of the Charges against him, 1 July 1998, para. 36; *Zafiro v. United States*, 506 U.S. 534 (1993), filed in the Addendum.
[118] Prosecutor's Response, para. 23, quotes *Zafiro v. United States*, 506 U.S. 534 (1993), filed in the Addendum.
[119] Prosecutor's Response, para. 27.

NYIRAMASUHUKO'S REPLY TO NTEZIRYAYO'S AND THE PROSECUTOR'S RESPONSES AND TO THE PROSECUTOR'S ADDENDUM

44. The Defence for Nyiramasuhuko prays that the Chamber grant her Motion, declare the Prosecutor's Response frivolous, and order appropriate sanctions in this regard.[120]

45. The Defence submits that contrary to the Prosecutor's submissions, the Motion is not frivolous. It further submits that Rule 82 (B) presupposes the possibility that in joint proceedings the Accused may suffer serious prejudice.[121] Besides, the Chamber's decisions on Motions for separate proceedings filed by other Parties cannot be used to declare Nyiramasuhuko's Motion moot, as alleged by the Prosecutor.[122] The Defence stresses that it has never questioned the qualification of the three Judges to assess the evidence, and that it does not submit that the evidence is tainted by the prejudice she has suffered.[123] As to the lack of appeal against oral decisions issued by the Chamber allowing the use of certain documents, the Defence submits that Rule 73 does not constitute an obligation to appeal.[124]

46. As to the Prosecutor's distinction between the decision in *Kovacevic et al*. and the present situation, the Defence submits that there is no difference between a decision denying joint proceedings and a decision ordering severance to the extent that the reason for the decision is the possibility of a conflict of interests, which may cause prejudice to an accused.[125] It recalls that the conditions of Rule 82 (B) may be met by two alternative elements, which render baseless the Prosecutor's argument that the decision was not exclusively issued because of the possible conflict of interest.[126] Further, it is clear from this decision that the invoked motive is the serious prejudice.[127]

47. Besides, the Defence contends that it has never argued that Nyiramasuhuko suffered prejudice because her witnesses were cross-examined by Nsabimana and Kanyabashi.[128] Rather, the Defence has argued that the serious prejudice was caused by a conflict of interests flowing from contradictory and critical defence strategies.[129] The Defence notes that the Prosecutor has not presented any argument countering its submissions that Nyiramasuhuko has suffered serious and irreparable prejudice because she had to cross-examine Prosecution witnesses first and to present her defence case first.[130]

48. As to Nyiramasuhuko's right to move for recall, rebuttal or rejoinder of witnesses mentioned by the Prosecutor, the Defence replies that this is a possibility on which Nyiramasuhuko cannot rely, and the prejudice has already been sustained.[131] Further, any such motion would be contrary to the protection of witnesses and temporal and financial economy.[132] Besides, it would aggravate the violation of Nyiramasuhuko's right to a fair trial without undue delay.[133]

49. With regard to the Prosecution's allegation that the Motion is without merit because the Defence case has been closed since 24 November 2005, the Defence regards its case as ongoing, pointing out that otherwise there would be no reason for the Accused or her Counsel to be present, to

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[120] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, paras. 61-64.
[121] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, para. 7.
[122] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, paras. 18-20.
[123] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, paras. 21-22, 34-35.
[124] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, para. 39.
[125] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, para. 24.
[126] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, para. 26.
[127] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, para. 27.
[128] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, para. 28.
[129] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, para. 29.
[130] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, para. 40.
[131] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, para. 44.
[132] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, para. 45.
[133] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, para. 46.

cross-examine witnesses, and intervene in other ways. Further, in joint proceedings, a trial is terminated when all defence cases and the final pleadings have been heard.[134] The Defence for Nyiramasuhuko adds that it is contradictory for the Prosecutor to agree with Nteziryayo's submission regarding the Parties' right to rely on evidence, while contending that Nyiramasuhuko's case is closed, because if her case were closed, she could not rely on further evidence yet to be tendered.[135]

50. In its Reply to the Prosecution's Addendum, the Defence for Nyiramasuhuko reiterates the arguments contained in the Motion,[136] adding, however, that the Prosecution relies on the same elements as those mentioned in Rule 82 and in the jurisprudence of the ICTR and the International Criminal Tribunal for the Former Yugoslavia with regard to the severance of joint proceedings in conspiracy charges.[137] According to the Defence, the criterion used by the courts of the United States of America regarding severance in joint proceedings, is evidence of a conflict of interests emanating from antagonistic or contradictory defence strategies and comprising the risk of causing serious damage to a legal right of a joint accused.[138]

51. In the Zafiro et al. case cited by the Prosecution,[139] the judges decided that the conflict of interests was not clearly contradictory or antagonistic and that no legally recognized prejudice had been caused.[140] The Defence submits that the serious violation of a fundamental right of an accused must not be confused with the risk of a jury's incomprehension in joint proceedings, especially if the charges concern conspiracy. It is well aware that Nyiramasuhuko's case is not heard by three judges, and not by a jury, but maintains that her most fundamental right, the right to a fair trial, has been violated in an irreversible manner and that in consequence her trial must be severed.[141] Since the prejudice has already been suffered, the judges – however experienced – cannot put her back to a situation minimizing that prejudice, unless they were to grant the Motion.[142] As stated in the remarks of Judge Stevens, the Defence submits that Nyiramasuhuko has to face two "additional Prosecutors", namely, Kanyabashi and Nsabimana and that this has allowed the Prosecution, after the end of its case, to benefit from Kanyabashi's and Nsabimana's defence strategies. This is an unfair advantage for the Prosecution and disadvantages Nyiramasuhuko, whose defence case is closed. The presence of two "additional Prosecutors" *per se* is evidence of proceedings which have become unfair.[143] Whilst in the case cited by the Prosecutor the conditions for severance have not been met, the court clearly recognizes the right to severance in cases where the right to a fair trial is in danger of suffering prejudice, and a fortiori if a prejudice to this right has already been suffered.[144]

52. In Reply to Nteziryayo's Response, Nyiramasuhuko agrees that all parties should be heard if the Motion is granted.[145] As to the question of who can rely on evidence in joint proceedings, the Defence stresses that if there is a charge of conspiracy, every piece of evidence concerning an act undertaken for the common aim may be relied upon against all persons accused of conspiracy, once conspiracy has been proved beyond reasonable doubt.[146] Therefore, not all evidence can be used against all parties, even if there is a conspiracy charge.[147] Further, according to the Defence, all

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[134] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, paras. 52-53.
[135] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, paras. 56-57.
[136] Nyiramasuhuko's Reply to the Prosecutor's Addendum, para. 18.
[137] Nyiramasuhuko's Reply to the Prosecutor's Addendum, para. 11.
[138] Nyiramasuhuko's Reply to the Prosecutor's Addendum, para. 10.
[139] United States Supreme Court, *Zafiro et al. v. United States*, 25 January 1993, 506 U.S. 534, 113 S.Ct. 933, contained in Prosecutor's Addendum.
[140] Nyiramasuhuko's Reply to the Prosecutor's Addendum, para. 13.
[141] Nyiramasuhuko's Reply to the Prosecutor's Addendum, para. 14.
[142] Nyiramasuhuko's Reply to the Prosecutor's Addendum, para. 17.
[143] Nyiramasuhuko's Reply to the Prosecutor's Addendum, paras. 19-21.
[144] Nyiramasuhuko's Reply to the Prosecutor's Addendum, para. 23.
[145] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, paras. 65-66.
[146] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, para. 68.
[147] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, para. 69.

evidence presented in joint proceedings may be used by all parties to raise reasonable doubt as to their respective criminal responsibility.[148] The Defence also submits that this question of law should be clarified by the Chamber as quickly as possible.[149]

KANYABASHI'S RESPONSE

53. The Defence for Kanyabashi prays that the Chamber declare that his defence has not interfered with other defence teams' strategies, but that it has only tried to present a full defence in joint proceedings, and leaves it to the Chamber to decide the Motion.[150]

54. The Defence submits that it has always opposed the joinder but respects the Chamber's decision of 5 October 1999.[151] As to Nyiramasuhuko's allegations of interfering in her defence, Kanyabashi submits that the Indictment (paras. 5.1 and 6.62) refers to an alleged conspiracy with Nyiramasuhuko and that he needs to cross-examine witnesses on this subject.[152] This does not, however, constitute interfering in another Accused's defence.[153] As to Nyiramasuhuko's submission regarding prejudice resulting from Kanyabashi's defence, which is opposed to hers, Kanyabashi replies that his defence strategy has been the same during the proceedings and that his cross-examination of Nyiramasuhuko could not have been a surprise, since her examination-in-chief aimed to cast doubt on statements Kanyabashi had elicited from Witnesses RV, Alison Des Forges, and André Guichaoua, or were raised by Nyiramasuhuko herself.[154]

55. Besides, the Defence for Kanyabashi contends that it does not relentlessly insist upon certain allegations against Nyiramasuhuko, as alleged by the latter, but that it responds to her allegations and that, according to certain observers, it is rather Nyiramasuhuko who lays the blame on local authorities, such as Kanyabashi.[155] Kanyabashi's defence strategy is clear: to defend himself against the accusations leveled against him and because of which he has been detained for more than ten years, while being presumed innocent.[156]

56. The Defence further stresses that apart from clerical errors, it has complied with the disclosure obligations, as noted by Counsel for Nyiramasuhuko.[157]

57. As to the order of conducting cross-examinations and presenting defence cases, the Defence contends that in a trial joining six accused, all cannot testify at the same time. An order has to be established, and this was done according to the applicable law. There was no appeal.[158]

58. The Defence also submits that it agrees with Nteziryayo's and the Prosecutor's submissions regarding the right of other parties to rely on evidence presented in joint proceedings.[159]

NYIRAMASUHUKO'S REPLY TO KANYABASHI'S RESPONSE

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[148] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, para. 70.
[149] Nyiramasuhuko's Reply to Nteziryayo's and the Prosecutor's Responses, para. 71.
[150] Kanyabashi's Response, paras. 22-23.
[151] Kanyabashi's Response, para. 5.
[152] Kanyabashi's Response, para. 6.
[153] Kanyabashi's Response, para. 7.
[154] Kanyabashi's Response, paras. 11-15.
[155] Kanyabashi's Response, para. 17, quotes *Agence Hirondelle*, referred to in para. 18 of the Motion.
[156] Kanyabashi's Response, para. 18.
[157] Kanyabashi's Response, paras. 19-20, quotes French Transcripts of 14 November 2005, p. 14 (p. 10 of the English version).
[158] Kanyabashi's Response, para. 21.
[159] Kanyabashi's Response, paras. 8-9.

59. In its Reply to Kanyabashi's Response, the Defence for Nyiramasuhuko reiterates its arguments contained in the Motion[160] and submits that it did not criticize Kanyabashi for his choice of defence strategy, since it is his right to defend himself in any way he chooses.[161] It reiterates that Kanyabashi interferes with its defence strategy, since his strategy goes further than he pretends, because he considers that the implication and degree of criminality regarding the events at Butare between April and July 1994 rest on the government and its members, including Nyiramasuhuko, and not the "little bourgmestres", including himself.[162] Whilst this strategy is legitimate, it is also legitimate for Nyiramasuhuko to point out that Kanyabashi's defence strategy is contradictory to hers and aims at incriminating her.[163] The Defence submits that it is this strategy which makes Kanyabashi interfere with her defence.[164] Even if the Chamber found that Kanyabashi's defence strategy does not interfere with Nyiramasuhuko's, it is still in contradiction with hers, lays the blame on her, and thus has caused her prejudice.[165]

60. The Defence also maintains that there were elements of surprise in Kanyabashi's cross-examination since he used documents that were not known, and in some cases have not been divulged, to the Defence.[166] In this context, the Chamber has not been consistent in its orders for disclosure, or regarding the formulation of suggestions that may be put to witnesses.[167]

61. As to Kanyabashi's argument that in joint proceedings not all the Accused can be heard at the same time, the Defence argues that this is not an issue. Rather, the fact that Nyiramasuhuko was compelled to be the first Accused to cross-examine Prosecution witnesses, and especially to be the first to first present her defence case, has caused her prejudice. The Defence points out that this is not contested by Kanyabashi.[168]

Deliberations

62. As a preliminary matter, the Chamber observes that many of the portions of the transcripts cited and relied upon by the Defence are not properly referenced,[169] or are not referenced at all.[170] This observation also applies to a decision quoted by the Defence.[171] The Chamber reminds Counsel of their obligation to act with care and diligence, pursuant to Articles 5 (a) and 6 of the Code of Professional Conduct for Defence Counsel. It is not up to the Chamber to decipher parties' pleadings.

63. The Chamber recalls the provisions of Rule 82:

> (A) In joint trials, each accused shall be accorded the same rights as if he were being tried separately.
>
> (B) The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

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[160] Nyiramasuhuko's Reply to Kanyabashi's Response, para. 26.
[161] Nyiramasuhuko's Reply to Kanyabashi's Response, para. 8.
[162] Nyiramasuhuko's Reply to Kanyabashi's Response, para. 14, French Transcripts of 19 April 2001, p. 184 (HC), English Transcripts pp. 140-141 (CS).
[163] Nyiramasuhuko's Reply to Kanyabashi's Response, para. 15.
[164] Nyiramasuhuko's Reply to Kanyabashi's Response, para. 15.
[165] Nyiramasuhuko's Reply to Kanyabashi's Response, para. 18.
[166] Nyiramasuhuko's Reply to Kanyabashi's Response, paras. 19-23.
[167] Nyiramasuhuko's Reply to Kanyabashi's Response, paras. 23-24.
[168] Nyiramasuhuko's Reply to Kanyabashi's Response, para. 25.
[169] See, for example, Transcripts referred to at paras. 97, 102, 104, 144, 145, 148, 156 of the Motion.
[170] See, for example, Transcripts referred to at para. 152 of the Motion.
[171] See para. 75 of the Motion.

64. The Chamber recalls that it has a discretionary power to order a separate trial.[172] It has carefully considered the Parties' submissions regarding the alleged conflict of interests and the violations of the interests of justice and will address them in turn.

Conflict of Interests that Might Cause Serious Prejudice

65. Regarding a conflict of interests between co-accused within the meaning of Rule 82 (B), the Chamber observes that its existence is to be determined on a case-by-case basis,[173] and that for such a conflict to exist, circumstances must be extraordinary.[174]

66. The Chamber observes that Nyiramasuhuko alleges a conflict of interests between its defence strategy and Nsabimana's and Kanyabashi's respective defence strategies, based on three main elements: (1) the fact that Kanyabashi and Nsabimana insist on allegations that do not concern them, although they are contained in their Indictments, in order to attack Nyiramasuhuko; (2) the different positions held by these three Accused with regard to membership of political parties or of government; and (3) their different implications in the events in Butare between April and July 1994.

67. The Chamber recalls that a legally recognized conflict of interests that would cause serious prejudice is not demonstrated if one accused shifts blame to another joint accused.[175] The Chamber further recalls that a situation where the accused have allegedly played different roles in the hierarchy or even in different hierarchies of command, leading to possibly different culpability of the accused, does not constitute a conflict of interests that might cause serious prejudice to the accused.[176] The Chamber recalls the Brdanin and Talic Decision, where it was held:

> Nor does the Trial Chamber see any possibility of serious prejudice resulting from the prospect that Brdanin may give evidence which incriminates Talic (…). A joint trial does not require a joint defence, and necessarily envisages the case where each accused may seek to blame the other. (…) Any prejudice which may flow to either accused from the loss of the "right" asserted by Talic here to be tried without incriminating evidence being given against him by his co-accused is not ordinarily the type of serious prejudice to which Rule 82 (C) *(sic)* is directed. The Trial Chamber recognises that there could possibly exist a case in which the circumstances of the conflict between the two accused are such as to render unfair a joint trial against one of them, but the circumstances would have to be extraordinary.[177]

68. Having reviewed all arguments, including the portions of transcripts in support of the alleged conflict of interests,[178] the Chamber is of the opinion that the Defence for Nyiramasuhuko has not

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[172] Decision on Ntahobali's Motion for Separate Trial, para. 32, quotes *Prosecutor v. Brdanin and Talic*, Decision on Request to Appeal (AC), 16 May 2000.
[173] Decision on Ndayambaje's Motion for Severance, para. 11; see also *Prosecutor v. Bizimana et al.*, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Joseph Nzirorera, 12 July 2000, para. 23.
[174] Decision on Nsabimana's Motion for Severance, para. 19; Decision on Ntahobali's Motion for Separate Trial, paras. 35-36, quotes *Prosecutor v. Brdanin and Talic*, Decision on Motions by Momir Talic for Separate Trial and for Leave to File a Reply, 9 March 2000, para. 29, upheld in *Prosecutor v. Brdanin and Talic*, Decision on Request to Appeal (AC), 16 May 2000. *See* also *Prosecutor v. Bizimana et al.*, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Joseph Nzirorera, 12 July 2000, para. 19.
[175] Decision on Nsabimana's Motion for Severance, para. 32; see also Decision on Ntahobali's Motion for Severance, para. 16; Decision on Ntahobali's Motion for Separate Trial, para. 39.
[176] Decision on Nsabimana's Motion for Severance, paras. 29-30, quotes *Prosecutor v. Brdanin et al.*, Decision on Motions by Momir Talic for a Separate Trial and for Leave to File a Reply, 9 March 2000, paras. 23-29.
[177] *Prosecutor v. Brdanin et al.*, Decision on Motions by Momir Talic for a Separate Trial and for Leave to File a Reply, 9 March 2000, para. 29
[178] The Motion, paras. 97, 102, 104, quotes *Prosecutor v. Nyiramasuhuko et al.*, French Transcripts of 12 October 2004, pp. 7-9; English Transcripts pp. 5-9; French Transcripts of 31 October 2005, pp. 1-18; English Transcripts pp. 3-12; French Transcripts of 25 October 2005, pp. 60-62; English Transcripts pp. 53-55; French Transcripts of 27 October 2005, pp. 19-31; English Transcripts pp. 21-24; French Transcripts of 7 November 2005, pp. 36-39; English Transcripts pp. 29-31.

demonstrated that there is a conflict of interests between Nyiramasuhuko and her two co-accused, corresponding to the extraordinary and exceptional circumstances which are necessary for the application of Rule 82 (B).

69. Further, the Chamber notes that its decisions, which have purportedly aggravated the prejudice resulting from this alleged conflict of interests, were legally made and are unchallenged. The Chamber is of the view that these decisions do not give rise to any prejudice.

70. The Chamber underscores that it has always been and continues to be alive to the need for a fair trial with due considerations given to the rights of the accused within a joint trial, to ensure that each does not lose the rights that he or she would have if tried alone.[179] It also recalls that the Rules provide for several remedies, which are always available should any prejudice arise within the course of the trial and if the legal requirements are met. Such remedies may include cross-examination, further cross-examination, recall, or rebuttal evidence.

71. The Chamber therefore finds that there has not been any demonstration of a conflict of interests that would cause serious prejudice within the meaning of Rule 82 (B).

Interests of Justice

72. As a preliminary matter, the Chamber notes that the Defence for Nyiramasuhuko has included its earlier Motion for Stay of Proceedings in the present Motion by way of reference.[180] The Chamber does not consider that the Defence for Nyiramasuhuko is justified in raising the arguments contained in the earlier Motion once again, as there are no new elements and the Chamber has already decided this Motion. The issue of general alleged delay due to joinder that was not included in that Motion will be addressed in this Decision. The Chamber will also address the conduct of Counsel at the end of the present Decision.

73. The Defence for Nyiramasuhuko submits that pursuant to Rule 82 (B), it is in the interests of justice that Nyiramasuhuko's trial be severed from Nsabimana's and Kanyabashi's. It mainly relies on three elements: (1) the right to a fair trial; (2) the right to be tried without undue delay; and (3) the consideration of the complexity of a case in determining appropriate delays. According to the Defence, none of these elements is met in the present case, and therefore severance, to be followed by a new trial, is warranted. However, because of the delays, the Defence moves for a stay of proceedings.

74. The Chamber notes the submission that Nyiramasuhuko's trial has been rendered unfair by the conflict of interests between her defence strategy and Nsabimana's and Kanyabashi's. However, the Chamber has already determined that no conflict of interests within the meaning of Rule 82 (B) has been demonstrated, for the reasons given in paragraphs 68 to 71 above.

75. As to the right to be tried without undue delay and the consideration of the complexity of the case, the Chamber underscores that it is fully aware of the length of proceedings and the detention period of the Accused, and that the expeditiousness of proceedings has been a constant concern.[181] The Chamber recalls that the interests of justice mentioned in Rule 82 (B) may include, *inter alia*, an expeditious and fair trial as provided in Article 19. However,

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[179] The Motion, para. 159, quotes Prosecutor v. Nyiramasuhuko et al., Décision relative à la requête de Ntahobali en séparation de procès, 2 February 2005, para. 39.
[180] The Motion, paras. 174, 186.
[181] See, for example, the 15 *bis* Decision, para. 33 (l), where the Trial Chamber held: "Finally, we also note that it is an important consideration to the administration of justice that proceedings must not be allowed to drag on endlessly. They must come to an end at some point." See also Decision on Joinder, para. 15; Decision on Ntahobali's Motion for Severance, para. 23; Decision on Ndayambaje's Motion for Severance, paras. 18-19; Decision on Nyiramasuhuko's Motion for Stay of Proceedings, para. 16.

> "in determining whether a delay in the criminal proceedings against the accused is undue, it is essential to consider the length of the delay, the gravity, nature and complexity of the case, as well as any prejudice that the accused may suffer."[182]

The Chamber notes that a joint trial might last longer than that of a single accused,[183] without necessarily encroaching upon the right to be tried without undue delay.[184] The Chamber reiterates that the instant case raises complex issues of law and fact.[185]

76. The Chamber also recalls its decision that the fact that an accused might be tried faster, should severance be granted, does not *per se* render unreasonable the length of the joint proceedings. Further, the possible acceleration of proceedings by severance is not necessarily compatible with the good administration of justice.[186] The Chamber is of the opinion that Nyiramasuhuko's submissions to the effect that the trials of all Accused would be concluded by now, had joinder been denied, are hypothetical and speculative.

77. Besides, the Chamber observes that whilst the right to be tried without undue delay, pursuant to Articles 19 (1) and 20 (4) (c), is one of the elements of the interests of justice within the meaning of Rule 82 (B), it is not the only one. Rather, the advantages of a joint trial, which are not lightly outweighed, include uniform presentation of evidence and uniform procedure; the guarantee of consistent treatment of evidence, verdicts, and sentencing; and ensuring that witnesses need not be called repeatedly in separate trials.[187] The Chamber notes that the protection of victims and other witnesses is part of the interests of justice pursuant to Rule 82 (B),[188] and that this has been the constant concern of the Chamber.[189] In this context, the Chamber recalls that

> "the similarity of the allegations in the different indictments (…) will avoid the unnecessary pressure and trauma caused to victims and other witnesses who may be repeatedly called upon to testify in separate trials."[190]

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[182] Decision on Nsabimana's Motion for Severance, paras. 38, 40, quotes *Prosecutor v. Bagosora et al.*, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 23 September 1999, paras. B (i) and (ii); reiterated in Decision on Ndayambaje's Motion for Severance, para. 18, which quotes ECHR, *Eckle v. Germany*, Judgement of 15 July 1982, Series A no. 51, *Neumeister*, 27 June 1968, Series A, N°8, *König*, 28 June 1978, Series A, N°27, *Foti and others*, 10 December 1982, Series A, N°56, *Zimmermann and Steiner*, 13 July 1983, Series A, N°66, para. 24, reiterated in Decision on Ntahobali's Motion for Severance, para. 23; see also 15 *bis* Decision, quoting *Prosecutor v. Seselj*, Decision on Prosecutor's Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence, 9 May 2003, para. 21; *Prosecutor v. Ngirumpatse et al.*, Decision on Prosecutor's Motion for Joinder of Accused and on the Prosecutor's Motion for Severance of the Accused, 29 June 2000, para. 38.

[183] Decision on Nsabimana's Motion for Severance, para. 40; Decision on Ndayambaje's Motion for Severance, para. 18.

[184] Decision on Ndayambaje's Motion for Severance, para. 18.

[185] Decision on Nsabimana's Motion for Severance, para. 40.

[186] European Court of Human Rights, *Neumeister*, 27 June 1968, Series A, N°8, reiterated in Decision on Ntahobali's Motion for Severance, para. 24; see also Decision on Nyiramasuhuko's Motion for Stay of Proceedings, para. 15, quoting *Zimmermann and Steiner*, 13 July 1983, Series A, No. 66, para. 24.

[187] *Prosecutor v. Bagosora et al.*, Decision on Request for Severance by Accused Kabiligi, 24 March 2005, para. 13.

[188] *Prosecutor v. Ntabakuze et al.*, Decision on the Defence Motion Requesting an Order for Separate Trial, 25 March 1998, p. 3; *Prosecutor v. Bizimana et al.*, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Joseph Nzirorera, 12 July 2000, para. 26; *Prosecutor v. Bagosora et al.*, Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses, 9 September 2003, para. 21; *Prosecutor v. Bagosora et al.*, Decision on Request for Severance by Accused Kabiligi, 24 March 2005, para. 13; *Prosecutor v. Delalic et al.*, Decision on Motions for Separate Trial Filed by the Accused Zejnil Delalic and the Accused Zdravko Mucic, 25 September 1996, paras. 6-7; *Prosecutor v. Kovacevic et al.*, Decision on Motion for Joinder of Accused and Concurrent Presentation of Evidence, 14 May 1998, para. 10 (b).

[189] See, for example, the Decision on Joinder, para. 16, reiterated in Decision on Ntahobalis' Motion for Severance, para. 25 and in the Decision on Ndayambaje's Motion for Severance, para. 20; Decision on Nsabimana's Motion for Severance, paras. 34, 39-40, 42; 15 *bis* Decision, para. 33 (h).

[190] Decision on Nsabimana's Motion for Severance, para. 42, quotes *Prosecutor v. Ntabakuze and Kabiligi*, Decision on the Defence Motion Requesting an Order for Separate Trials, 1 October 1998.

78. With respect to the request for a new trial after severance is granted, the Chamber notes that witnesses may have to be recalled to testify again, which is the situation the Chamber wished to avoid when it granted joinder.

79. On balance, therefore, the Chamber is of the opinion that the length of proceedings has not violated Pauline Nyiramasuhuko's right to be tried without undue delay, given the complexity of the present case and taking into account the other elements that make up the interests of justice within the ambit of Rule 82 (B), discussed in the preceding paragraphs, as well as the advanced stage of proceedings. The Chamber notes that the length of proceedings is also quoted by the Defence in support for its prayer for a stay of proceedings, but considers that such a measure is not justified under the present circumstances.

80. The Trial Chamber is of the view that no case has been made for severance, a new trial, or a stay of proceedings against Pauline Nyiramasuhuko. The Chamber finds that it would not be in the interests of justice to grant the Motion.

Conduct of Counsel

81. The Chamber notes that the Defence for Nyiramasuhuko has included its earlier Motion for Stay of Proceedings, filed on 25 June 2003, in the present Motion by way of reference. The Chamber further notes that the earlier Motion included the alleged prejudice Nyiramasuhuko had suffered from not being promptly informed of her rights when she was arrested and until her initial appearance.[191] This issue was already addressed in 2000.[192]

82. The Chamber recalls that in 2004, it considered Counsel's conduct in re-litigating issues resolved in 2000 to be an attempt to obstruct proceedings and warned Counsel pursuant to Rule 46 (A).[193] The Chamber is now of the opinion that sanctions pursuant to Rule 73 (F) are warranted for Counsel's lack of observance of the Chamber's warning in this matter.

83. The Chamber recalls that pursuant to Rule 73 (F),

> a Chamber may impose sanctions against Counsel if Counsel brings a Motion (…) that in the opinion of the Chamber, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof.

84. As the prayers included in the 2003 Defence Motion and reintegrated into the present Motion have been addressed in 2004, the Chamber is of the opinion that relitigating these matters is frivolous. It therefore orders that the fees associated with the filing of the previous Motion as an annex to the present Motion not be paid.

For the Above reasons, the Chamber

DENIES the Motion for severance, a new trial, and stay of proceedings in all respects;

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[191] See paras. 51, 65 of Nyiramasuhuko's "Requête de Pauline Nyiramasuhuko en arrêt des procédures pour abus de procédures (délais déraisonnables et procès inéquitable)", filed on 25 June 2003, annexed to the Motion, and incorporated in paras. 174, 186.

[192] Decision on Nyiramasuhuko's Motion for Certification to Appeal, paras. 24-25, refers to Prosecutor v. Nyiramasuhuko et al., Décision relative à la requete de la Défense en exclusion de preuve et remise de biens saisis, 12 October 2000. The Chamber recalls that it held then that '[i]t worries the Chamber that the same Defence Counsel who brought the Motion decided by the late Judge Kama in March 2000 felt no qualms in bringing back the same issues in June 2003, without saying a word to even hint at the fact that they had raised those issues on a previous occasion and that the decision went against them. This raises grave questions of professional responsibility", see Decision on Nyiramasuhuko's Motion for Certification to Appeal, para. 27.

[193] Decision on Nyiramasuhuko's Motion for Certification to Appeal, paras. 32, 34.

IMPOSES sanctions pursuant to Rule 73 (F) of the Rules;

ORDERS that fees associated with the filing of the 2003 Motion in annex to the present Motion not be paid.

Arusha, 7 April 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997
15 May 2006 (ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Joseph Kanyabashi, Elie Ndayambaje, Sylvain Nsabimana, Alphonse Nteziryayo, Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Voir dire proceeding to ascertain that Ntahobali's interviews legally obtained, Voir dire procedure is not specifically provided for under the Rules, Definition of the voir dire procedure, Burden of the Defence to demonstrate that accused's statement has not been made voluntarily, No risk of contamination of evidence because the Chamber is composed of professional Judges, Request denied – Scope of the use of Ntahobali's interviews at this stage of the proceedings, General principle : the use of prior statements of a witness during the witness' cross-examination for the purpose of challenging his credibility is allowed, Request to deny the Prosecutor the possibility to use prior statements dismissed – Admissibility of Ntahobali's interviews at this stage of the proceedings, Right not to be compelled to testify against himself or to confess guilt, Recording procedure, Right to Counsel free of charge, Right to an interpreter free of charge, Right to stop the interview at any moment to request the assistance of Counsel, Questioning shall not proceed without the presence of counsel, Waivers of rights signed by the Accused after the rights pursuant to Rules 42 and 43 of the Rules had been read to the Accused or he had read them himself, Written statements admissible for the purpose of cross-examining Ntahobali – Rules applied with assistance of national principles only if necessary for guidance in the interpretation of these Rules

International Instruments cited :

Rules of Procedure and Evidence, rules 37 (B), 42, 42 (A) (iii), 43, 63, 89, 89 (C), 89 (D), 92 and 95 ; Statute, art. 18 and 20 (4)

International and National Cases cited :

I.C.T.R. : The Prosecutor v Pauline Nyiramasuhuko et al., Decision to Confirm the Indictment, 29 May 1997 (ICTR-97-21) ; Trial Chamber, The Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze, Decision on Kabiligi's Motion to Nullify and Declare Evidence Inadmissible, 2 June 2000 (ICTR-97-34) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Prosper Mugirnaeza's Renewed Motion to Exclude His Custodial Statements from Evidence, 4 December 2003 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89 (C), 14 October 2004 (ICTR-98-41)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Zejnil Delalić et al., Decision on the Motions for the Exclusion of Evidence by the Accused Zejnil Delalić, 25 September 1997 (IT-96-21) ; Appeals Chamber, The Prosecutor v. Zdravko Mucić et al., Judgment, 20 February 2001 (IT-96-21) ; Trial Chamber, The Prosecutor v. Slobodan Milosević, Decision on Prosecution Motion for Voir Dire Proceeding, 9 June 2005 (IT-02-54)

United Kingdom : Supreme Court of Hong Kong, Ibrahim v. R., 6 March 1914, (1914) A. C. 609

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

SEISED of Kanyabashi's oral Motion to use Ntahobali's interviews taken by Prosecution investigators in July 1997 argued on 9 May 2006;

CONSIDERING the Responses of the Prosecution and of the co-Accused as well as a Reply by the Defence also argued on 9 May 2006;

CONSIDERING that at the end of the hearing on 9 May 2006, the Chamber directed the Registry to transmit to it the transcripts of the statements that are said to have been made and all the relevant documents for its deliberations;[1]

CONSIDERING that on 10 May 2006, the Prosecution filed a number of documents, which were transmitted to the Chamber on 12 May 2006 and that the Chamber examined the following documents when it considered the Motion, which in the Decision it will refer to as "Ntahobali's interviews":

(i) two copies of a document entitled, "*Avis de droits du suspect*" with Registry numbers 12504*bis* and 12502*bis*, which show that the Accused Ntahobali read his rights under Rules 42 and 43 or they were read out to him in a language he understood. The two documents are dated 24 July 1997 at 01:07 am in Nairobi and signed by the Accused and the witness, Mr. Robert Petit ("Waiver of 01:07am of 24 July 1997");

(ii) a handwritten statement dated and signed by the Accused Ntahobali on 24 July 1997 at 01.24 am in Nairobi, with Registry number 12503*bis*, which shows that the Accused surrendered himself to the Tribunal;

(iii) a handwritten page dated 24 July, 1997 at 01:10 am which appears to be the copy of the one numbered 12503*bis* but containing no name or signature with Registry number 12501*bis*;

(iv) two pages of a Registry form filled in by hand indicating the name of the witness as being the Accused Ntahobali and other particulars, both pages dated 24 July 1997 at 01:42 am, and signed by the Accused and the interviewers, with Registry numbers 12500*bis* and 12499*bis*;

(v) 2 pages of photos, one containing 2 photos, with Registry number 12498*bis* and the other containing 4 photos, with Registry number 12496*bis*. Both pages include the date of 24 July 1997 and signed; a blank page with a signature dated 24 July 1997 at 15:42, with Registry number 12497*bis*;

(vi) A document entitled "*Avis de droits du suspect*" with Registry number 12495*bis*, which shows that the Accused Ntahobali read his rights under Rules 42 and 43 or they were read out to him in a language he understood . It is signed conjointly by the

[1] T. 9 May 2006 pp 55, "We will adjourn this proceeding regarding this motion, these submissions for deliberations. We will certainly say to the registry, the Trial Chamber would like to have the transcripts of the statements that are said to have been made and all the pertinent documents for the Chamber's consideration as is used during its deliberations […]"

Accused and Mr. Robert Petit as a witness on 24 July 1997 at 15.35 and at 15.36 respectively ("Waiver of 15:35 and 15:36 of 24 July 1997");

(vii) a sketch with the name of the Accused Ntahobali and those of the investigators namely, R. Petit and P. Dobbie, dated 26 July 1997 and signed at the bottom, with Registry number 12494*bis*;

(viii) A document entitled "*Avis de droits du suspect*" with Registry number 12486*bis*, which shows that the Accused Ntahobali read his rights under Rules 42 and 43 or they were read out to him in a language he understood on 26 July 1997 at 09:26 in Arusha ("Waiver of 26 July 1997");

(ix) transcripts of Ntahobali's interviews of 24 and 26 July 1997 in French, with Registry numbers 12485*bis* to 11911*bis*;

(x) transcripts of Ntahobali's interviews of 24 and 26 July 1997 in French, with Registry numbers 11909*bis* to 11526*bis*;

HAVING RECEIVED a letter from Arsène Shalom Ntahobali, dated 9 May 2006 filed on 11 May 2006 ("Letter from Ntahobali");

CONSIDERING the Prosecution's Response to Ntahobali's letter of 11 May 2006;

HAVING ALSO RECEIVED an *Affidavit* by Arsène Shalom Ntahobali, signed on 11 May 2006, filed on 12 May 2006 ("Ntahobali's *Affidavit*");

CONSIDERING the submissions made on 15 May 2006 during proceedings;

CONSIDERING the Statute of the Tribunal (the "Statute") in particular Article 20 (4) of the Statute and the Rules of Procedure and Evidence (the "Rules"), specifically Rules 42, 43, 63, 89, 92 and 95 of the Rules;

NOW DECIDES the Motion.

Submissions of the Parties

Defence for Kanyabashi

1. The Defence for Kanyabashi requests the Chamber to grant it leave to use earlier statements made by Arsène Shalom Ntahobali during his cross-examination. These are statements he made on 24 and 26 July 1997 to Prosecution Investigators ("transcripts of Ntahobali's interviews"), as well as related documents signed by the Accused, including three waivers of his rights, biographical elements of 23 and 24 July 1997, and a one page sketch, dated 26 July 1997. At the end of Ntahobali's examination-in-chief, the Defence communicated to the other defence teams, its intention to use these documents.

2. The Defence submits that it will use the documents to challenge the credibility of the Accused, but that it will not address their substance. Further, the Defence submits that they should not be used against co-Accused. It maintains that it is justified to use the documents, since Kanyabashi, who is being jointly tried with Ntahobali, has been implicated by the latter during his testimony. Accordingly, the Defence argues that it has the right to challenge Ntahobali's credibility by using the statements Ntahobali made to the Prosecution in 1997.

3. However, the Defence submits that, at this stage of proceedings, the Prosecution is foreclosed from requesting a voir dire with the aim of tendering the statements into evidence, since it is a fundamental right for an accused person to know the entirety of the evidence against him before he decides to put up his defence. In this sense, the rights of an accused differ from those of the Prosecution, for example, the Prosecution does not have the right to remain silent.

4. The Defence refers to Rules 42, 43, 63, 92, and 95. Rule 92 makes no distinction between the Prosecution and the Defence and refers to Rule 63, which concerns the admissibility. Rules 42 and 43 address issues of substance and form, respectively, Rule 43 being less exacting than Rule 42. The Defence submits that the rights of the Accused Ntahobali have been respected in the production of the relevant documents, as there are three statements to the effect that no promises or threats were used. Rule 42 has been complied with, as well as the substance of Rule 43.[2] It only remains with the Chamber to determine the question whether a voir dire should be held before the documents in question may be used.

5. As to the question whether the same rules regarding foreclosure are applicable to the Prosecution and co-accused, the Defence relies on the English decision in *Queen v. Myers*,[3] in which it was held that an out-of-court confession made by one defendant, which the Prosecution had not relied upon because of admitted breaches of procedural rules, may be put in evidence by the second defendant as evidence of the facts stated, as long as the confession is relevant to the second Defence and so long as it appears that the confession was not obtained in a manner which would have made it inadmissible. Therefore, according to English law, the Defence can use an earlier declaration of a co-accused, even if the Prosecution may not. Further, two other English decisions allow the use of an inadmissible confession in cross-examining a co-accused.[4]

6. In support of its submission that such statements may not be used against co-accused, the Defence relies on the English decision in Rawson, which held that it was a fundamental rule of evidence that statements made by one defendant either to the Police or to others (other than statements, whether in the presence or absence of co-defendant, made in the course and pursuance of a joint criminal enterprise to which the co-defendant was a party), are not evidence against a co-defendant, unless the co-defendant either expressly or by implication adopts the statements and thereby makes them his own.[5]

Submissions made by the Prosecution

7. The Prosecution submits that Ntahobali's 1997 statements do not contain a confession in the strict legal sense, but merely explain the Accused's role in the 1994 events. The statements made in 1997 are closer to 1994 and therefore more reliable than subsequent statements. According to the Prosecution, it is in the interests of justice that the interviews be admitted into evidence.

8. Pursuant to Rule 89 (C), a previous statement made in an interview can be used by the Parties to the proceedings, as it is the very purpose for which such interviews are conducted by the Prosecution. The Prosecution had also intended using the documents in question in its cross-examination of Ntahobali. Further, the interview itself is admissible as an exhibit. There is no material prejudice, as the Prosecution has complied with the Rules, including Rules 42 and 43. This is evident from the transcripts of the interviews and the documents signed by the Accused.

9. The Prosecution submits that the Chamber is entitled to examine the transcripts of the interviews, as well as the accompanying documentation, including the waivers signed by the Accused and it will discern that there is no material prejudice, because the Prosecution has complied with the

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[2] Counsel for Kanyabashi opined that about 90 % of Rule 43 had been observed but admitted that he found some of the questions related to this issue hard to answer, such as whether a copy had immediately been given to Ntahobali.
[3] *R. v. Myers* [1998] A.C. 124, House of Lords, in: Archbold, *Criminal Pleadings, Evidence and Practice* (2001) p. 1492, para. 15-367.
[4] *R. v. Rawson* [1986] Q.B. 174, 80 Cr.App.R.218, CA; *Lui Mei Lin v. R.* [1989] A.C. 288, PC. In: Archbold, *Criminal Pleadings, Evidence and Practice* (2001) p. 1492, para. 15-367.
[5] *R. v. Rudd*, 32 Cr.App.R. 138, CCA; *R. v. Gunewardene* [1951] 2 K.B. 600, 35 Cr.App.R.80, CCA; *R. v. Rhodes*, 44 Cr.Ap.R. 23, CCA, in: Archbold, *Criminal Pleadings, Evidence and Practice* (2001) p. 1492, para. 15-368.

Rules, including Rules 42 and 43. This is evident from the transcripts of the interviews and the documents signed by the Accused.

10. The Prosecution recalls that Ntahobali voluntarily surrendered to the Tribunal and freely agreed to be interviewed without Counsel. According to the Prosecution, he is a man of high intellect and intellectual accomplishments, so that there can be no question of his not understanding what was occurring during the interviews. The interviews were sealed in his presence, and he signed to that effect. There is no evidence of threats, torture, or oppression used during the interview. Rule 42 was fully complied with because the Accused was informed of his right to Counsel, to the free assistance of an interpreter, and to remain silent.

11. The Prosecution submits that it did not use the statements during the Prosecution case because it was not known at the time whether the Accused was going to testify and whether his testimony would be inconsistent with his previous statements.

12. The Prosecution submits that it does not seek a voir dire, as it is neither applicable, nor relevant. Since the Accused is in the witness box, he can be asked questions in cross-examination or re-examination. Further, the documents in question are self-evident and self-explanatory. The Prosecution recalls that a *voir dire* is not essential before International Tribunals. It submits that the *Zigiranyirizo case*, which orders a *voir dire*,[6] is distinguishable from the instant case because it concerns a Defence Motion for Disclosure of Evidence. Further, the case at hand is heard before three professional judges, whereas the voir dire procedure has been developed to facilitate the work of a jury.[7]

13. As to the applicable law, the Prosecution relies on the decision to admit Nsabimana's statements through its expert witness Desforges,[8] while its weight and probative value were to be determined at a later stage. According to the Prosecution, there is no jurisprudence with regard to a possible foreclosure of the Prosecution to tender the relevant documents.

14. The Prosecution further relies on a decision in *Bizimungu et al.*, on the Prosecution's compliance with Rules 40, 42 and 43.[9] A similar decision was issued in Delalic et al.,[10] when it was stated that the standard of oppression changes with the age and experience with the administration of justice the interviewee may have. In a decision in Kabiligi and Ntabakuze, it was held that the Trial Chamber does not exercise a general control over investigations conducted by the Prosecution as such, but may only grant relief if an alleged unlawful investigation results in material prejudice to an accused.[11]

15. The Prosecution further stresses the wide discretion the Chamber has pursuant to Rules 89 (D) and 94. It quotes a decision in Martic which held that the Tribunal's practice is in favour of admissibility, whereas the admission of a document is not equivalent to the recognition of its correctness.[12]

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[6] *Prosecutor v. Protais Zigiranyirazo*, Decision on the Defence Motion for Disclosure of *Voir Dire* Evidence, 27 April 2006.
[7] *Prosecutor v. Milosevic*, Decision on Prosecution Motion for *Voir Dire* Proceeding, 9 June 2005, para. 2; *Prosecutor v. Delalic et al.*, Decision on the Motions for the Exclusion of Evidence by the Accused, Zejnil Delalic, para. 29.
[8] Prosecutor v. Nyiramasuhuko et al., T. 8 June 2004.
[9] *Prosecutor v. Bizimungu et al.*, Decision on Prosper Mugiraneza's Renewed Motion to Exclude His Custodial Statements from Evidence, 4 December 2003, para. 37.
[10] *Prosecutor v. Delalic et al.*, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, 2 September 1997, paras. 63-67, upheld in the Appeals Chamber Judgment, 20 February 2001, paras. 528, 533, 543, 551, 554.
[11] *Prosecutor v. Kabiligi and Ntabakuze*, Decision on Kabiligi's Motion to Nullify and Declare Evidence Inadmissible, 2 June 2000, para. 19. The Prosecution also relies on *Prosecutor v. Oric*, Decision on Defence Motion to Exclude Interview of the Accused Pursuant to Rules 89(D) and 95, 7 February 2006, para. 29.
[12] *Prosecutor v. Martic*, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, 19 January 2006, para. 2.

Defence for Ndayambaje

16. The Defence for Ndayambaje agrees with the Defence for Kanyabashi as far as the Prosecution's foreclosure from introducing the documents at this point is concerned. Further, there might also be a prejudice to the Accused Ndayambaje, which had to be raised at this moment, as it might not be possible to do so later.

17. The Defence also argues that if the Prosecution did not tender the documents in question because they did not know if the Accused would testify, then it would have been the proper procedure to reserve the right to cross-examination regarding this document in the eventuality that the Accused would testify in his own defence.

Defence for Nteziryayo

18. The Defence for Nteziryayo relies on the Canadian decision rendered in *Regina v. Crawford*. Its solution for the competing rights of co-accused is that a co-accused is not bound by the rules on the admissibility of a statement, but can cross-examine on credibility matters. Further, he cannot produce a statement as evidence without admissibility issues being resolved. An accused who testifies against a co-accused must accept that his credibility can be fully challenged by the latter.[13] Therefore, in the cited decision, a voir dire was not held to be necessary. The Defence adds that the Canadian Supreme Court did not have to contend with the equivalent of Rule 82 of the Rules.

Defence for Nyiramasuhuko

19. The Defence for Nyiramasuhuko agrees with the proposition that an accused has the fundamental right to be informed of the evidence that may be used against him. It recalls that the Prosecution has chosen a different procedure and has not tendered the evidence in question within the framework of its case. According to the Defence for Nyiramasuhuko, the Defence for Kanyabashi is as foreclosed as the Prosecution from tendering the documents in question.

20. The Defence states that the ICTY jurisprudence reflects the position that mere compliance with Rules 42 and 43 is not enough to use a document.[14] Further, it is incongruous that an Accused may prove that the Prosecution has respected these Rules.

21. The Defence refers to the cited decision in *Crawford*, but stresses that the passage relevant to the matter at hand states that where allegations on a co-accused are relevant to his defence, an accused can not be limited. The remedy would be to request severance, which may be granted if there is serious prejudice.[15] It was pointed out by the Defence for Nteziryayo, however, that this passage was merely the Supreme Court's analysis of the Court of Appeals' decision.

22. The Defence submits that there is a further distinction between *Crawford* and the instant case, because in the Canadian case, each co-accused was charged with having murdered the same person, whereas Butare addresses the alleged joint commission of genocide and crimes against humanity.

23. The Defence also submits that while the Defence for Kanyabashi has argued that the documents will only be used against Ntahobali, the latter has spoken frequently about his mother, the Accused Nyiramasuhuko. Her Defence therefore seeks clarification on whether the documents will not

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[13] *R. v. Crawford*, [1995] 1 S.C.R., pp. 874-882.
[14] *Prosecutor v. Delalic et al.*, Decision on Zdravko Mucic's Motion For the Exclusion of Evidence, 2 September 1997; *Prosecutor v. Oric*, Decision on Defence Motion to Exclude Interview of the Accused Pursuant to Rules 89 (D) and 95, 7 February 2006; *Prosecutor v. Halilovic*, Decision on Motion for Exclusion of Statement of Accused, 8 July 2005.
[15] *R. v. Crawford*, [1995] 1 S.C.R., p. 866, 870.

also be used to make allegations against Nyiramasuhuko, particularly as the presentation of her case and her testimony has already been concluded. The possible prejudice arising from such use is obvious.

24. The Defence recalls that Ntahobali is not an ordinary witness, but an Accused. He has the right to know the evidence to be used against him; that it is a co-accused who decides to use it, changes nothing. This right is so fundamental that at the present moment, it is impossible to use the declarations against Ntahobali.

Defence for Ntahobali

25. The Defence for Ntahobali objects to anyone using the documents in question, for any end. A simple summary examination of the documents will not end the discussion or provide an answer to the question whether they may be used by the Defence for Kanyabashi.

26. According to the Defence, the hearing held on 9 May 2006, cannot be equated to a *voir dire*, because a simple examination of the documents does not permit the Chamber to know whether the Accused answered questions while a gun was held to his head.

27. The Defence argues that it is impermissible for the Defence for Kanyabashi to submit that 90 % of the documents in question have been obtained in compliance with the Rules, because Counsel may not testify.

28. The Defence also submits that the Canadian law as to a co-defendant's right to launch allegations against an accused is not as clear as has been pleaded. The decision in *Crawford* is distinguishable, as an interrogation in this case would have concerned the absence of a declaration, rather than an existing earlier declaration as in the present case.

29. The Defence refers to the Canadian Supreme Court decision of *R. v. G. (B.) [B.G.]*,[16] made after the decision in *Crawford*, which held,

> To reintroduce an involuntary statement in this way would run counter to the most fundamental aspect of trial fairness. In many cases, as here, the guilt of the accused will depend solely on his credibility and of that of the other witnesses. To allow the statement to be used, even for the limited purpose of undermining the credibility of the accused, could lead to abuse and serious injustice. That is why the traditional rule, in force in Canadian law, must be interpreted in such a way that no use may be made of an inadmissible statement at any stage whatsoever of the trial.

30. Further, the Defence submits that it is incumbent on the Chamber to fully explore the circumstances surrounding the taking of the allegedly voluntary interviews.[17] It also recalls that it was held in a *Bagosora et al.* decision that the most exacting standards must be observed in determining whether an interview was given under oppressive conditions.[18]

31. The Defence therefore submits that the Chamber must demand convincing proof from the Prosecution as to the free and voluntary character of the statements and the compliance with the Rules when the statements were obtained. It recalls that the Prosecution carries the burden of proof in that

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[16] *R.. v. G. (B.) [B.G.],* [1999], 2 S.C.R., p. 660, para. 34. The Chamber takes note that this passage refers to confessions and that the following paragraph distinguishes the law applicable to confessions from the use of former mere statement of an accused in the cross-examination conducted by a co-accused.

[17] The Defence relies on *Prosecutor v. Sefer Halilovic*, Decision on Motion for Exclusion of Statement of Accused, 8 July 2005.

[18] *Prosecutor v. Bagosora et al.*, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89 (C), 14 October 2004, para. 17, quotes *Prosecutor v. Delalic et al.*, Decision on Zdravko Mucic's Motion For the Exclusion of Evidence, 2 September 1997, para. 42.

matter. The Defence further submits that it has informed the Chamber as of 2001 of its objections to the use of the documents in question. In 2001, the Defence had indicated to the Chamber that when Ntahobali made the interviews in 1997, he was under the belief that he was cooperating with representatives of the Tribunal, rather than those of the Office of the Prosecutor.[19] This also applies to the interviews having been granted in the context of arrests of Ntahobali's family members and the payment of money to the Kenyan police in exchange for the promise of their liberation, particularly his father's.

32. The Defence also submits that two of the declarations in question have been illegally obtained from Ntahobali and that an illegally obtained declaration may never be used to cross-examine the accused who is its author. If they were to be used, a *voir dire* procedure would have to be ordered, as has been done at this Tribunal.[20] In the case of such a procedure, all witnesses implicated in the production of the statement will have to be heard.

33. The Defence for Ntahobali concludes by stating that the highest standards of justice should be applied by International Tribunals, given that they judge the most serious crimes.

Letter from Ntahobali

34. The Accused Arsène Shalom Ntahobali submits that he has written a letter to the Chamber on 9 May 2006 because he is testifying and has not been able to address his Counsel during the proceedings held on that day. He argues that if he had been given the floor in court, he would have made suggestions to them or addressed himself to the Chamber, but he was not asked to speak. Therefore, he wishes to raise certain issues regarding the use of the interviews.

35. Ntahobali submits, as he indicated to the Chamber on Monday, 8 May 2006, that he has never received the nine original audio tapes made in the course of the 1997 interviews. Further, he has never received the document he wrote himself at the Hotel Intercontinental, as confirmed in the French transcripts of tape 3, p. 8 (K0133936).

36. Besides, Ntahobali submits that the transcripts have been signed neither by him, nor by the investigators. It is not clear that these transcripts are a faithful reflection of the originals. Further, while browsing the transcripts, he has noticed several mistakes.

37. Ntahobali submits that whilst the Prosecution has alleged that there is a document handwritten by him and dated 24 July 1997, this is not the case. Rather, this one-page document has been handwritten by Mr Robert Petit.

38. The Accused Ntahobali recalls that Robert Petit introduced himself as Legal Officer of the Tribunal, and Paul Dobbie as an Investigator of the Tribunal. Nobody told him that they were working at the Office of the Prosecutor.

39. Further, five Accused in the Butare proceedings have made statements, including Kanyabashi, who was in largely more favourable conditions when interrogated. The Accused Ntahobali requests to know if the Chamber will allow him to use these declarations, which in several respects exonerate him.

40. The Accused Ntahobali requests to be heard by the Chamber regarding the circumstances under which these interviews were conducted, and how he spent his nights handcuffed, before an

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[19] *Prosecutor v. Nyiramasuhuko et al.*, Decision on the Defence Motion to Suppress Custodial Statements by the Accused, 8 June 2001.
[20] *Prosecutor v. Protais Zigiranyirazo*, Decision on the Defence Motion for Disclosure of *Voir Dire* Evidence, 27 April 2006.

unjust or prejudicial decision is taken. He also requests to be given the nine original audio tapes to allow him to undertake the necessary verifications and to answer questions.

Prosecution's Response to Letter from Ntahobali

41. In its Response, the Prosecution submits that the interview tapes of Ntahobali were on the Prosecution Modified Exhibits List of 27 September 2001, and that the Prosecution wrote to all Defence Counsel in the Butare case on 12 October 2001 to collect 5 CD Roms containing the proposed Prosecution exhibits, including Ntahobali's interviews. The Prosecution confirms that the Defence for Ntahobali, as well as the other Defence teams subsequently received copies of the interview tapes and transcripts on 16 October 2001, while the originals remain sealed and under the Prosecution's custody.

42. As to the transcript of the interview on tape 3, the Prosecution submits that K0133936 refers to two documents. The Accused confirmed in the course of the interview that the first document was handwritten by him at the Hotel Intercontinental. The document in question indicates that no threat was made and no promise or inducement was offered to the Accused to surrender. The second typed document containing the rights of the Accused during the interviews was prepared by the Interviewing Officer and signed by the Accused Ntahobali. The Prosecution submits that it is currently unable to confirm if copies of these two documents have been served on the Accused. However, Counsel for Kanyabashi served copies on all Parties at the beginning of his cross-examination of the Accused Ntahobali.

Ntahobali's Affidavit

43. The Accused Ntahobali submits in his affidavit dated 11 May 2006 that his interviews of 1997 need to be viewed in the context of arrests of his immediate family members, including his father. His family members were only released in exchange for sums of money paid to the Kenyan police. However, when he surrendered to ICTR representatives, he did so under the impression that in exchange for his cooperation, his father would be released. Further, the ICTR representatives did not make it clear to him that they were working for the Prosecutor. Ntahobali submits that although he was detained in Nairobi from 23 July 1997, he was not formally arrested before 25 July 1997. Further, he had to sleep handcuffed. The Accused submits that while he was being acquainted with his rights, he was not afforded a real opportunity of considering and exercising them. He argues that subterfuge was used to surprise him into making statements as he did not understand who he was talking to and nobody had told him that the persons he took to be "ICTR representatives" were in fact working for the Prosecution.

44. In the hearing on 15 May 2006, the Chamber asked the Accused Ntahobali whether the issues raised in the affidavit corresponded to those he had wanted to be heard on, as stated in his letter, and whether he had anything to add to his *affidavit*. The Accused replied that those were the issues he had wished to discuss and that he had nothing to add, reiterating his complaint about a missing handwritten document.

Deliberations

45. The Chamber notes that three main issues were raised on 9 May 2006: whether it should conduct a *voir dire* proceeding to ascertain that Ntahobali's interviews were properly taken; the scope of the use of Ntahobali's interviews at this stage of the proceedings; and their admissibility.

The Request for a Voir Dire Proceeding

46. The Chamber notes that in its submissions, the Defence for Ntahobali, relying heavily on Canadian jurisprudence and practice, maintains that for Ntahobali's interviews to be used by the Defence of Kanyabashi, the Chamber is required to hold a *voir dire* procedure to determine whether

they were given voluntarily and thus legally obtained by the Prosecution, in compliance with the Statute and the Rules.

47. The common law procedure of a 'trial within a trial,' also referred to as a *voir dire* procedure is,

> "a preliminary examination to test the admissibility of evidence [on the ground that it was not made voluntarily] in the absence of the jury, the purpose being to avoid contaminating the minds of the jury with material that might never become evidence in the case."[21]

In the United Kingdom, the *voir dire* procedure has been extended to apply to

> "the admissibility of a confession if the Defence represents to the court that the confession may have been obtained by oppression of the person who made it, or in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof."[22]

48. The jurisprudence has been that for the procedure to be triggered, the Defence is required to satisfy the court of the existence of any of the situations amounting to an accused's statement not having been made voluntarily,[23] and, once a statement is challenged on the ground that it was not made voluntarily, "the Prosecution has the burden of proving, beyond a reasonable doubt," that it was made voluntarily and that it was not obtained either by fear of prejudice or hope of advantage held out by interrogators.[24]

49. The Chamber notes that the *voir dire* procedure is not specifically provided for under the Rules. The Appeals Chamber in the *Delalić et al*. case opined that

> "rules of evidence as expressly provided in the Rules should be primarily applied, with assistance of national principles only if necessary for guidance in the interpretation of these Rules."[25]

However, the Appeals Chamber did not rule out the application of the *voir dire* procedure by a Trial Chamber if in a particular case it thought it appropriate.[26]

50. While the Chamber recalls that since a *voir dire* procedure is usually embarked upon in the absence of the jury in order to prevent contamination of evidence, there is no such risk of

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[21] *Prosecutor v. Milosevic*, Decision on Prosecution Motion for Voir Dire Proceeding of 9 June 2005 which also quoted Archbold 2003 at paras. 4-288 to 4-291 giving examples of circumstances in which a voir dire procedure may be used to include determining the admissibility of the defendant's previous guilty plea to the offence for which he is currently on trial, the admissibility of a confession by the accused, the admissibility of identification evidence, the admissibility of *res gestae* statements, the competence of witnesses, questioning by a judge of an unwilling witness, and whether the jury should be directed that they may draw inferences against a defendant who fails to give evidence; *Prosecutor v. Delalic et al*, Decision on the Motions for the Exclusion of Evidence by the Accused, Zejnil Delalic of 25 September 1997 at para. 29, quoting the English case of *Ibrahim v. R (1914) A. C. 609* where it was declared: "It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Hale."

[22] *Prosecutor v. Delalic et al*, Decision on the Motions for the Exclusion of Evidence by the Accused, Zejnil Delalic of 25 September 1997, para. 31.

[23] *Prosecutor v. Delalic et al*, Decision on the Motions for the Exclusion of Evidence by the Accused, Zejnil Delalic of 25 September 1997, para. 31.

[24] *Prosecutor v. Delalic et al*, Decision on the Motions for the Exclusion of Evidence by the Accused, Zejnil Delalic of 25 September 1997 at para. 32; *Prosecutor v. Bagosora et al*, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89 (C) (TC), 14 October 2004, para. 17.

[25] *Prosecutor v. Delalic et al*, Appeals Chamber Judgment of 20 February 2001, para. 538.

[26] *Prosecutor v. Delalic et al*, Appeals Chamber Judgment of 20 February 2001, para. 543.

contamination of evidence because the Chamber is composed of professional Judges who hear the case without the aid of jurors.[27]

51. The Chamber notes that since Ntahobali's interviews are not confessions to the commission of the crimes for which he has been charged and that, rather, the interviews include Ntahobali's account of the events of 1994, the *voir dire* procedure requested is not appropriate in the circumstances of the case.

52. The Chamber finds the Defence for Ntahobali's submission that if the Chamber were to hold a *voir dire*, it may show that during Ntahobali's interviews, the Accused may have had a weapon put against his head or he may have been given promises inducing him to give the interviews, to be mere speculation.

53. The Chamber agrees with the Appeals Chamber that the Rules should be primarily applied, with assistance of national principles only if necessary for guidance in the interpretation of these Rules. The Chamber is not convinced that it is only by way of a *voir dire* that the challenge to the Prosecution's compliance with the Statute and the Rules when it conducted Ntahobali's interviews can be dealt with.

54. The Chamber recalls that in the cases of *Bagosora et al*.,[28] *Bizimungu et al*.,[29] and *Kabiligi and Ntabakuze*,[30] Trial Chambers at the Tribunal perused the transcripts of the interviews in which custodial statements of the respective accused persons were taken and made determinations as to whether the Prosecution complied with the relevant Articles, i.e., Articles 18 and 20 and the relevant Rules, i.e., Rules 42, 43, 63 and 92.

55. The Chamber finds that through a perusal of the transcripts of Ntahobali's interviews as well as through the normal procedure of admissibility of evidence provided under Rule 89 (C), and the conditions laid out in Rules 89 (D) and 95, it is able ascertain whether the Prosecution obtained Ntahobali's interviews in compliance with Article 20 of the Statute and Rules 42, 43 and 63 of the Rules.

56. Accordingly, the Chamber denies the Defence of Ntahobali's request to hold a *voir dire* procedure.

Scope of the Use of Ntahobali's Interviews

57. The Chamber recalls that the Defence for Kanyabashi, Ndayambaje and Nyiramasuhuko submitted that the Prosecution is not entitled to tender into evidence Ntahobali's interviews or to use them to challenge his credibility, at this stage of the proceedings. According to the Defence of Kanyabashi and Nyiramasuhuko, this tendering should have been done during the presentation of the Prosecution case. The Defence for Ndayambaje adds that according to common-law jurisdictions, the Prosecution must use any statement made by an accused during the presentation of its own case and not afterwards. Furthermore, Kanyabashi and Nyiramasuhuko's Defence point out that an accused has the right to know the totality of the evidence that may be used against him.

58. The Defence for Nyiramasuhuko argued that the foreclosure extends to the co-accused.

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[27] *Prosecutor v. Milosevic*, Decision on Prosecution Motion for *Voir Dire* Proceeding, 9 June 2005.
[28] *Prosecutor v. Bagosora et al*, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89 (C), 14 October 2004.
[29] *Prosecutor v. Bizimungu et al,* Decision on Prosper Mugiraneza's Renewed Motion to Exclude his Custodial Statements from Evidence, 4 December 2003.
[30] *Prosecutor v. Kabiligi and Ntabakuze,* Decision on Kabiligi's Motion to Nullify and Declare Evidence Inadmissible, 2 June 2000.

59. The Chamber also recalls the Prosecution submissions that it intends to use Ntahobali's interviews to cross-examine him and that it is not foreclosed from doing so. The Prosecution further indicates that during the presentation of its case, it was not in a position to know whether or not the Accused would testify on his own behalf and that he would give evidence which is inconsistent with his previous statements.

60. The Chamber is of the opinion that as a general principle, the use of prior statements of a witness during the witness' cross-examination for the purpose of challenging his credibility is allowed and should not be precluded if it is shown to be relevant and reliable. The Chamber considers that there is no distinction between an ordinary witness and an accused who testifies on his behalf in this regard.

61. The Chamber sees no reason to preclude the Prosecution, or any other cross-examining party, from using Ntahobali's interviews for the purpose of cross-examining the Accused on issues pertaining to his credibility only, as long as they are admissible. The Chamber stresses, however, that since the Prosecution did not seek to use the interviews as evidence during the presentation of its case, it is precluded from using their substance at this stage of the proceedings. Regardless of the Accused's choice whether to testify on his own behalf, the Prosecution should have presented this evidence if it intended to rely on the substance of the interviews.

62. Accordingly, the Chamber denies the Motion to declare the Prosecution foreclosed from using Ntahobali's interviews.

63. Finally, the Chamber finds Nyiramasuhuko's submission alleging that the foreclosure should extend to the co-accused to be without legal basis.

Admissibility of Ntahobali's Interviews

64. As a preliminary matter, the Chamber notes that the record of Ntahobali's interviews contains portions in which the word "inaudible" is recurrent. The Chamber has noted that the quality of the tapes is assessed in the cover page of the transcript and ranges from bad to good. Based on this assessment of the quality of the tapes, the Chamber is not convinced that ordering a new transcription of the tapes would result in more clarity in the transcription of the questions and answers. Moreover, the Chamber does not find that the mention of the word "inaudible" in the transcripts affects the reliability and/or substance of the information contained therein.

65. The Chamber recalls that the Defence for Kanyabashi requested to use Ntahobali's interviews in cross-examination to challenge his credibility and that the Prosecution also requested to use them in cross-examination because of alleged inconsistencies with Ntahobali's testimony in court.

66. In the Chamber's opinion, for the Parties to use Ntahobali's interviews in the current proceedings, it is necessary that they be admissible into evidence, provided the relevant safeguards and procedural protections under Article 20 of the Statute and Rules 42, 43 and 63 of the Rules were complied with when the interviews were taken, and provided they are relevant.

67. The Chamber notes that when Ntahobali was interviewed on 24 and 26 July 1997 by Prosecution investigators, his Indictment had already been confirmed by Judge Yakov Ostrovsky on 29 May 1997.[31]

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[31] *Prosecutor v Nyiramasuhuko et al*, Decision to Confirm the Indictment of 29 May 1997.

68. Article 20 (4) guarantees the accused, *inter alia,* the right not to be compelled to testify against himself or to confess guilt.

69. Once an Accused is in the custody of the Tribunal, the Prosecution is required to comply with the provisions of Rule 63 if it intends to question him.[32] Rule 63 indicates that the questioning shall not proceed without the presence of counsel unless the Accused has waived his right. The questioning also has to comply with the recording procedure under Rule 43 and the Accused has to be reminded of his right to remain silent and of the fact that the statement may be used as evidence pursuant to Rule 42 (A) (iii) of the Rules.

70. The transcripts of Ntahobali's interviews show that the Accused was clearly informed of his rights under Rules 42 and 43 at the beginning of the interview of 24 July 1997 as well as at the beginning of the interview of 26 July 1997, as well as on several occasions throughout the interview.

71. The Accused was informed of his right to counsel, to the free assistance of an interpreter and that if he chooses to answer questions without the presence of counsel, he can stop the interview at any time and request a counsel. The Accused answered that he understood. When the Accused was informed of his right to remain silent and that any statements he makes shall be recorded and may be used in evidence, he indicated that he understood. After the Accused read out a paper containing a waiver of rights to counsel, the investigator asked him if he understood that what he had read meant that he chose to be interviewed without a lawyer. The Accused answered in the affirmative. The Accused was asked if he chose to be interviewed without threat or duress from anyone, and he confirmed this fact. The Accused was offered the option to write down his account of the events or to be questioned and he chose to be questioned.

72. The Chamber further notes that Ntahobali's interviews were audio-recorded, in accordance with the procedure set out in Rule 43 of the Rules. The records indicate that throughout the interviews, there were regular breaks, upon request by the Accused. Even if the Accused appears to have been tired at the end of the 26 July 1997 interview, there is no evidence that the questioning may have been oppressive or that the Accused had lost control of the situation.

Issues raised in Ntahobali's *affidavit*

73. The Chamber has taken note of the submissions made by Ntahobali in his *affidavit*, and has also given him the opportunity to further elaborate on them in court. The Chamber is of the opinion

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[32] Rule 63 (Questioning of Accused) provides: Questioning by the Prosecutor of an accused, including after the initial appearance, shall not proceed without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present. If the accused subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the accused's counsel is present. The questioning, including any waiver of the right to counsel, shall be audio-recorded or video-recorded in accordance with the procedure provided for in Rule 43. The Prosecutor shall at the beginning of the questioning caution the accused in accordance with Rule 42 (A) (iii);
Rule 42 (Rights of Suspects during Investigation) provides: (A) (iii) the right to remain silent, and to be cautioned that any statement the suspect makes shall be recorded and may be used in evidence.
Rule 43 (Recording Questioning of Suspects) provides: Whenever the Prosecutor questions a suspect, the questioning shall be audio-recorded or video-recorded, in accordance with the following procedure: (i) the suspect shall be informed in a language the suspect speaks and understands that the questioning is being audio-recorded or video-recorded; (ii) in the event of a break in the course of the questioning, the fact and the time of the break shall be recorded before audio-recording or video-recording ends and the time of resumption of the questioning shall also be recorded; (iii) at the conclusion of the questioning the suspect shall be offered the opportunity to clarify anything the suspect has said, and to add anything the suspect may wish, and the time of conclusion shall be recorded; (iv) a copy of the recorded tape will be supplied to the suspect or, if multiple recording apparatus was used, one of the original recorded tapes; (v) after a copy has been made, if necessary, of the recorded tape, the original recorded tape or one of the original tapes shall be sealed in the presence of the suspect under the signature of the Prosecutor and the suspect; and (vi) the tape shall be transcribed if the suspect becomes an accused.

that the issues raised in the *affidavit* refer to matters prior to the Accused's 1997 interviews and his arrest.

74. The Chamber observes that in the handwritten document which the Accused signed in Nairobi on 24 July 1997 at 01.24 a.m., he stated that he would go to Arusha himself, if he had the means. He further asserted that no promises or threats had been used to obtain his surrender.

75. The Chamber observes that the waivers of rights were signed after the rights pursuant to Rules 42 and 43 of the Rules had been read to the Accused or he had read them himself. The latter confirmed in the proceedings held on 15 May 2006 that he signed a waiver of his rights, which is also clear from the transcripts of the interviews.[33] These are the right to Counsel, free of charge, the right to an interpreter, free of charge, the right to remain silent, the information that the interview would be taped and may serve as evidence against the Accused, and the right to stop the interview at any moment to request the assistance of Counsel. Ntahobali signed that he had read or been told in a language he understood about these rights, that he was ready to answer questions and make a statement and that he did not request Counsel at the time. He also signed to the effect that there had been neither promises, nor threats, and that no pressure was put on him.

76. The Chamber also notes that it is clear from the transcripts that at least one of the ICTR representatives introduced himself as an investigator.[34] The Chamber observes that the interrogators introduced themselves to the Accused as coming from the Tribunal, and that there was nothing to mislead him to believing otherwise. In any case, the Chamber notes that Rule 37 (B) of the Rules allows the Prosecutor to authorize investigators or any other person to act on his behalf. The Chamber therefore does not find that the Accused did not know whom he was talking to, or that subterfuge was used by the investigators.

Issues raised in Ntahobali's letter

77. With regard to the submissions contained in Ntahobali's letter, the Chamber notes that there is no legal requirement for the transcripts of interviews to be signed by either interviewee or investigators. Further, the Chamber observes that the Prosecution has indicated, without being challenged, that copies of the original audio tapes were communicated to all Defence teams, including the Accused's. Therefore, the Chamber finds that the Accused Ntahobali had access to a copy of the recordings of the interviews. Should he wish to examine the[35] originals, he would have to formally apply and give reasons for such a request.

78. Finally, as to the missing document the Accused referred to in his letter and in the proceedings held on 15 May 2006, the Chamber has carefully examined the transcripts and is of the view that while there may have been two handwritten statements signed by the Accused on 24 July 1997, one handwritten by the Accused and one by another person, and while the first document has not been filed, they appear to have had similar contents.[36] From the transcripts, the filed document appears to be a summary of the one alleged to have been handwritten by the Accused, and both state the Accused's surrender to the ICTR representatives. The Accused confirmed on 15 May 2006 that he signed the handwritten document filed by the Prosecution. Taking into account the handwritten document dated 24 July 1997, signed by the Accused, and the waivers of his rights signed on 24 and 26 July by the Accused, the Chamber finds that the absence of an additional handwritten document does not diminish the value of the Accused's signed statements that he had surrendered freely, that no threats or

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[33] Tape 1, pp. 2-5 (English version), K-0153970, K-0153971, K-0153972, K-0153973.
[34] Tape 1, p. 2 (English version), K-0153970.
[35] Tape 3 (English version), K-0166746.
[36] Tape 3 (English version), K-0166746.

promises had been used, that he had waived his rights and that he would go to Arusha himself, if he had the means to do so.

Conclusion on the admissibility

79. Rule 89 (C) empowers the Chamber to admit evidence which is relevant to the subject matter before it and which has probative value while Rule 89 (D) deals with the Chamber's powers to verify the authenticity of evidence obtained out of court. However, Rule 95 empowers the Chamber to exclude evidence which is obtained by methods casting substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

80. Having reviewed Ntahobali's interviews, the Chamber has not found any instance in which the Accused asked to stop the interview to obtain presence of Counsel, or which showed that his statement was given under duress. The Chamber finds that Ntahobali's interviews show that the Accused was questioned voluntarily and answered in a language that he understood. The Chamber concludes that Ntahobali's interviews fully comply with the requirements of Article 20 of the Statute and Rules 42, 43 and 63 of the Rules and are relevant to the trial. Moreover, the Chamber recalls that the Defense for Ntahobali did not challenge that Ntahobali made the interviews in issue. Accordingly, the Chamber finds that Ntahobali's interviews are admissible under Rule 89 (C) for the purpose of cross-examining Ntahobali on issues relating to his credibility.

81. The Chamber notes that among Ntahobali's interviews, the one taken on 24 July 1997 starting at 3:31 p.m. refers to written statements taken from the Accused after his arrest at around 1:07 a.m. on 24 July 1997. The Chamber notes, after a perusal of the interviews that the Accused had signed waivers of rights to Counsel, before those statements were taken; one relating to the conditions of his surrender and the other containing biographical information; pictures were also taken after his arrest and form part of these records. The Chamber notes that in the transcripts of the 24 and 26 July 1997 interviews, the Accused confirms that his rights were read out to him before he signed a waiver of rights and made those statements. The Chamber finds that these written statements are admissible under Rule 89 (C) of the Rules for the purpose of cross-examining Ntahobali on issues relating to his credibility and that they will be admitted after the cross-examination by each Party concerned, if they are used.

82. Accordingly, the Chamber grants Kanyabashi's and any other co-Accused's Motion as well as the Prosecution's Motion to cross-examine the Accused Ntahobali using his interviews to challenge his credibility. Following its practice, the Chamber adds that only the portions of Ntahobali's interviews that will be used by Kanyabashi, the Prosecution, and any other Party during cross-examination on issues of credibility, will be admitted as evidence.

FOR THE ABOVE REASONS, THE TRIBUNAL

RULES ADMISSIBLE Ntahobali's interviews of 1997. A request for admission of any portion used in cross-examination by the co-Accused or the Prosecution will be determined at the end of each cross-examination;

GRANTS Kanyabashi's Motion to use Ntahobali's interviews in cross-examination to test Ntahobali's credibility;

GRANTS in part, the Prosecution Motion and allows it to use Ntahobali's interviews in cross-examination to test Ntahobali's credibility;

DENIES the Prosecution Motion in all other respects;

DENIES Ntahobali's request to hold a voir dire procedure;

DENIES the request to declare the Prosecution foreclosed from using Ntahobali's interviews.

Arusha, 15 May 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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Decision on Ntahobali's Motion for Certification to Appeal the Chamber's Decision Granting Kanyabashi's Request to Cross-Examine Ntahobali Using 1997 Custodial Interviews
1st June 2006 (ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Joseph Kanyabashi, Elie Ndayambaje, Sylvain Nsabimana, Alphonse Nteziryayo, Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Certification to appeal, Absolute exception when deciding on the admissibility of evidence – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A), 73 (B) and 73 (C)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible', 18 March 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Defence Motion for Certification to Appeal the 'Decision on Defence Motion for a Stay of Proceedings and Abuse of Process', 19 March 2004 (ICTR-98-42) ; Appeals Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Prosecutor's Motion for Certification to Appeal the Decision of the Trial Chamber dated 30 November 2004 on the Prosecution Motion for Disclosure and Evidence, 4 February 2005 (ICTR-98-42)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Sefer Halilović, Decision on Motion for Certification, 30 June 2005 (IT-01-48)

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy B. Bossa (the "Chamber");

SEISED of Ntahobali's "*Requête en extrême urgence d'Arsène Shalom Ntahobali afin d'obtenir la certification d'appel de la décision intitulée* 'Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997,'" filed on 19 May 2006 (the "Motion");

CONSIDERING the Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997, issued on 15 May 2006 (the "Impugned Decision");

HAVING RECEIVED the

(i) "Réponse de Joseph Kanyabashi à la Requête en extrême urgence d'Arsène Shalom Ntahobali afin d'obtenir la certification d'appel de la décision intitulée 'Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997,'" filed on 22 May 2006 ("Kanyabashi's Response");

(ii) "Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Certification to Appeal the Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997", filed on 23 May 2006 ("Prosecution's Response");

(iii) "Réplique de Arsène Shalom Ntahobali à la Réponse de Joseph Kanyabashi à la Requête en extrême urgence d'Arsène Shalom Ntahobali afin d'obtenir la certification d'appel de la décision intitulée 'Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997,'" filed on 25 May 2006 ("Ntahobali's Reply to Kanyabashi"); and

(iv) "*Réplique de Arsène Shalom Ntahobali à la* Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Certification to Appeal the Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997," filed on 26 May 2006 ("Ntahobali's Reply to the Prosecution").

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), specifically Rule 73 (B) and (C) of the Rules;

NOW DECIDES the Motion, pursuant to Rule 73 (A) of the Rules, on the basis of the written submissions of the Parties.

Submissions of the Parties

Defence for Ntahobali

1. The Defence for Ntahobali moves the Chamber for certification to appeal the Impugned Decision. Certification is sought with respect to the use of Ntahobali's statements to the Prosecution investigators in 1997 during Ntahobali's cross-examination.

2. The Defence submits that the Chamber erred in law regarding several issues[1] and that it raised three additional legal issues, namely, whether a *voir dire* proceeding should be held to ascertain that Ntahobali's statements were properly taken; the scope of the use of Ntahobali's statements at this stage of the proceedings; and their admissibility.[2] According to the Defence, these questions would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and their immediate resolution by the Appeals Chamber may materially advance the proceedings.[3]

3. The Defence argues that the question of admissibility or use of a prior statement of an accused is important and affects the fairness of proceedings because of the Accused's fundamental rights as

[1] The Motion, para. 12. As the Defence for Ntahobali indicates in its Reply to Kanyabashi, para. 17, that the errors in law have only been pointed out for reasons of judicial rectitude, and that Kanyabashi's response in that matter is not relevant to the question of certification, the Chamber deems it unnecessary to reproduce either the alleged errors in law or the Prosecution's or Kanyabashi's arguments.
[2] The Motion, para. 13.
[3] The Motion, para. 14.

guaranteed under the Statute and the Rules. These rights are affected by the Impugned Decision.[4] It is undeniable that the credibility of an Accused's testimony is at the very core of the trial.[5] Further, it is equally undeniable that the use of prior statements by opponents to assess the credibility of the Accused is likely to affect the outcome of the trial.[6]

4. The Defence relies on several decisions. In *Muvunyi*, the Trial Chamber held that the admissibility of evidence the Prosecution wished to use and which the Accused consistently denied, would have an impact on the rest of the trial, and that the decision thus regarded a question likely to affect the fairness and expeditiousness of proceedings.[7] This Decision also held that an immediate resolution by the Appeals Chamber might advance proceedings, especially because of the impending evaluation of this evidence in the context of the Judgement.[8] In the *Ndindiliyimana et al*. case, it was determined that "admitting documents with an unknown and possibly incriminating content into evidence may affect the fairness of the proceedings and the outcome of the trial".[9] Trial Chamber I of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") in *Halilovic* held that the admission of the Accused's interview had a bearing on the fairness of proceedings, as well as on the outcome of the trial, because it involved a number of the Accused's statutory rights. This decision also determined that an immediate resolution by the Appeals Chamber would materially advance proceedings and therefore granted the Motion for certification.[10]

5. The Defence submits that the admissibility or the use of Ntahobali's prior statements may also concretely advance proceedings, as it affects and will affect the Accused's defence strategy through defence exhibits introduced by other accused, considering the sometimes contradictory and incompatible defence strategies. This is particularly true with regard to the large number of witnesses which are yet to be heard in the course of all defence cases, and who are likely to aim at contradicting the Accused's former statements or his testimony in this respect.[11]

6. Finally, and subsidiarily, the Defence submits that even if the criteria for certification have not been met, the importance of the question within the context of the *Butare* proceedings, where several Accused made statements when they were arrested, would justify the Chamber to order certification to appeal *proprio motu*, so that the Appeals Chamber determines these fundamental legal issues as a question of general interest.[12]

Kanyabashi's Response

7. The Defence for Kanyabashi requests the Chamber reject the Motion, as the conditions set out in Rule 73 (B) of the Rules are not met.

8. The Defence agrees that the admissibility of extra-judiciary statements of an accused made to persons of authority may have an impact on the fairness of proceedings, as has been held in the *Halilovic* case,[13] where the Appeals Chamber quashed the Trial Chamber's decision which had

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[4] The Motion, para. 15.
[5] The Motion, para. 16.
[6] The Motion, para. 17.
[7] The Motion, paras. 18-19, quoting *Prosecutor v. Muvunyi*, Reasons for the Oral Decision on Muvunyi's Motion for Certification to Appeal the Chamber's Decision of 26 April 2006, 12 May 2006, para. 8.
[8] The Motion, para. 20, quoting *Prosecutor v. Muvunyi*, Reasons for the Oral Decision on Muvunyi's Motion for Certification to Appeal the Chamber's Decision of 26 April 2006, 12 May 2006, para. 9.
[9] The Motion, para. 21, quoting *Prosecutor v. Ndindiliyimana et al*., Decision on Bizimungu's Motion for Certification to Appeal the Chamber's Oral Decision of 2 February 2006 Admitting Part of Witness GFA's Confessional Statement into Evidence, 27 February 2006, para. 12.
[10] The Motion, para. 22, quoting *Prosecutor v. Halilovic*, Decision on Motion for Certification, 30 June 2005, p. 2.
[11] The Motion, para. 24.
[12] The Motion, para. 25.
[13] Kanyabashi's Response, para. 6, quoting *Prosecutor v. Halilovic*, Decision on Motion for Certification, 30 June 2005.

admitted into evidence an extra-judiciary statement of the Accused made to Prosecution investigators.[14] However, the Defence alleges that Halilovic's reasons were more serious than Ntahobali's.[15] Further, not all decisions regarding the admissibility of such statements are subject to interlocutory appeal.[16] Regarding the *Muvunyi* Decision cited, the Defence submits that its context is different in that it addresses the admissibility of evidence after the close of the Prosecution case.[17]

9. The Defence submits that none of Ntahobali's reasons are likely to affect the fairness of proceedings, because the Impugned Decision takes into account all of his arguments and demands the respect of Art. 20 of the Statute and Rules 42, 43, and 63 of the Rules. Further, the Chamber rejected the argument that a co-accused is bound by the rules on the admissibility of a statement[18] and held an informal *voir dire* proceeding by ordering the respect of the rights of the Accused. Therefore, the Impugned Decision does not involve an issue that would significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial.[19]

10. The Defence submits that it is equally difficult to see how an immediate resolution of the Appeals Chamber may materially advance the proceedings, since the Impugned Decision limited the use of the statements to challenging Ntahobali's credibility and it is not clear how his testimony or the statements may be contradicted by witnesses led by the co-Accused.[20]

11. The Defence submits that Ntahobali ,must have raised the argument that the Chamber could *proprio motu* grant certification to appeal knowing that his arguments were weak.[21] It recalls that the Chamber clearly stated on 9 May 2006 that it was not going to address hypothetical issues.[22] With regard to the statements the other accused allegedly made, the Defence points out that the Chamber does not have any information about their nature and the conditions under which they were made.[23]

Prosecution's Response

12. The Prosecution submits that the Motion should be dismissed, as it does not meet the criteria for certification set out in Rule 73 (B) of the Rules[24] and is without merit in law or fact.[25] It argues that the Impugned Decision complied with Ntahobali's rights under Art. 20 of the Statute and Rules 42, 43, and 63 of the Rules.[26]

13. The Prosecution recalls that the Chamber held that "certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence […] it is the responsibility of the Trial Chamber, as triers of fact, to determine which evidence to admit during the course of the trial".[27]

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[14] Kanyabashi's Response, para. 6, quoting *Prosecutor v. Halilovic*, Appeals Chamber, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005.
[15] Kanyabashi's Response, para. 6.
[16] Kanyabashi's Response, para. 7, quoting *Prosecutor v. Halilovic*, Decision on Prosecution Request for Certification for Interlocutory Appeal of 'Decision on Motion for Exclusion of Statement of Accused', 25 July 2005.
[17] Kanyabashi's Response, para. 8.
[18] Kanyabashi's Response, para. 9, quoting the Impugned Decision, para. 18.
[19] Kanyabashi's Response, para. 9.
[20] Kanyabashi's Response, para. 10, quoting the Impugned Decision, para. 82.
[21] Kanyabashi's Response, para. 11.
[22] Kanyabashi's Response, para. 12, quoting *Prosecutor v. Nyiramasuhuko et al.*, French Transcripts of 9 May 2006, p. 18.
[23] Kanyabashi's Response, para. 13.
[24] Prosecution's Response, para. 2.
[25] Prosecution's Response, para. 18.
[26] Prosecution's Response, para. 16, quoting the Impugned Decision, para. 55.
[27] Prosecution's Response, para. 8, quoting *Prosecutor v. Nyiramasuhuko*, Appeals Chamber, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004.

14. The Prosecution submits that the Chamber as the trier of fact is invested with inherent powers in its dispensation of justice under Rules 54, 73 *bis* (B) (v), 73 *ter* (B) (iv), 89, 95, and 98 of the Rules. The Prosecution stresses that the Appeals Chamber held in the *Halilovic* case that "the Trial Chamber […] had the discretion to admit the record, at least so long as doing so did not violate any specific restrictions outlined in the remainder of the Rules nor the principle of Rule 89 (B) requiring application of the rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law".[28]

15. With regard to the interviews of other Accused, the Prosecution argues that the Chamber should not allow Ntahobali to appeal a matter that is not before it. While the Chamber may make orders *suo motu*, it is submitted that the instant case does not require such order.[29]

16. The Prosecution further submits that the jurisprudence relied on by the Defence is only of persuasive value and can be distinguished from the matter at hand.[30]

17. The Prosecution adds that all the assertions put forward by the Defence in support of its certification to appeal are a guise to further slow down proceedings rather than to expedite the process.[31]

Ntahobali's Reply to Kanyabashi

18. The Defence for Ntahobali submits that Kanyabashi's Response is contradictory, as it alleges that the admissibility of the interviews is not likely to significantly affect the fairness of proceedings, while it also indicates that the question of the admissibility of extra-judicial statements made by an accused to persons in position of authority can have an impact on the fairness of proceedings.[32]

19. With regard to Kanyabashi's argument that the question at hand is not likely to substantially compromise proceedings, because the Impugned Decision only declared the interviews admissible with a view to test Ntahobali's credibility, the latter submits that the *Halilovic* Decision cited considered that the admissibility *stricto sensu* met the criteria for certification.[33] Besides, despite this limited use, the interviews have been declared admissible and the content read out in proceedings will be part of the evidence.[34]

20. The Defence further argues that while Kanyabashi stated that the Chamber could not determine the question of the interviews of the other Accused, because it did not know the context of these interviews, the Chamber need not know these specific conditions.[35] The simple fact of the Appeals Chamber determining the question would significantly advance proceedings, since it might apply *mutatis mutandis* to subsequent cases.[36]

Ntahobali's Reply to the Prosecution

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[28] Prosecution's Response, para. 9, quoting *Prosecutor v. Halilovic*, Appeals Chamber, Decision on the Interlocutory Appeal Concerning Admission of Recors of the Interview of the Accused from the Bar Table, 19 August 2005, para. 14.
[29] Prosecution's Response, para. 13.
[30] Prosecution's Response, paras. 14-15, quoting *Prosecutor v. Halilovic*, Appeals Chamber, Decision on the Interlocutory Appeal Concerning Admission of Records of the Interview of the Accused from the Bar Table, 19 August 2005, paras. 19, 35, 40, 41, 45, 54, 62, 63, 65.
[31] Prosecution's Response, para. 17.
[32] Ntahobali's Reply to Kanyabashi, para. 27.
[33] Ntahobali's Reply to Kanyabashi, paras. 28-29.
[34] Ntahobali's Reply to Kanyabashi, para. 30.
[35] Ntahobali's Reply to Kanyabashi, paras. 33-34.
[36] Ntahobali's Reply to Kanyabashi, paras. 34-35.

21. The Defence for Ntahobali points out that even if the Appeals Chamber Decision in *Nyiramasuhuko et al*., on which the Prosecution relies, indicates that certification of an appeal has to be the absolute exception when deciding on the admissibility of evidence, this does not mean that an accused's statement may not be one of these exceptional cases, both because of the importance of the question and the number of rights of the accused which are concerned.[37]

22. Further, the Defence submits that the request for certification is not limited to the simple admissibility of the statements. Rather, the question of whether a *voir dire* proceeding has to be held also satisfies the conditions under Rule 73 (B), and is distinct from the admissibility issue.[38]

23. With regard to the *Halilovic* Decision on which the Prosecution relies and which held that "the Trial Chamber had the discretion to admit the record, at least so long as doing so did not violate any specific restrictions outlined in the remainder of the Rules", the Defence submits that the spirit of the Rules is clearly violated if promises and threats are used to obtain a statement from an accused. Evidence for this violation is found both in the *affidavit* and in the transcripts of the Accused's cross-examination, especially those of 24 May 2006.[39]

24. Concerning the Prosecution's submission that referring to the other Accused's statements is inappropriate and that the Chamber should not allow Ntahobali to appeal questions that are not before it, the Defence replies that it never intended appealing this issue.[40] Rather, these statements were mentioned in the Motion in relation to the condition of materially advancing proceedings, pursuant to Rule 73 (B) of the Rules.[41] The Defence submits that it is obvious that if a contentious legal issue is determined by the Appeals Chamber, proceedings advance concretely, in the sense that if the same question is raised subsequently, the Appeals Chamber's position will be already established.[42]

Deliberations

25. The Chamber notes that decisions under Rule 73 (A) of the Rules are "without interlocutory appeal", and that certification to appeal is an exception the Chamber may grant, if the two criteria under Rule 73 (B) of the Rules are satisfied. This is the case if the Impugned Decision involves an issue that would significantly affect (a) the fair and expeditious conduct of the proceedings, or the outcome of the trial, and (b) if the applicant demonstrates that an immediate resolution by the Appeals Chamber may materially advance the proceedings. Both of these conditions require a specific demonstration, and are not met through a general reference to the submissions on which an impugned Decision was rendered.[43] The Chamber will address the conditions set out in Rule 73 (B) of the Rules in turn.

26. The Chamber is aware of the Appeals Chamber's ruling that certification of an appeal has to be the absolute exception when deciding on the admissibility of evidence, and that it is the

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[37] Ntahobali's Reply to the Prosecution, paras. 6-7.
[38] Ntahobali's Reply to the Prosecution, para. 8.
[39] Ntahobali's Reply to the Prosecution, para. 9.
[40] Ntahobali's Reply to the Prosecution, paras. 11-12.
[41] Ntahobali's Reply to the Prosecution, para. 12.
[42] Ntahobali's Reply to the Prosecution, para. 13.
[43] *Prosecutor v. Nyiramasuhuko et al.,* Decision on Prosecutor's Motion for Certification to Appeal the Decision of the Trial Chamber dated 30 November 2004 on the Prosecution Motion for Disclosure and Evidence, 4 February 2005, para. 11; *Prosecutor v. Nyiramasuhuko et al.,* Decision on Defence Motion for Certification to Appeal the 'Decision on Defence Motion for a Stay of Proceedings and Abuse of Process', 19 March 2004, paras. 12-16; *Prosecutor v. Nyiramasuhuko et al.,* Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible', 18 March 2004, paras. 14-17.

responsibility of the Trial Chamber to determine which evidence to admit during the course of the trial.[44]

27. Nonetheless, the Chamber is of the view that the admissibility of an accused's interviews is an important matter that could have a bearing on the fairness of the proceedings, as it affects the fundamental rights of the accused.[45] Therefore, the Chamber finds that the Impugned Decision involves an issue that could significantly affect the fair conduct of the proceedings. With respect to the expeditious conduct of the proceedings, the Chamber notes that the Impugned Decision is the first decision on the admissibility of prior statements of an Accused in this case. Moreover, the Chamber has noted the Parties' submissions that there may be similar statements made by other Accused. The Chamber therefore considers that a resolution of this issue by the Appeals Chamber at this stage could significantly expedite the conduct of the proceedings. Accordingly, the first condition set out in Rule 73 (B) of the Rules is met.

28. The Chamber also notes that in the specific circumstances of this case, similar issues may arise in the future, and that an immediate resolution of this matter by the Appeals Chamber may therefore materially advance the proceedings. Accordingly, the second criterion for certification, pursuant to Rule 73 (B) of the Rules, is also satisfied.

29. The Chamber has carefully considered all the other submissions of the Parties and is of the view that while they may be relevant on appeal, they are not relevant to the determination of this Motion.

30. The Chamber therefore grants Ntahobali certification to appeal the Impugned Decision.

FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS the Motion.

Arusha, 1 June 2006.

[Signed]: William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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[44] *Prosecutor v. Nyiramasuhuko et al.*, Appeals Chamber, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004, para. 5.
[45] *Prosecutor v. Halilovic*, Decision on Motion for Certification, 30 June 2005, p. 2.

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Order Assigning Judges to a Case Before the Appeals Chamber 13 June 2006 (ICTR-98-42-A)

(Original : English)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

Joseph Kanyabashi, Elie Ndayambaje, Sylvain Nsabimana, Alphonse Nteziryayo, Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Assignment of Judges

International Instruments cited :

Rules of Procedure and Evidence, rules 73 (B) and 73 (C) ; Statute, art. 11 (3) and 13 (4)

I, FAUSTO POCAR, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

RECALLING the "Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using the Ntahobali's Statements to Prosecution Investigators in July 1997" and the "Decision on Ntahobali's Motion for Certification to Appeal the Chamber's Decision Granting Kanyabashi's Request to Cross-Examine Ntahobali Using 1997 Custodial Interviews" rendered by Trial Chamber II respectively on 15 May 2006 and 1 June 2006;

NOTING the « *Appel de l'Accusé Arsène Shalom Ntahobali à l'encontre de la Décision intitulée* 'Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using the Ntahobali's Statements to Prosecution Investigators on July 1997' » filed on 8 June 2006;

CONSIDERING Articles 11 (3) and 13 (4) of the Statute of the International Tribunal and Rule 73 (B) and (C) of the Rules of Procedure and Evidence of the International Tribunal;

CONSIDERING the composition of the Appeals Chamber of the International Tribunal as set out in document IT/245 issued on 12 May 2006;

HEREBY ORDER that the Bench in *The Prosecutor v. Arsène Shalom Ntahobali et al.,* Case N°ICTR-97-21-AR73, shall be composed as follows:

Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Done in English and French, the English version being authoritative.

Done this 13th day of June 2006, At The Hague, The Netherlands.

[Signed] : Fausto Pocar

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Decision on the Prosecutor's Urgent Motion to Compel Disclosure of Unredacted Witness Statements by Nsabimana's Defence 29 June 2006 (ICTR-97-29-T, Joint Case: ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Joseph Kanyabashi, Elie Ndayambaje, Sylvain Nsabimana, Alphonse Nteziryayo, Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Disclosure of Unredacted Witness Statements by the Defence, Purpose of the disclosure, Distinction between the obligation of the Prosecution and that of the Defence with regard to the disclosure of witness statements regarding the consequence of striking off of witnesses, Definition of will-say statements – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 66 (A) and 73 ter

International Case cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Arsène Shalom Ntahobali's Motion to Amend His Witness List and to Reconsider the Decision of 26 August 2005 Titled: "Decision on the Defence Motion to Modify the List of the Defence Witnesses For Arsène Shalom Ntahobali", 27 January 2006 (ICTR-98-42)

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the "Prosecutor's Urgent Motion to Compel Disclosure of Nsabimana's Witnesses Non-Redacted Statements", filed on 23 June 2006 (the "Motion");

CONSIDERING the "*Réplique de Sylvain Nsabimana au* 'Prosecutor's Urgent Motion to Compel Disclosure of Nsabimana's Witnesses's Non redacted Statements' *déposée le 23 juin 2006*", filed on 26 June 2006 (the "Defence Response");

CONSIDERING the "Prosecutor's Reply to Nsabimana's *réplique* re Witnesse's Non-Redacted Statements", filed on 27 June 2006 (the "Prosecution Reply");

NOTING the "Scheduling Order of 14 December 2005", ordering "the Defence for Sylvain Nsabimana to continue its disclosure obligations in a timely fashion with a view to being ready to start their Defence case immediately after the close of the case for Ntahobali";[1]

[1] Paragraph *f* of the Scheduling Order.

RECALLING the "Oral Decision on the Prosecutor and Pauline Nyiramasuhuko's Motion to Have Disclosure of Sylvain Nsabimana's Unredacted Statements", issued on 22 June 2006 (the "Oral Decision of 22 June 2006");[2]

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

NOW DECIDES the matter, pursuant to Rule 73 (A), on the basis of the written submissions of the Parties.

Submissions of the Parties

The Prosecution

1. The Prosecution prays the Chamber to order the Defence for Nsabimana to disclose the unredacted statements of its witnesses within 48 hours pursuant to Rule 54. Failure to do so, the Prosecution requests that the concerned witnesses be stricken off the list of Defence witness.

2. The Prosecution submits that despite the Chamber's Decision of 22 June 2006, the Defence for Nsabimana has not made any effort to provide the Prosecutor with the requested statements, yet it was due to start its case on 26 June 2006.

3. The Prosecution argues that it cannot accept the Defence's representation that it does not have a copy of the said statements and submits that there has been no advance notice of this loss and no showing of due diligence by the Defence to enquire about these statements more than five years after the arrest of their former investigator.[3]

4. The Prosecution further alleges that it cannot accept the Defence's representation that the arrest of its former investigator Joseph Nzabirinda and seizures carried out in 2001 resulted in loss of the only existing copy of statements[4] and that the Accused Nsabimana does not have a copy of any of the statements collected on his behalf.[5]

The Defence

5. The Defence points out that in its Oral Decision of 22 June 2006, the Chamber asked not only the Defence but also any other Party, including the Prosecution, to disclose the sought statements if they have them.[6]

6. The Defence submits that neither the original, nor the copies of the unredacted statements of its witnesses contacted by Joseph Nzabirinda, its former investigator who is now an accused before the Tribunal, are in its possession.[7]

7. The Defence argues that the Prosecution could not assume that the Defence possesses those statements simply because they were not part of the items seized from Joseph Nzabirinda upon his arrest in November 2001.[8]

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[2] The Prosecutor v. Pauline Nyiramasuhuko et al.; T. 22 June 2006, p. 11.
[3] Paragraph 22 of the Motion.
[4] Paragraph 19 of the Motion.
[5] Paragraph 20 of the Motion.
[6] Paragraph 7 of the Response.
[7] Paragraph 18 of the Response.
[8] Paragraph 17 of the Response.

8. The Defence also submits that striking some of its witnesses because of its failure to disclose statements which are not in its possession would cause considerable prejudice to the Accused Nsabimana's rights and to the fairness of the trial.[9]

9. The Defence underscores that the issue of impossibility to disclose the unredacted statements only concerns the witnesses who were contacted by its former investigator Joseph Nzabirinda.[10] With respect to the remaining witnesses, whose redacted statements have been disclosed to the Parties, the Defence asserts that their unredacted statements are available and will be disclosed in due time.[11]

The Prosecution Reply

10. The Prosecution submits that the Defence for Nsabimana had never mentioned the absence of the unredacted statements, neither in 2005 when it filed the redacted statements, nor on 15 June 2006, when it indicated the order of appearance of its witnesses and the status of its disclosure.[12]

11. The Prosecution argues that the Defence had the obligation to obtain the full unredacted statements from the witnesses if it had lost both the originals and all the copies, and to bring this situation to the notice of the Chamber and the Parties.[13]

Deliberations

12. The Chamber recalls its Oral Decision of 22 June 2006 and reiterates that where statements were made by potential witnesses, the concerned Party is bound to disclose the said statements in their entirety, in conformity with the Rules. The Chamber points out that one of the purposes of such disclosure is to enable the other Parties to conduct an effective cross-examination of the witnesses if they so wish.

13. With respect to the request for disclosure, the Chamber has noted the Defence's submissions that the said unredacted witness statements are apparently unavailable and cannot therefore be disclosed. Accordingly, the Chamber denies the Prosecutor's request.

14. With respect to the request for striking off witnesses, the Chamber notes that there exists a distinction between the obligation of the Prosecution and that of the Defence with regard to the disclosure of witness statements. As regards the Prosecution, under Rule 66 (A) failure to disclose may lead to striking off the concerned witnesses. As for the Defence, failure to disclose witness statements does not necessarily lead to the striking off of witnesses particularly taking into account Rule 73 *ter*. The Chamber therefore finds no merit in the Prosecution's request to strike off Defence witnesses whose unredacted statements are apparently unavailable and cannot be disclosed.

15. The Chamber further notes that the *will-say* statements as well as the personal particulars of the said witnesses have already been disclosed by the Defence. The Chamber recalls that *will-say* statements must be

> "clear enough to cover the scope of the proposed testimony of the witness; they must be full and comprehensive, not in the sense of giving all the details, but at least laying out the scope of what the witness is expected to cover in clear terms."[14]

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[9] Paragraph 27 of the Response.
[10] Paragraph 28 of the Response.
[11] Paragraph 29 of the Response.
[12] Paragraphs 07-08 of the Reply.
[13] Paragraph 10 of the Reply.

The Chamber therefore expects the *will-say* statements to meet the requirements set out above. The Chamber further observes that *will-say* statements of such nature enable "the other party or the other parties to prepare and to raise issues",[15] as it has been reiterated in the instant proceedings.

16. Finally, the Chambers finds it unacceptable that the Defence of Nsabimana did not inform the Parties and the Chamber about the problems concerning the disclosure of some of the unredacted witness statements until this issue was formally raised by the Prosecution just before the start of Nsabimana's case. The Chamber reminds the Parties that compliance with disclosure obligations is crucial to the smooth conduct of proceedings. In addition, the Chamber considers that the Defence should have been diligent and made reserve copies of the alleged unredacted statements. In the Chamber's view, this omission amounts to negligence on the part of the Defence. The Chamber therefore does not expect from the Defence of Nsabimana a repeat of this conduct.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Prosecutor's Motion in its entirety.

Arusha, 29 June 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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[14] *Nyiramasuhuko et al*., Decision on Arsène Shalom Ntahobali's Motion to Amend His Witness List and to Reconsider the Decision of 26 August 2005 Titled: "Decision on the Defence Motion to Modify the List of the Defence Witnesses For Arsène Shalom Ntahobali" (TC) 27 January 2006, para. 24.
[15] Idem.

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Decision on Ndayambaje's Motion for Extension of Time to Reply to the Prosecutor's Response to its Motion for Exclusion of Evidence 30 June 2006 (ICTR-96-8-T ; Joint Case N°ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Elie Ndayambaje – Extension of Time, Demonstration by the Defence that it attempted to file its Reply within the time-limits but failed due to reasons beyond its control – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 73 (A)

International Case cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Prosecutor's Motion for an Extension of Time within which to Comply with the Court Order to File and Indictment, 2 march 2001 (ICTR-98-27)

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy B. Bossa (the "Chamber");

SEISED of Ndayambaje's "Requête en extension de délais afin de déposer la "Réplique à la réponse du Procureur à la requête d'Elie Ndayambaje aux fins d'exclure les témoignages et/ ou les portions de témoignages des témoins entendus au procès sur des faits qui sont en dehors de l'acte d'accusation"" with 12 transmission verification reports dated 13 and 14 June 2006 annexed, filed on 20 June 2006 (the "Motion");

CONSIDERING the « Prosecutor's Response to the "Requête en extension de délai afin de déposer la "Réplique à la réponse du Procureur à la requête d'Elie Ndayambaje aux fins d'exclure les témoignages et/ ou les portions de témoignages des témoins entendus au procès sur des faits qui sont en dehors de l'acte d'accusation" », filed on 21 June 2006 (the « Prosecutor's Response »);

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

NOW DECIDES the Motion, pursuant to Rule 73 (A) of the Rules, on the basis of the written submissions of the Parties.

Introduction

1. On 31 May 2006, Ndayambaje filed a Motion requesting the Chamber to exclude, in whole or in part, the testimony of some witnesses who testified on facts outside the scope of the Indictment against him ("Ndayambaje's Motion of 31 May 2006").[1]

2. On 5 June 2006, the CMS directed the Prosecution and any other concerned Party to file a Response to Ndayambaje's Motion of 31 May 2006 within five days of its communication, and the Defence to file its Reply within five days following such Responses, if it so wished.

3. On 9 June 2006 the Prosecution filed its Response to Ndayambaje's Motion.

Submissions of the Parties

The Defence

4. The Defence submits that it tried to fax its reply on 13 June 2006 but that it only succeeded to transmit part of it due to communication difficulties.

5. On 14 June 2006, the Defence attempted again to fax its Reply, but failed. The same day, it sent an electronic copy of its Reply to Mr Roger Kouambo, explaining the difficulties in transmitting the signed original by fax.

6. The Defence submits that from 15 to 17 June 2006, it attempted to fax its Reply using different fax machines, confirmations of which will be available at the end of the month and therefore could not be annexed to the Motion.

7. Between 17 and 19 June 2006, both Lead and Co-Counsel for the Accused were travelling from Montreal to Arusha to attend trial and thus were unable to file the original Motion before they arrived in Arusha. Accordingly, the Defence filed its Reply on 20 June 2006, together with the Motion.

8. The Defence submits that for reasons beyond its control, it has been unable to file its Reply within the time-limits set and thus prays that the Chamber grant its Motion to file its Reply so that it may be considered during the determination of its Motion of 31 May 2006.

The Prosecution

9. In objecting to the Motion, the Prosecution quotes the Chamber's Decision of 2 March 2001, in which a request for extension of time within which to comply with a court order was granted in the interests of justice, even though the Chamber expressed concern that the Motion was filed after the expiration of the deadline.[2] The Prosecution submits that the instant Motion has been filed after the expiration of the deadline and should therefore be dismissed.

10. The Prosecution further submits that the Defence has not acted with due diligence because when it failed to fax its Reply, it did not contact the Registry in order to find an alternative solution.

Deliberations

11. The Chamber notes that, according to the CMS notification dated 5 June 2006, Ndayambaje should have filed his reply to the Prosecution Response to the Motion of 31 May 2006 no later than 14

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[1] « Requête d'Elie Ndayambaje aux fins d'exclure les témoignages et/ou les portions de témoignages des témoins entendus au procès sur des faits qui sont en dehors de l'acte d'accusation, » filed on 31 May 2006.
[2] *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-27-T, Decision on Prosecutor's Motion for an Extension of Time within which to Comply with the Court Order to File and Indictment of 2 march 2001.

June 2006. The Chamber further notes that, as evidenced in the annexes to the Motion, the Defence attempted to fax its Reply on 13 June 2006 that is within the time-limits set for such a filing.

12. Further evidence annexed to the Motion shows that the Defence continued its efforts to fax the signed Reply on 14 June 2006, and failed. The Chamber notes that subsequently, the Defence electronically mailed to Mr Roger Kouambo (CMS Coordinator) an unsigned version of its Reply, which was brought to the attention of the Trial Chamber.

13. The Chamber also notes that the Defence submits that it continued attempts to fax its signed Reply between 15 and 17 June 2006, but failed.

14. In the Chamber's opinion, the Defence has demonstrated that it attempted to file its Reply within the time-limits for such filing but failed due to reasons beyond its control. Moreover, after comparing the unsigned version of the Defence Reply which was electronically received by the Registry and then forwarded to the Chamber and the signed version of the Reply filed on 20 June 2006, the Chamber finds that they are one and the same document. Accordingly, the Chamber finds that the Defence was diligent in its attempts to file its Reply within the time-limits set by the Chamber.

15. The Chamber therefore grants the Defence Motion and extends the time for filing its Reply to 20 June 2006 to enable its consideration in the determination of Ndayambaje's Motion of 31 May 2006.

FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS the Defence Motion and extends the time for filing its Reply to 20 June 2006 to enable its consideration in the determination of Ndayambaje's Motion of 31 May 2006.

Arusha, 30 June 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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Decision on Alphonse Nteziryayo's Motion to Modify His Witness List 14 July 2006 (ICTR-97-29A-T ; Joint Case : ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Alphonse Nteziryayo – Modification of the Defence Witness List – Deletion of witnesses of the witness list – Addition of witnesses of the witness list, Witness summary or will-say statement, Demonstration by Defence of the relevance of the testimony to the proceedings, Estimated length of the examination-in-chief to be provided by the Defence, Information required in order for the Trial Chamber to determine properly the materiality and probative value of the proposed testimony to the proceedings – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A), 73 ter (B) and 73 ter (E)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Prosecutor's Motions for Leave to Call Additional Witnesses and for the Transfer of Detained Witnesses, 24 July 2001 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Prosecutor's Motion to Modify the Sequence of Appearance of Witnesses on her Witness List, 27 February 2002 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Prosecutor's Motion to Drop and Add Witnesses, 30 March 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E), 21 May 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali, Rule 73 ter (E), Rules of Procedure and Evidence, 26 August 2005 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Arsène Shalom Ntahobali's Motion to Amend His Witness List and to Reconsider the Decision of 26 August 2005 Titled: "Decision on the Defence Motion to Modify the List of the Defence Witnesses For Arsène Shalom Ntahobali", 27 January 2006 (ICTR-98-42)

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

SITTING as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the "Avis de modification de la liste des témoins de la défense d'Alphonse Nteziryayo et subsidiairement, requête en modification de la liste des témoins de la défense d'Alphonse Nteziryayo", filed on 26 June 2006 (the "Motion");

CONSIDERING the "Prosecutor's Response to Nteziryayo's Motion to Vary His Witness List", filed on 3 July 2006 (the "Prosecution Response");

CONSIDERING the "*Réplique d'Alphonse Nteziryayo à la* 'Prosecutor's Response to Nteziryayo's Motion to Vary His Witness List'", filed on 4 July 2006 (the "Defence Reply");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence ("The Rules"), particularly Rules 73 *ter* (B) and (E) of the Rules;

NOW DECIDES the matter, pursuant to Rule 73 (A), on the basis of the written submissions of the Parties.

Submissions of the Parties

The Defence

1. The Defence submits that pursuant to Rule 73 *ter* (E), it may modify its witness list without having to file a motion with the Chamber for that purpose, since its own case has not yet started. Accordingly, the Defence moves the Chamber to take note of its new list of witnesses following the deletion and addition of certain witnesses.

2. Subsidiarily, however, the Defence submits that if the Chamber were to find that its leave is required for the Defence to vary its witness list at this stage, it prays the Chamber to:

(i) Order the deletion of the following 22 witnesses from its witness list: AND-1, AND-2, AND-3, AND-4, AND-6, AND-7, AND-8, AND-9, AND-10, AND-12, AND-15, AND-21, AND-22, AND-24, AND-26, AND-27, AND-28, AND-32, AND-33, AND-34, AND-35, and AND-37.

(ii) Order the addition of the following 13 witnesses to its witness list: AND-41, AND-44, AND-50, AND-53, AND-54, AND-59, AND-60, AND-61, AND-64, AND-69, AND-72, AND-73, and AND-74.

(iii) Take note of the new order of appearance of Alphonse Nteziryayo's witnesses as follows: (1) AND-5, (2) AND-11, (3) AND-13, (4) AND-14, (5) AND-16, (6) AND-17, (7) AND-18, (8) AND-19, (9) AND-20, (10) AND-23, (11) AND-25, (12) AND-29, (13) AND-30, (14) AND-31, (15) AND-36, (16) AND-38, (17) AND-41, (18) AND-44, (19) AND-50, (20) AND-53, (21) AND-54, (22) AND-59, (23) AND-60, (24) AND-61, (25) AND-64, (26) AND-69, (27) AND-72, (28) AND-73, and (29) AND-74.

3. The Defence submits that it has lost contact with some of the witnesses who were mentioned in its Response to the Scheduling Order of 14 December 2005, and that it is therefore compelled to substitute them.

4. The Defence submits that the testimony of the witnesses it requests to be added is pertinent to one or more charges against the Accused.

5. The Defence alleges that Witnesses AND-41 and AND-59 will testify on the Gikore meeting and will challenge Prosecution Witness FAH's testimony in this regard. Defence Witness AND-54 will corroborate the testimonies of Witnesses AND-41 and AND-59.

6. As for Witness AND-44, the Defence asserts that he will testify that he escorted Alphonse Nteziryayo when the latter assisted people fleeing to Butare, between 6 and 15 April 1994.

7. With regard to Witness AND-50, the Defence submits that she will testify that she and some other persons were protected by Alphonse Nteziryayo between 6 April and 3 July 1994. She will further testify that she saw Alphonse Nteziryayo almost daily during that period.

8. The Defence alleges that the proposed Witnesses AND-53 and AND-64 will testify to a Kibayi meeting that took place in May 1994, during which Alphonse Nteziryayo made a speech. The said witnesses will challenge Prosecution Witnesses QBU and FAK's testimony concerning, among others, what the Accused said during that meeting.

9. The Defence asserts that the proposed Witness AND-60 will testify about the Muyaga meeting. He will further challenge the entirety or part of Prosecution Witnesses FAB and QBY's testimony. The Defence argues that he is the only witness who can corroborate Witness AND-20's testimony, as Witnesses AND-7 and AND-35 are intended to be withdrawn.

10. The Defence submits that Witness AND-61 will testify about the Ntyazo meeting and will challenge Prosecution Witness FAI's testimony on this point.

11. The Defence argues that the proposed Witness AND-69 will testify on Kabakobwa's event, trainings for the civilian defence purpose and distributions of weapons. He will also challenge the testimony of Prosecution Witnesses FAM, FAI, RV, and QCB.

12. The Defence submits that the proposed Witness AND-72 will testify on the Mugusa meetings and will challenge Prosecution Witness QBV's testimony.

13. Concerning proposed Witness AND-73, the Defence submits that he will testify on the meeting which took place in Kirarambogo, and especially on what the Accused Alphonse Nteziryayo said during that meeting. He will also challenge the testimony of Prosecution Witness RV and will be the only witness who can corroborate the testimony of Witness AND-29.

14. With regard to proposed Witness AND-74, the Defence asserts that he will substantially testify on Alphonse Nteziryayo's functions in the Ministry of the Interior, especially concerning his role within the communal police and the civilian defence. He will also testify on his personal relationship with the Accused Alphonse Nteziryayo and his family.

The Prosecution

15. The Prosecution submits that in the case at bar, under Rule 73 *ter* (E), the Defence must "move by way of motion before the Trial Chamber for leave to vary its decision as to which witnesses are to be called". The Prosecution further submits that, even if Alphonse Nteziryayo has not begun to call witnesses, the Defence phase of the trial has begun, and the Prosecution and the other parties already have received his witness list and begun preparations.

16. The Prosecution consequently submits that the Defence for Alphonse Nteziryayo should move the Trial Chamber for leave to vary its witness list.

17. The Prosecution submits that the Defence for Alphonse Nteziryayo should be asked to notify the Prosecution if Alphonse Nteziryayo will be called.

18. The Prosecution submits that it does not object either to the deletion or to the addition. It requests, however, that the Chamber order the Defence to disclose the proposed witnesses' *will-say* statements to the other Parties.

The Defence Reply

19. The Defence submits that the Prosecution has not given any legal argument when it alleged that the Defence has to file a motion in order to modify its witness list at this stage.

20. The Defence alleges that it has already disclosed the added witnesses' *will-says* to the other Parties.

21. The Defence submits that the Accused Alphonse Nteziryayo has the full right to decide whether or not to testify on his own behalf at any time, with or without a disclosed *will-say*.

Having deliberated

22. The Chamber recalls Rule 73 *ter* (E), which provides that:

> "After commencement of the Defence case, the Defence, if it considers it to be in the interest of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called."

23. The Chamber notes the Defence submissions that as its own case has not yet started in the meaning of the aforesaid Rule, it may therefore vary its witness list without moving the Chamber.

24. The Chamber observes that Rule 73 *ter* (E) appears to address the issue of the modification of the list of Defence witnesses in the context of a single accused trial which differs from the instant case where six accused are jointly tried. The Chamber recalls that it decided during the Pre-Defence Conference of 18 October 2004 that all pre-defence briefs would have to be filed by all accused by 31 December 2004, including the lists of witnesses that they intend to call to testify.[1] The Chamber considers that from that date, the Prosecution and the other Parties began their preparation on the basis

[1] The Prosecutor v. Nyiramasuhuko et al., T. 18 October 2004, p. 20.

of the witnesses lists and summaries attached to the pre-defence briefs. The Chamber notes that the Defence case as a whole effectively started on 31 January 2005 and that for purposes of reasonable preparation any accused who intends to vary his witness list has to comply with the requirement of Rule 73 *ter* (E) in that regard.

25. The Chamber recalls that the Defence for Nteziryayo intends to delete 22 witnesses from its current list and to add 13 new ones and that the Prosecution objects neither to the addition nor the deletion of witnesses sought by the Defence.

On the Deletion of Witnesses

26. The Chamber finds that the proposed deletion of twenty two witnesses could significantly expedite the proceedings and enhance judicial economy.[2] Therefore, the Chamber grants the Defence request to delete Witnesses AND-1, AND-2, AND-3, AND-4, AND-6, AND-7, AND-8, AND-9, AND-10, AND-12, AND-15, AND-21, AND-22, AND-24, AND-26, AND-27, AND-28, AND-32, AND-33, AND-34, AND-35, and AND-37 from its initial list.

On the Addition of Witnesses

27. The Chamber recalls decisions granting motions for additional witnesses by this Tribunal in the interests of justice, and notes that the moving party has always provided an indication of the proposed witness' testimony, in the form of a witness summary or *will-say* statement. The moving party has also to demonstrate the relevance of the evidence to the proceedings and to provide the estimated length of the examination-in-chief. This is to ensure that there is no prejudicial element of surprise to the other Parties and that there exists sufficient information with which to prepare their examinations and make the necessary investigations if required. More importantly, it allows the Chamber to make a proper determination as to the materiality and probative value of the proposed testimony to the proceedings.[3]

28. The Chamber will now examine the materiality and probative value of the proposed additional witnesses:

- Witness AND-50's expected testimony covers largely the period referred to in the Indictment, notably between 6 April and 3 July 1994 and during which he alleged to have seen Alphonse Nteziryayo almost everyday.
- Witnesses AND-53 and AND-64 are expected to testify on the Kibayi meeting held in May 1994.
- Witness AND-60 is expected to testify about the Muyaga meeting during which Alphonse Nteziryayo is alleged to have made a speech and asked the members of population to remain calm and to denounce any suspicious stranger to the authorities.
- Witness AND-61 is expected to testify, among others, on what Alphonse Nteziryayo allegedly said during the meeting held in Ntyazo on 22 May 1994.

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[2] *The Prosecutor v. Nyiramasuhuko et al.,* Decision on the Prosecutor's Motion to Drop and Add Witnesses (TC), 30 March 2004, para. 40.

[3] *Nyiramasuhuko et al*. Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Ntahobali (TC), 26 August 2005 para. 40; *Nyiramasuhuko et al*., Decision on the Prosecutor's Motions for Leave to Call Additional Witnesses and for the Transfer of Detained Witnesses (TC), 24 July 2001; Decision on the Prosecutor's Motion to Modify the Sequence of Appearance of Witnesses on her Witness List (TC), 27 February 2002; *Bagosora et al.,* Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) (TC), 21 May 2004; *Nyiramasuhuko et al.,* Decision on Arsène Ntahobali's Motion to Amend His Witness List and to Reconsider the Decision of 26 August 2005 Titled: "Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali" (TC), 27 January 2006, para. 20.

- Witness AND-69 is expected to testify, among others, on the Kabakobwa's event and the involvement of the Accused with the civilian defense.
- Witness AND-72 is expected to testify, among others, on the Mugusa meetings, the massacres which took place in the vicinity of the communal office of Mugusa and the murder of *conseiller* Nkulikiyinka.
- Witness AND-73 is expected to testify on the meeting held in Kirarambogo on 22 May 1994. He is further alleged to corroborate Witness AND-29's testimony in this respect.

29. The Chamber is of the opinion that the testimony of Witnesses AND-50, AND-53, AND-64, AND-60, AND-61, AND-69, AND-72, and AND-73 may be material to Alphonse Nteziryayo's case and have some probative value. Therefore, the Chamber grants the request for their addition as Defence Witnesses.

Witnesses AND-41, AND-59 and AND-54

30. The Chamber observes that Witnesses AND-41, AND-59, and AND-54 could be material to Nteziryayo's case as they are expected to testify on the participation of Alphonse Nteziryayo in the Gikore meeting during which he may have made a speech calling on the members of population to stop violence and to assist the authorities restoring peace and may have some probative value.

31. However, the Chamber considers that two witnesses' testimony on the Gikore meeting should suffice. The Defence should choose two witnesses and file their pseudonyms together with a revised list of witnesses, within two weeks from the date of this decision.

Witnesses AND-44 and AND-74

32. The Chamber notes that the Defence submits that Witness AND-44 should testify that between 6 and 15 April 1994, Alphonse Nteziryayo helped people escape to Butare.

33. The Chamber further notes that Witness AND-74 is expected to testify substantially on Alphonse Nteziryayo's functions in the Ministry of the Interior, especially concerning his role within the communal police and the civilian defense. He will also testify on his personal relationship with the Accused Alphonse Nteziryayo and his family.

34. The Chamber is of the view that Witness AND-74's *will-say* statement as produced in support of the request for his addition does not allow the Chamber to fully determine the materiality of his expected testimony. His will-say statement does not seem to address Alphonse Nteziryayo's functions in the Ministry of the Interior as submitted by the Defence.

35. In the Chamber's view, Witnesses AND-44 and Witness AND-74's expected testimonies may be material to the Defence case and may have some probative value. The Chamber grants the request for their addition. Nonetheless, the Chamber orders the Defence to provide more details on their expected testimonies in revised will say statements.

36. Finally, the Chamber points out that Nteziryayo's witness list, as it stands, is still long and must be significantly reduced. It therefore urges the Defence to revise it further with a view to reducing it.

On the Prosecution Request

37. With regard to the Prosecution request to be notified if the Accused Alphonse Nteziryayo will be testifying on his own behalf, the Chamber finds such a request to be premature and thus denies it.

38. Concerning the Prosecution's further request for disclosure of the proposed witnesses' *will-say* statements to the other Parties, the Chamber notes that the disclosures have already been made. Therefore, this request has become moot.

FOR THE ABOVE REASONS, THE TRIBUNAL,

GRANTS the Defence Motion to delete from its list Witnesses AND-1, AND-2, AND-3, AND-4, AND-6, AND-7, AND-8, AND-9, AND-10, AND-12, AND-15, AND-21, AND-22, AND-24, AND-26, AND-27, AND-28, AND-32, AND-33, AND-34, AND-35, and AND-37.

GRANTS the Defence Motion to add to its list Witnesses AND-50, AND-53, AND-60, AND-61, AND-64, AND-69, AND-72 and AND-73.

ORDERS the Defence to provide a revised witness list within two weeks from the date of this decision.

GRANTS the Defence Motion to add to its list Witness AND-44 and Witness AND-74, and

ORDERS the Defence to provide more details concerning the circumstances surrounding the alleged evacuation of people by the Accused to Butare and concerning Alphonse Nteziryayo's functions in the Ministry of the Interior.

URGES the Defence to reduce significantly its witness list.

DENIES the Prosecution's request to be notified if the Accused Alphonse Nteziryayo will be testifying on his own behalf.

DECLARES moot the Prosecution request for disclosure of the proposed witnesses' will-say statements to the other Parties.

Arusha, 14 July 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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Decision on Sylvain Nsabimana's Extremely Urgent Motion to Drop and Add Witnesses
14 July 2006 (ICTR-97-29A-T ; Joint Case : ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Sylvain Nsabimana – Modification of the Defence Witness List – Deletion of witnesses of the witness list – Addition of witnesses of the witness list, Witness summary or will-say statement, Information required in order for the Trial Chamber to determine properly the materiality and probative value of the proposed testimony to the proceedings – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A) and 73 ter (E)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Prosecutor's Motions for Leave to Call Additional Witnesses and for the Transfer of Detained Witnesses, 24 July 2001 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Prosecutor's Motion to Modify the Sequence of Appearance of Witnesses on her Witness List, 27 February 2002 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Prosecutor's Motion to Drop and Add Witnesses, 30 March 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E), 21 May 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali, Rule 73 ter (E), Rules of Procedure and Evidence, 26 August 2005 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Arsène Shalom Ntahobali's Motion to Amend His Witness List and to Reconsider the Decision of 26 August 2005 Titled: "Decision on the Defence Motion to Modify the List of the Defence Witnesses For Arsène Shalom Ntahobali", 27 January 2006 (ICTR-98-42)

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the "Requête en extrême urgence de Sylvain Nsabimana aux fins d'adjonction et de retrait de témoins sur sa liste", filed on 7 July 2006 (the "Motion") and the annex thereof, filed on the same day;

CONSIDERING the "Prosecutor's Response to the Motion of Sylvain Nsabimana to Withdraw 7 Witnesses and Add 1 New Witness", filed on 10 July 2006 (the "Prosecution Response");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 73 *ter* (E);

NOW DECIDES the matter, pursuant to Rule 73 (A), on the basis of the written submissions of the Parties.

Submissions of the Parties

The Defence

1. The Defence moves the Chamber for leave to delete from its witness list the following witnesses: DECA, TEME, JOJO, HINO, QN3, QN5, and QN6; and to add one, Witness AGWA. The Defence alleges that it had lost contact with Witness AGWA, so he could not be included in Nsabimana's initial witness list.

2. The Defence argues that Witness AGWA is relevant to Nsabimana's case, as he is the sole witness who will testify on Nsabimana's character. This proposed witness should testify at the end of Nsabimana's case, allowing the other Parties to prepare adequately, and that his expected examination-in-chief would take only four hours.

The Prosecution

3. The Prosecution submits that the Defence has failed to provide the *will-say* statement of Witness AGWA in support of its request for the addition of this witness. The Prosecution states, however, that it does not object to the Motion, subject to adequate disclosure of Witness AGWA's intended testimony and his or her personal particulars by the Defence, in due time.

Deliberations

4. The Chamber recalls Rule 73 *ter* (E), which provides that:

> "After commencement of the Defence case, the Defence, if it considers it to be in the interest of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called."

On the Deletion of Witnesses

5. The Chamber finds that the proposed deletion of seven witnesses could significantly expedite the proceedings and enhance judicial economy.[1] Therefore, the Chamber grants the Defence request to delete Witnesses DECA, TEME, JOJO, HINO, QN3, QN5, and QN6 from its initial list.

On the Addition of Witness AGWA

6. The Chamber notes that the Defence did provide Witness AGWA's *will-say* statement on 7 July 2006 in a separate document, contrary to the Prosecution submissions.

7. The Chamber recalls decisions granting motions for additional witnesses by this Tribunal in the interests of justice, and notes that the moving party has always provided an indication of the proposed witness' testimony, in the form of a sufficient witness summary or *will-say* statement. The moving party has also to demonstrate the relevance of the evidence to the proceedings and the estimated length of the examination-in-chief. This is to ensure that there is no prejudicial element of surprise to the other Parties and that there exists sufficient information with which to prepare their examinations and make the necessary investigations if required. More importantly, it allows the Chamber to make a proper determination as to the materiality and probative value of the proposed testimony to the proceedings.[2]

8. After reviewing Witness AGWA's *will-say* statement, the Chamber observes that this witness will testify, among others, on the pacification meeting convened by the Accused Nsabimana at Nyarutegia market.[3] The Chamber is satisfied that Witness AGWA's proposed testimony contains relevant and probative evidence which the Chamber should hear in the interests of justice. The Chamber therefore grants the motion for the addition of Witness AGWA as a Defence Witness for Nsabimana.

9. Finally, the Chamber orders the Defence to call Witness AGWA to testify towards the end of Nsabimana's case to allow the other Parties to prepare adequately.

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[1] *Nyiramasuhuko et al*., Decision on the Prosecutor's Motion to Drop and Add Witnesses (TC), 30 March 2004, para. 40.
[2] *Nyiramasuhuko et al*. Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Ntahobali (TC), 26 August 2005 para. 40; *Nyiramasuhuko et al*., Decision on the Prosecutor's Motions for Leave to Call Additional Witnesses and for the Transfer of Detained Witnesses (TC), 24 July 2001; Decision on the Prosecutor's Motion to Modify the Sequence of Appearance of Witnesses on her Witness List (TC), 27 February 2002; *Bagosora et al*., Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) (TC), 21 May 2004; *Nyiramasuhuko et al*., Decision on Arsène Ntahobali's Motion to Amend His Witness List and to Reconsider the Decision of 26 August 2005 Titled: "Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali" (TC), 27 January 2006, para. 20.
[3] In the Motion it is stated NYARUTEGIA whereas in the *will-say* it is written NYARUTEJA.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Defence Motion to delete from its list Witnesses DECA, TEME, JOJO, HINO, QN3, QN5 and QN6;

GRANTS the Defence Motion to add Witness AGWA to its list; and

ORDERS the Defence to call Witness AGWA to testify towards the end of its case.

Arusha, 14 July 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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Decision on Pauline Nyiramasuhuko's Extremely Urgent Motion for Extension of Time within which to File a Response
17 August 2006 (ICTR- ICTR-97-21-T ; Joint Case : ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Sylvain Nsabimana and Pauline Nyiramasuhuko – Extension of Time, Moving party has to demonstrate diligence in its attempts to meet the deadline – Motion denied

International Instruments cited :

Code of Professional Conduct for Defence Counsel, art. 6 ; Rules of Procedure and Evidence, rules 73 (A) and 73 (F)

International Case cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Elie Ndayambaje, Decision on Ndayambaje's Motion for Extension of Time to Reply to the Prosecutor's Response to its Motion for Exclusion of Evidence, of 30 June 2006 (ICTR-96-8)

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the "Requête d'extrême urgence en extension de délai aux fins de présenter la réponse à la requête en extrême urgence de Sylvain Nsabimana en admission de la déclaration écrite du témoin JAMI en application de l'Article 92 bis du Règlement de Preuve et Procédure et le cas échéant à toutes autres procédures déposées entre le 18 juillet 2006 et le 7 août 2006", filed on 1 August 2006 (the "Motion");

CONSIDERING the "Réplique de Sylvain Nsabimana à la Requête « d'extrême urgence en extension de délai aux fins de présenter la réponse à la requête en extrême urgence de Sylvain Nsabimana en admission de la déclaration écrite du témoin JAMI en application de l'Article 92 bis du

Règlement de Preuve et Procédure et le cas échéant à toutes autres procédures déposées entre le 18 juillet 2006 et le 7 août 2006 »", filed on 7 August 2006 ("Nsabimana's Response");

CONSIDERING the Statute of the Tribunal (the "Statute"), the Rules of Procedure and Evidence ("the Rules"), and the Code of Professional Conduct for Defence Counsel ("the Code"), in particular Article 6;

NOW DECIDES the matter, pursuant to Rule 73 (A), on the basis of the written submissions of the parties.

Submissions of the Parties

Nyiramasuhuko's Defence

1. The Defence for Nyiramasuhuko submits that it was informed by its Legal Assistant of a memo relating to Nsabimana's Motion of 31 July 2006[1], setting out the timeframes for Responses/Replies to it.

2. The Defence submits that both Lead Counsel and co-Counsel are, during the judicial break and until 7 August 2006, on vacation outside Canada and have no access to e-mail, including the Motion mentioned above. The Defence submits that its Legal Assistant did not receive Nsabimana's Motion on the date it was filed, but rather the memo setting out the timeframes for filing Responses and Replies.

3. Given the technical difficulties it has faced, the Defence requests an extension of time to 7 August 2006 to respond to Nsabimana's Motion, as well as to any other motion(s) filed between 18 July 2006 and 7 August 2006.

Nsabimana's Response

4. Recalling the events that led to the filing of its Motion, the Defence for Nsabimana objects to Nyiramasuhuko's request, arguing that the reason advanced by Nyiramasuhuko for an extension is not based on any premise serious enough to warrant the extension requested. In support of this, the Defence for Nsabimana underscores Article 6 of the Code of Professional Conduct for Defence Counsel and draws the Chamber's attention to the *Ndayambaje* Decision of 30 June 2006.[2]

5. The Defence notes that Counsel for the other Parties in the case, who were also on vacation, were able to file Responses to the Motions. In any case, the Defence for Nyiramasuhuko's ability to file this Motion shows its general ability to do so.

6. Moreover, the Defence recalls that the session is expected to resume on 21 August 2006 and that it is required to issue its order of calling witnesses at the latest on 14 August 2006.[3] The Defence argues that therefore, it is in the interests of justice that the said Motions be decided upon as matter of extreme urgency, so that it may prepare its case within the time limits prescribed by the Chamber.

Having deliberated,

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[1] Requête en extrême urgence de Sylvain Nsabimana en admission de la déclaration écrite du témoin JAMI en application de l'Article 92 bis du Règlement de Preuve et Procédure.
[2] *Prosecutor v. Ndayambaje*, ICTR-96-8-T (TC), Decision on Ndayambaje's Motion for Extension of Time to Reply to the Prosecutor's Response to its Motion for Exclusion of Evidence, of 30 June 2006, para. 14.
[3] See Annexes to the Response.

7. The Chamber has considered all the submissions of the Parties. It notes that to date, the Defence of Nyiramasuhuko has not filed any Responses to the various Motions nor has it filed a reply to Nsabimana's Response to the instant Motion.

8. The Chamber recalls Article 6 of the Code of Professional Conduct for Defence Counsel which provides that "Counsel must represent a client diligently in order to protect the client's best interests."

9. The Chamber further recalls the *Ndayambaje* Decision referred to above in which the Chamber decided that for such an extension to be granted, the moving party must demonstrate diligence in its attempts to meet the deadline and also that it was only due to reasons beyond its control that it has failed to do so.

10. The Chamber notes that the Defence requested an extension of time until 7 August 2006 in order to file Response(s) to various Motions filed between 18 July and 7 August 2006. During this period, three Motions have been filed, namely, Nsabimana's Motion to Drop and Add Witnesses, filed on 27 July 2006,[4] Nsabimana's Motion to Hear Witness AGWA'S Testimony by Video-link, filed on 27 July 2006,[5] and Nsabimana's Motion to Admit Witness JAMI's Statement under Rule 92 *bis*, filed on 31 July 2006.[6]

The merits of this Motion with regard to all motions filed between 18 July and 7 August 2006

11. Regarding the two Motions filed on 27 July 2006, the Registry's Scheduling Order required Responses by 31 July 2006.[7] Since the instant Motion was filed on 2 August 2006, two days after the expiration of time within which to file Responses, the Chamber finds that, in effect, there is no time to extend. The Chamber will address below the merits of this Motion with regard to all motions filed between 18 July and 7 August 2006.

12. Regarding the Motion filed on 31 July 2006, the Chamber notes that the Registry's Scheduling Order required Responses by 3 August 2006.[8] Since the instant Motion was filed on 2 August 2006, one day before expiration of the time limits for filing a response, the Chamber will consider the merits of the request for extension.

13. The Chamber notes that the Defence principally argues that because Counsel was on vacation outside their home country, they were unable to access their e-mails and thus to receive timely information. The Defence further submits that it was only informed of the existence of the Nsabimana Motion of 31 July 2006, because the Legal Assistant had informed it of the relevant Scheduling Order.

14. The Chamber notes that the Defence has not demonstrated any efforts it has made to prevent this kind of situation, even when on vacation. In the Chamber's opinion, any diligent counsel would have made arrangements within the team to ensure they are informed in a timely fashion of all that occurs in the case and thus to ensure timely action can be taken, when necessary. In this context, the Chamber notes that the Accused Nyiramasuhuko has been assigned both a Lead and a Co-counsel. The

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[4] Requête en extrême urgence de Sylvain Nsabimana aux fins de retrait et d'adjonction de témoins sur sa liste Article 73 ter (E) du Règlement de Preuve de Procédure.

[5] Requête en extrême urgence de Sylvain Nsabimana pour faire témoigner AGWA par vidéo conférence Articles 54, 73 et 71 du Règlement de Preuve et de Procédure (Strictement Confidentiel et sous scellés)

[6] Requête en extrême urgence de Sylvain Nsabimana en admission de la déclaration écrite du témoin JAMI en application de l'article 92 bis du Règlement de Preuve et de Procédure (Strictement Confidentiel).

[7] See Facsimile Transmission dated 28 July 2006 from Mr. Roger Kouambo, Trial Chamber II Coordinator in the Court Management Section, at para. 2, indicating that "The Parties have until Monday 31st of July 2006 to file their Responses, if any, after receipt of this notification."

[8] See Facsimile Transmission dated 31 July 2006 from Mr. Roger Kouambo, Trial Chamber II Coordinator in the Court Management Section, at para. 2, indicating that "The Prosecutor and the other Defence teams have three (3) days from the date of this notification to file their Responses, if any, after receipt of this notification."

Chamber further notes that the Defence has not demonstrated that circumstances beyond Counsel's control prevented it from taking action in a timely manner. Accordingly, the Chamber denies the Defence request to extend the deadline within which to file responses to the various Motions filed between 18 July and 7 August 2006.

15. In addition, the Chamber finds the Motion is frivolous, within the purview of Rule 73 (F) of the Rules, and orders that the Registry deny all fees associated with its preparation.

FOR THE ABOVE REASONS, THE TRIBUNAL,

DENIES the Defence request to extend the deadline within which to file responses to the various Motions filed between 18 July and 7 August 2006; and

ORDERS that the Registry deny the Defence of Nyiramasuhuko all fees associated with preparation of the instant Motion.

Arusha, 17August 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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Decision on Sylvain Nsabimana's Extremely Urgent Motion to Drop and Add Witnesses
17 August 2006 (ICTR-97-29-T ; Joint Case : ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

International Instruments cited :

Rules of Procedure and Evidence, rules 73 (A), 73 ter (B) and 73 ter (E)

International Case cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Prosecutor's Motions for Leave to Call Additional Witnesses and for the Transfer of Detained Witnesses, 24 July 2001 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Prosecutor's Motion to Modify the Sequence of Appearance of Witnesses on her Witness List, 27 February 2002 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E), 21 May 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali, Rule 73 ter (E), Rules of Procedure and Evidence, 26 August 2005 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Alphonse Nteziryayo, Decision on Alphonse Nteziryayo's Motion to Modify His Witness List, 14 July 2006 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Arsène Shalom Ntahobali's Motion to Amend His Witness List and to Reconsider the Decision of 26 August 2005 Titled: "Decision on the Defence Motion to Modify the List of the Defence Witnesses For Arsène Shalom Ntahobali", 27 January 2006 (ICTR-98-42)

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the "Requête en extrême urgence de Sylvain Nsabimana aux fins de retrait et d'adjonction de témoins sur sa liste", filed on 27 July 2006 (the "Motion");

CONSIDERING

(i) the "Prosecutor's Response to the Requête en extrême urgence de Sylvain Nsabimana aux fins de retrait et d'adjonction de témoins sur sa liste Article 73 ter (E) du Règlement de Preuve et de Procédure", filed on 31 July 2006 (the "Prosecution Response");

(ii) the "Observations de Sylvain Nsabimana sur la réponse du Procureur à sa « Requête en extrême urgence de Sylvain Nsabimana aux fins de retrait et d'adjonction de témoins sur sa liste»", filed on 3 August 2006 (the "Defence Reply");

CONSIDERING the Statute of the tribunal (the "Statute") and the Rules of Procedure and Evidence ("The Rules"), particularly Rule 73 *ter* (B) and (E) of the Rules;

NOW DECIDES the matter, pursuant to Rule 73 (A) of the Rules, on the basis of the written submissions of the parties.

Submissions of the Parties

The Defence

1. The Defence, recalling its Pre-Defence Brief filed 30 December 2004, and the Chamber's Decision of 14 July 2006, granting its Motion to add one witness and to remove seven others from its initial list of witnesses, requests the Chamber to grant it leave to remove three witnesses (JEJE, DOS, and QN1) from its list of witnesses and add one witness (DEDE).

2. The Defence requests the addition of Witness DEDE who it claims could not be added to the Defence's initial list of witness, as he could not be found at the time. It was only in July 2006 that the Defence was able to trace the witness' whereabouts.

3. The Defence submits that, according to the relevant *will-say* statement attached to the Motion, Witness DEDE is expected to testify in chief for about four hours, and essentially with regard to the Accused's character, since the proposed witness has known him for many years, the installation of the Accused as *Préfet*, the events at Mbazi and the arrests of the authors of the crimes at the behest of the Accused. At the same time, he is expected to contradict the testimony of Prosecution Witness SJ, whom he knew during the events of 1994, and about the numerous displacements at the *préfectural* office and the requisition of petrol. The Defence further submits that Witness DEDE is important to its case, because to this moment, he is the only witness who will talk about the events mentioned above.

4. The Defence, recalling the jurisprudence of the Tribunal, in particular in the case of *Nahimana*,[1] submits that the addition of Witness DEDE will not cause prejudice to any of the Parties since he will be called at the end of the Defence case, thus allowing the other Parties to prepare their cross-examination.

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[1] *Prosecutor v. Nahimana et. al.*, ICTR-99-52-T, (TC) Decision on the Defence Motion to Re-instate the List of Witnesses for Ferdidnand Nahimana, Pursuant to Rule 73 *ter*, at para. 6.

The Prosecution

5. The Prosecution submits that it has no objections to the Defence's Motion with respect to the dropping of the witnesses. Furthermore, it does not oppose the request to add Witness DEDE if the Chamber decides that the criteria for granting the motion have been met.

6. The Prosecution underscores and requests that its right to have 21 days to investigate the allegations of the witness before his cross-examination, pursuant to Rule 73 of the Rules, is preserved.

7. However, the Prosecution argues that the *will-say* statement submitted for Witness DEDE is vague and ambiguous and constitutes insufficient notice of the expected testimony. It requests that the Defence give "further and better particulars" of the expected testimony of the witness.

8. The Prosecution requests that the Chamber order the Defence to disclose the expected order of appearance of the upcoming witnesses.

The Defence Reply

9. The Defence submits that it does not agree with the Prosecution demand for further information about Witness DEDE, saying that it will not provide personal information about the witness until he is added onto the witness list. It assures the court that as soon as the witness is added on to the list, the Defence will disclose the witness' personal particulars within the prescribed timeframes.

10. The Defence also submits that the Prosecutor's claim that Witness DEDE's statement is vague is "not pertinent."

Having deliberated,

11. The Chamber has considered the submissions of the Parties, noting that none of the Defence Teams have filed Responses to the Motion.

12. The Chamber recalls Rule 73 *ter* (E) of the Rules, which provides that:

> After commencement of the Defence case, the Defence, if it considers it to be in the interest of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as which witnesses are to be called.

13. The Chamber notes that the Prosecution offers no specific objection to the Defence request to add or delete some of its witnesses, and reminds the Chamber of its right to a time period of 21 days in which to prepare, before a new witness can be brought to the stand.

On the Deletion of Witnesses

14. The Chamber is satisfied that the proposed deletion of three witnesses could expedite the proceedings and enhance judicial economy.[2] Accordingly, the Chamber grants the Defence request to delete Witnesses JEJE, DOS, and QN1 from the Defence's list of witnesses.

On the Addition of Witness DEDE

15. The Chamber recalls its recent decision in *Nteziryayo*, in which it noted:

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[2] *The Prosecutor v. Nyriamasuhuko et al.,* T. 18 October 2004, p. 20. Also, *The Prosecutor v. Nteziryayo*, Decision on Alphonse Nteziryayo's Motion to Modify His Witness List (TC), 14 July 2006, para. 26.

> The moving party has always provided an indication of the proposed witness' testimony, in the form of a witness summary or will-say statement. The moving party has also to demonstrate the relevance of the evidence to the proceedings and to provide the estimated length of the examination-in-chief. This is to ensure that there is no prejudicial element of surprise to the other Parties and that there exists sufficient information with which to prepare their examinations and make the necessary investigations if required. More importantly, it allows the Chamber to make a proper determination as to the materiality and probative value of the proposed testimony to the proceedings.[3]

16. The Chamber notes that according to the Defence, Witness DEDE's expected testimony covers the Accused's character, the installation of the Accused as *Préfet*, the events at Mbazi, and counters the testimony of Prosecution Witness SJ, whom Witness DEDE knew during the events of 1994. Witness DEDE is also expected to testify about the numerous displacements at the *préfectural* office and the requisition of petrol. He therefore appears to be an important witness for the Defence. It is the Chamber's opinion that the proposed testimony of Witness DEDE may be material and may have probative value to the case of the Accused. The Chamber thus grants the Defence request to add him to his list of witnesses.

17. With regard to the request for timely disclosure of Witness DEDE's identifying information, the Chamber notes that the Defence is required to provide such identifying details to the other Parties 21 days before Witness DEDE testifies. Accordingly, the Chamber orders it to make a timely disclosure of the identifying information of Witness DEDE, so that the other Parties may prepare their cross-examination. Furthermore, the Chamber orders the Defence to call the witness towards the end of its case.

On the Prosecution's other Prayers

18. The Chamber recalls the Prosecution's submissions that Witness DEDE's will-say statement is too vague, particularly with regard to its paragraph 9, which indicates, "Witness DEDE will contradict 'certain allegations' of the Prosecution witness." The Chamber considers that the particular wording of this sentence is imprecise as to the exact allegations Witness DEDE is expected to contradict. The Chamber finds that this type of imprecision may impede the other Parties' right to sufficiently investigate the allegations and conduct cross-examination. The Chamber therefore orders the Defence to provide further and better particulars to Witness DEDE's will-say statement in that regard.

FOR THE ABOVE REASONS, THE TRIBUNAL,

GRANTS the Defence Motion, and orders the Defence to delete Witnesses JEJE, DOS, and QN1 from its list;

GRANTS the Defence Motion to add Witness DEDE to its list, and;

I. ORDERS the Defence to make timely disclosure of the identifying information of Witness DEDE;

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[3] *The Prosecutor v. Nteziryayo*, Decision on Alphonse Nteziryayo's Motion to Modify His Witness List (TC), 14 July 2006, para. 27. Also, *Nyiramasuhuko et al*. Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Ntahobali (TC), 26 August 2005 para. 40; *Nyiramasuhuko et al*., Decision on the Prosecutor's Motions for Leave to Call Additional Witnesses and for the Transfer of Detained Witnesses (TC), 24 July 2001; Decision on the Prosecutor's Motion to Modify the Sequence of Appearance of Witnesses on her Witness List (TC), 27 February 2002; *Bagosora et al*., Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) (TC), 21 May 2004; *Nyiramasuhuko et al*., Decision on Arsène Ntahobali's Motion to Amend His Witness List and to Reconsider the Decision of 26 August 2005 Titled: "Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali" (TC), 27 January 2006, para. 20.

II. ORDERS the Defence to provide further and better particulars to Witness DEDE's *will-say* statement on the issue of contradicting the Prosecution witness concerned; and

III. ORDERS the Defence to call Witness DEDE towards the end of its case.

Arusha, 17 August 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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Decision on Sylvain Nsabimana's Extremely Urgent – Strictly Confidential – Under Seal – Motion to Have Witness AGWA Testify via Video-Link
17 August 2006 (ICTR-97-29-T ; Joint Case : ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Sylvain Nsabimana – Video-Link Testimony, Discretionary power of the Trial Chamber to grant the hearing of testimony by video-conference in lieu of physical appearance where it is in the interests of justice, Demonstration of the importance of the Testimony, Grave health problems are a sufficient reason for video conferences when health issues are clearly set out – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 71 (A), 71 (D), 73 (A) and 90 (A).

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 October 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Testimony by Video-Conference, 20 December 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko, Decision on Nyiramasuhuko's Strictly Confidential Ex-Parte – Under Seal – Motion for Additional Protective Measures for Defence Witness WBNM, 17 June 2005 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Arsène Shalom Ntahobali's Extremely Urgent Motion for Video Link Testimony of Defence Witness WDUSA in Accordance With Rule 71 (A) and (D) of the Rules of Procedure and Evidence, 15 February 2006 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Alphonse Nteziryayo, Decision on Alphonse Nteziryayo's Motion to Modify His Witness List, 14 July 2006 (ICTR-98-42)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Duško Tadić, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, 25 June 1996 (IT-94-1) ; Trial Chamber, The Prosecutor v. Milorad Krnojelac, Order for Testimony via Video-Conference Link, 15 January 2001 (IT-97-25) ; Trial Chamber, The Prosecutor v. Slobodan Milošević, Order on Prosecution Motion for the Testimony of Nojko Marinovic visa Video-Conference Link of 19 February 2003 (IT-02-54) ; Trial Chamber, The Prosecutor v. Radoslav Brđanin, Order for Testimony via Video-Conference Link Pursuant to Rule 71 bis, 9 September 2003 (IT-99-36)

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEISED of the "Requête en extrême urgence de Sylvain Nsabimana pour faire témoigner AGWA par vidéo conférence, Articles 54, 73 et 71 du Règlement de Preuve et de Procédure (Strictement confidentiel et sous scellés) ", filed on 27 July 2006 (the "Motion"), annexed to which is a medical certificate of Witness AGWA of 18 July 2006 (the "Annex");

CONSIDERING :

The "Prosecutor's Response to the "Requête en extrême urgence de Sylvain Nsabimana pour faire témoigner AGWA par vidéo conférence strictement confidentiel et sous scellés (Art. 73 (A) et 71 (A)"", filed on 31 July 2006 (the "Prosecutor's Response");

i. The "Observations de Sylvain Nsabimana sur la réponse du Procureur à sa « Requête en extrême urgence de Sylvain Nsabimana pour faire témoigner AGWA par vidéo conférence », Articles 54, 73 et 71 du Règlement de Preuve et de Procédure (strictement confidentiel et sous scellés)", filed on 3 Ausgust 2006 (the "Defence Reply");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rules 71 (D) and 71 (A) of the Rules*;*

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

Submissions of the Parties

The Defence

1. The Defence moves the Chamber to allow Witness AGWA to testify from Belgium "or any other appropriate place" during the first week of September 2006 by means of a video-conference, pursuant to Rule 71 (D) of the Rules.[1] The Defence submits that this is necessary due to medical reasons which make it impossible for the witness to travel to Arusha.[2]

2. The Defence submits that pursuant to Rules 90 (A) and 71 of the Rules, while the principle is for witnesses to give oral testimony before the Chamber, a Chamber may, in exceptional circumstances and in the interests of justice, order a deposition by way of a video-conference.[3] The Defence relies on this Chamber's jurisprudence according to which the granting of video conference depends on the assessment of (i) the importance of the testimony; (ii) the inability or unwillingness of the witness to attend; and (iii) whether a good reason can be adduced for that inability or unwillingness.[4] According to the Defence, these conditions are fulfilled.

3. The Defence argues that the importance of Witness AGWA's expected testimony to Nsabimana's case has been noted by the Chamber, which held that it "contains relevant and probative

[1] The Motion, paras. 8, 23, 25.
[2] The Motion, para. 19; see also Annex.
[3] The Motion, paras. 9-11.
[4] The Motion, para. 14, quotes *Prosecutor v. Nyiramasuhuko et al.*, Decision on Arsène Ntahobali's Extremely Urgent Motion for Video-Link Testimony of Defence Witness WDUSA in Accordance With Rule 71 (A) and (D) of the Rules of Procedure and Evidence, 15 February 2006, para. 8.

evidence which the Chamber should hear in the interests of justice".[5] The Defence submits that the first criterion is therefore met.[6]

4. The Defence also states that Witness AGWA cannot travel to Arusha for medical reasons, as is borne out by the Annex. The Defence relies on the Tribunal's and the International Criminal Tribunal for the Former Yugoslavia's jurisprudence to submit that health problems have been held to be exceptional circumstances which justify testimony by video conference.[7]

The Prosecution

5. The Prosecution submits that it is entirely within the Chamber's discretion to grant a video conference in this matter.[8] However, it argues that the Defence has not shown the nature or seriousness of the witness' medical concerns and has thus failed to provide the Chamber with sufficient information on the basis of which to decide whether a video conference should be granted.[9] Further, the Prosecution submits that because of the importance attributed to the proposed testimony of Witness AGWA, it would be in the interests of justice that he be heard in Arusha. Finally, the Prosecution submits that the Defence has not shown any reason for the witness' unwillingness to come to Arusha, other than a generalized claim that he is unwell.[10]

The Defence Reply

6. The Defence submits that it is not authorised to indicate in detail the medical concerns of Witness AGWA because of medical confidentiality.[11] However, it submits that since the Witness has been advised not to travel during his treatment, this has been done for good reasons. Besides, it is not for the Prosecution or other Parties to the proceedings to assess the existence of valid medical reasons that might cause a witness' inability to travel, but for members of the medical profession alone.[12] The Defence indicates, however, that the Prosecution is free to contact the medical doctor who signed the witness' medical certificate.[13]

7. As to the Prosecution's argument that it would be in the interests of justice to have Witness AGWA testify in Arusha, the Defence submits that a testimony via video conference does not infringe upon the Parties' rights and is not contrary to the interests of justice.[14] As the witness cannot come to Arusha to testify, the video conference is the only way to hear him.[15] Pursuant to Art. 19 (1) of the Statute, which safeguards the Accused's rights, this is what has to be done.[16]

Having deliberated,

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[5] The Motion, paras. 15-16, quotes *Prosecutor v. Nyiramasuhuko et al.*, Decision on Sylvain Nsabimana's Extremely Urgent Motion to Drop and Add Witnesses, 14 July 2006, para. 8.
[6] The Motion, para. 18.
[7] The Motion, paras. 19-21, quotes Prosecutor v. Bagosora et al., Decision on Testimony By Video Conference, 20 December 2004, para. 5; Prosecutor v. Milosevic, Ordonnance relative a la requête de l'accusation aux fins d'entendre le témoignage de NOJKO Marinovic par voie de vidéo conférence, 19 February 2003.
[8] Prosecutor's Reply, para. 7.
[9] Prosecutor's Reply, para. 2.
[10] Prosecutor's Reply, paras. 3, 5.
[11] Defence Reply, para. 4.
[12] Defence Reply, para. 6.
[13] Defence Reply, para. 8.
[14] Defence Reply, para. 10.
[15] Defence Reply, para. 13.
[16] Defence Reply, para. 14.

8. The Chamber underscores the general rule articulated in Rule 90 (A), that "witnesses shall, in principle, be heard directly by the Chamber."[17] Nonetheless, the Chamber recalls that it has discretion to grant the hearing of testimony by video-conference in lieu of physical appearance where it is in the interests of justice, based on an assessment of; (i) the importance of the testimony, (ii) the inability or unwillingness of the witness to attend, (iii) whether a good reason can be adduced for that inability and unwillingness.[18] The burden of proof for authorising a witness' testimony to be taken by way of video-conference lies with the Party making the request.[19]

9. With respect to the first criterion, after having carefully reviewed the information regarding Witness AGWA's expected testimony contained both in the Motion and in the *will-say*, the Chamber finds that the Defence has demonstrated that his testimony is sufficiently important to the Accused's defence. The Chamber particularly recalls that it granted the Defence's request to add Witness AGWA to its witness list because he was expected to testify "among others, on the pacification meeting convened by the Accused Nsabimana at Nyarutegia market".[20]

10. With respect to the second and third criteria, the Chamber has noted the medical certificate annexed to the Motion, indicating that Witness AGWA is formally advised against travelling because of the treatment he is receiving, but not specifying the nature or gravity of his illness. While grave health problems have repeatedly been held to constitute a sufficient reason for video conferences, the Chamber notes that such health issues were clearly set out.[21] In the instant case, however, the Chamber considers that the Defence has not provided sufficient information regarding the witness' state of health, given that testimony via video-conference may only be granted in exceptional circumstances. Therefore, the second and third criterion for allowing the witness to testify via video-link have not been met and thus, the Defence prayer is denied.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in all respects.

Arusha, 17 August 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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[17] *Prosecutor v. Tadic*, Case N°IT-94-1-T, (TC) Decision on the Defence Motion to Summon and Protect Defence Witnesses. and on the Giving of Evidence by Video-Link, 25 June 1996, para.19, recalled in *Prosecutor v. Nyiramasuhuko et al.*, Decision on Arsène Shalom Ntahobali's Extremely Urgent Motion for Video Link Testimony of Defence Witness WDUSA in Accordance With Rule 71 (A) and (D) of the Rules of Procedure and Evidence, 15 February 2006, para. 7.

[18] *Prosecutor v. Bagosora et al,* ICTR-98-41-T, Decision on prosecution Request for testimony of Witness BT via Video-Link, 8 October 2004, para.6, recalled in *Prosecutor v. Nyiramasuhuko et al.*, Decision on Arsène Shalom Ntahobali's Extremely Urgent Motion for Video Link Testimony of Defence Witness WDUSA in Accordance With Rule 71 (A) and (D) of the Rules of Procedure and Evidence, 15 February 2006, para. 8.

[19] *Prosecutor v. Nyiramasuhuko et al.* ICTR-98-42-T, (TC) Decision on Nyiramasuhuko's Strictly Confidential *ex-parte* under seal Motion for Additional Protective Measures for Defence Witness WBNM of 17 June 2005, para. 9; *Prosecutor v. Nyiramasuhuko et al.*, Decision on Arsène Shalom Ntahobali's Extremely Urgent Motion for Video Link Testimony of Defence Witness WDUSA in Accordance With Rule 71 (A) and (D) of the Rules of Procedure and Evidence, 15 February 2006, para. 8.

[20] *Prosecutor v. Nyiramasuhuko et al.*, Decision on Sylvain Nsabimana's Extremely Urgent Motion to Drop and Add Witnesses, 14 July 2006, para. 8.

[21] *Prosecutor v. Bagosora et al.*, Decision on Testimony By Video-Conference, 20 December 2004, para. 5, quoting *Prosecutor v. Brdanin*, Order for Testimony via Video-Conference Link Pursuant to Rule 71 *bis*, 9 September 2003; *Prosecutor v. Milosevic*, Order on Prosecution Motion for the Testimony of Nojko Marinovic via Video-Conference Link, 19 February 2003; *Prosecutor v. Krnojelac*, Order for Testimony via Video-Conference Link, 15 January 2001.

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Decision on Nyiramasuhuko's Extremely Urgent Motion for Disclosure of Closed Session Transcripts of Witness ANL/CJ 30 August 2006 (ICTR-2000-56-T)

(Original: English)

Trial Chamber II

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

Pauline Nyiramasuhuko – Disclosure of Closed Session Transcripts of Witness in another trial, Criteria for the disclosure of confidential inter partes material to a party in another case, Existence of a factual nexus between the two cases – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A), 74 (F) (i) and 75 (G) (i)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Augustin Ndindiliyimana et al., Order for Protective Measures for Witnesses, 12 July 2001 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Augustin Bizimungu, Decision on the Prosecutor's Motion for Review, Variation and Extension of Protective Measures for Victims and Witnesses, 19 March 2004 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Augustin Bizimungu et al., Decision on Nsengiyumva's Extremely Urgent and Confidential Motion for Disclosure of Closed Session Testimony of Witness OX and Witness' Unredacted Statements and Exhibits, 23 August 2006 (ICTR-2000-56)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEISED OF the "Requête d'extrême urgence de Pauline Nyiramasuhuko aux fins d'obtenir les comptes rendus d'audience à huis-clos du témoin ANL/CJ (sic)"[1], filed on 23 August 2006 (the "Motion");

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 74 (F) (i) of the Rules;

NOTING that the Prosecution has not filed a response;

HEREBY DECIDES the Motion on the basis of the written submissions filed by the Defence for Nyiramasuhuko pursuant to Rule 73 (A) of the Rules.

1. Pauline Nyiramasuhuko, an Accused in the *Butare*[2] case, requests disclosure of the closed session transcripts in respect of protected Witness ANL/CJ, who testified for the Prosecution in the present case on 28 June 2006. The Motion is brought pursuant to Rule 75 (G) (i).

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[1] Nyiramasuhuko's Extremely Urgent Motion to Obtain the Closed Session Transcripts of Witness ANL/CJ (Unofficial Translation).

[2] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case N°ICTR-97-21-T, Joint Case N°ICTR-98-42-T.

2. The Chamber recalls its Decision of 23 August 2006 where it held that confidential *inter partes* material may be disclosed to a party in another case provided that the applicant demonstrates that it "is likely to assist that applicant's case materially, or […] there is a good chance that it would."[3] The Chamber further held that this standard can be met by showing that there is a factual nexus between the two cases.[4]

3. Nyiramasuhuko wishes to have access to the closed session transcripts of Witness ANL/CJ in order to prepare for cross-examination of unprotected Defence Witness Charles Karemano in the *Butare* case. She submits that both testimonies relate to the circumstances of the death of the same person in April 1994.

4. The Chamber is satisfied that the issue raised by the Nyiramasuhuko Defence establishes a sufficient factual nexus between the *Butare* case and the present case.

5. The Chamber, however, would like to note that the context of Prosecution Witness ANL/CJ's testimony should not have been known to the Defence for Nyiramasuhuko or anyone else outside the courtroom since the entire testimony of Witness ANL/CJ was given in closed session. At this stage, the Chamber wishes to underscore the importance of witness protection measures and reminds all parties to duly comply with the Chamber's orders in this respect.[5]

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion;

ORDERS the Prosecution and the Registry to transmit to the Nyiramasuhuko Defence the closed session transcripts of Witness ANL/CJ's testimony before this Chamber;

ORDERS that the Nyiramasuhuko Defence and the Accused shall be bound *mutatis mutandis*, upon receipt of the confidential material, by the terms of the above mentioned witness protection orders in the present case.[6]

Arusha, 30 August 2006.

[Signed] : Asoka de Silva ; Taghrid Hikmet ; Seon Ki Park

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[3] *The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu*, ICTR-00-56-T, "Decision on Nsengiyumva's Extremely Urgent and Confidential Motion for Disclosure of Closed Session Testimony of Witness OX and Witness' Unredacted Statements and Exhibits", 23 August 2006, para. 3 (with further references).
[4] Ibid.
[5] The Prosecutor v. Augustin Ndindiliyimana, Innocent Sagahutu, François-Xavier Nzuwonemeye, ICTR-2000-56-I, Order for Protective Measures for Witnesses, 12 July 2001; Le Procureur contre Augustin Bizimungu, Augustin Ndindiliyimana, Innocent Sagahutu, François-Xavier Nzuwonemeye, Affaire N°ICTR-2000-56-I, Décision sur la Requête du Procureur aux Fins de Modification et d'Extension des Mesures de Protection des Victims et des Témoins, 19 March 2004.
[6] Ibid.

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Decision on Ndayambaje's Motion for Exclusion of Evidence 1 September 2006 (ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Joseph Kanyabashi, Elie Ndayambaje, Sylvain Nsabimana, Alphonse Nteziryayo, Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Exclusion of evidence, Appropriate time to object to the admissibility of evidence : objection contemporary to the admission of the testimony, Possibility to raise submissions regarding the vagueness of the indictment in support of the exclusion of evidence at a later stage – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 47 (C) and 73 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Arsène Shalom Ntahobali, Decision on Ntahobali's Motion to Rule Inadmissible the Evidence of Prosecution Witness 'TN', 1 July 2002 (ICTR-98-42) ; Appeals Chamber, The Prosecutor v. Georges Rutaganda, Judgement, 26 May 2003 (ICTR-96-3) ; Appeals Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible', 2 July 2004 (ICTR-97-21) ; Appeals Chamber, The Prosecutor v. Eliezer Niyitegeka, Judgement, 9 July 2004 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004 (ICTR-98-42) ; Appeals Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Casimir Bizimungu's Motion to Declare Part of the Testimony of Witness GTD Inadmissible, 30 November 2004 (ICTR-99-50) ; Appeals Chamber, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and ICTR-96-17) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Motions for Judgement of Acquittal, 2 February 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Exclusion of Testimony Outside the Scope of the Indictment, 27 September 2005 (ICTR-98-41)

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy B. Bossa (the "Chamber");

SEISED of Ndayambaje's "Requête en extrême urgence d'Elie Ndayambaje aux fins d'exclure les témoignages et/ou les portions de témoignages des témoins entendus au procès sur des faits qui sont en dehors de l'acte d'accusation", filed on 31 May 2006 (the "Motion");

HAVING RECEIVED the

(i) "Prosecutor's Response to the Requête en extrême urgence d'Elie Ndayambaje aux fins d'exclure les témoignages et/ou les portions de témoignages des témoins entendus au procès

sur des faits qui sont en dehors de l'acte d'accusation", filed on 9 June 2006 ("Prosecution's Response");

(ii) "Réplique à la Réponse du Procureur à la Requête en extrême urgence d'Elie Ndayambaje aux fins d'exclure les témoignages et/ou les portions de témoignages des témoins entendus au procès sur des faits qui sont en dehors de l'acte d'accusation", filed on 20 June 2006 ("Ndayambaje's Reply")[1];

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), specifically Rule 47 (C) of the Rules;

NOW DECIDES the Motion, pursuant to Rule 73 (A) of the Rules, on the basis of the written submissions of the Parties.

Submissions of the Parties

Defence for Ndayambaje

1. The Defence requests the exclusion of testimonies or parts of testimonies of 14 Prosecution witnesses[2] because they concern facts or elements not pleaded in the Indictment and because it has not had a timely notification of these allegations.

2. The Defence argues that if the Chamber does not exclude the impugned evidence at this stage of the proceedings, Ndayambaje will suffer serious prejudice because along with the charges in the Indictment, the Accused will have to counter new facts or elements resulting from testimonies of Prosecution witnesses, even though the Chamber will have to dismiss them in its final deliberations.[3]

3. The Defence submits that, to be admissible, evidence must be relevant to an element of a crime with which the Accused is charged and therefore sufficiently related to some charge in the Indictment. If the Prosecution fails to establish the relevance of evidence to a charge against the Accused, this evidence must be deemed inadmissible.[4] The Defence stresses that the indictment must set out the material facts with enough detail to enable the accused to prepare his defence.[5] In this respect, the jurisprudence of both ICTY and ICTR clearly indicates that nothing can replace the indictment.[6] In particular, pre-trial submissions or disclosures are no adequate substitute for a properly pleaded indictment.[7] Failure to allege known material facts in an indictment is unacceptable and can only be remedied in exceptional cases,[8] since such an omission would impact negatively on the ability of the Accused to prepare his defence.[9] Such vagueness can only be harmless if it is shown that the accused's

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[1] See the Chamber's Decision on Ndayambaje's Motion for Extension of Time to Reply to the Prosecutor's Response to Its Motion for Exclusion of Evidence of 30 June 2006, which granted the relevant Motion to admit a Reply after the time frame stipulated.

[2] These witnesses are Witness QAR, Witness TO, Witness QAQ, Witness QAF, Witness FAL, Witness TP, Witness TW, Witness QAL, Witness RV, Witness FAU, Witness EV, Witness RT, Witness QBZ, and Witness FAG.

[3] The Motion, para. 46.

[4] The Motion, paras. 38-39, quoting *Prosecutor v. Bagosora et al.*, Decision on Exclusion of Evidence Outside the Scope of the Indictment, 27 September 2004, paras. 2, 5.

[5] The Motion, paras. 51, 74, quoting *Prosecutor v. Kupreskic et al.*, Appeals Chamber Judgement, 23 October 2001, paras. 88-90; *Prosecutor v. Blaskic*, Judgement, 29 July 2004, paras. 213, 215.

[6] The Motion, paras. 56, 59, quoting *Prosecutor v. Ntagerura et al.*, Trial Chamber, Judgement, 25 February 2004, Separate Opinion of Judge Dolenc, para. 11.

[7] The Motion, paras. 57-58, 76, quoting *Prosecutor v. Ntagerura et al.*, Trial Chamber, Judgement, 25 February 2004, paras. 37, 66, confirmed on Appeal, 6 February 2006; *Prosecutor v. Zigiranyirazo*, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief, 30 September 2005, para. 2.

[8] The Motion, para. 60, quoting *Prosecutor v. Ntakirutimana et al.*, Trial Chamber, Judgement, 13 December 2004, para. 125.

[9] The Motion, paras. 62-64, 75, quoting *Prosecutor v. Kupreskic et al.*, Judgement, 23 October 2001, paras. 98, 122; *Prosecutor v. Brdanin*, Decision on Motion for Acquittal, 28 November 2003, para. 88; *Prosecutor v. Stakic*, Trial Chamber, Judgement, 31 July 2003, paras. 771-772.

ability to prepare his case has not been materially impaired. If this is not demonstrated, the indictment causes injustice and the trial is rendered unfair.[10] The Defence recalls that a vague indictment in and of itself may be sufficient to reverse a conviction.[11]

4. While it is possible that evidence may turn out differently from what was expected, the Defence submits that in such cases, the indictment must be amended or proceedings adjourned, or certain evidence must be excluded as not being within the scope of the indictment.[12]

5. The Defence concedes that in some circumstances, a defective indictment may be cured, but submits that in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category.[13] Besides, a defective indictment can only be cured by information in a pre-trial brief when the material fact was already contained in the indictment in such a way that it could be discerned by the attentive reader.[14] The Defence recalls that the mere service of witness statements or "*will-say*" statements is not sufficient to inform the Defence of material facts that the Prosecution intends to prove at trial.[15] In the instant case, there has been no sufficient notice to cure the defects of the Indictment.[16]

6. The Defence submits that it must object if evidence regarding a fact not pleaded in the Indictment is about to be admitted. However, failure to object contemporaneously is not equivalent to a complete waiver. According to the Defence, the Chamber has always refused to consider the vagueness of the Indictment or any other defect in Prosecution disclosures with regard to evidence introduced by witnesses, even though this was raised in objections by Ndayambaje's co-accused.[17] Because of the numerous decisions by the Chamber in this sense, objections were not appropriate at the time. The Defence adds that now is the right time because the Defence case has not yet begun and the number of witnesses the Defence intends to call will be affected.[18] The Motion is not moot or premature, and it is in the interest of justice and of efficient proceedings to dismiss the listed testimonies now.[19] The Defence states that denying the Motion would be a denial of justice.[20]

7. The Defence submits that Ndayambaje will suffer irremediable prejudice if he has to present a defence for events that are not pleaded in his Indictment, more than ten years after their alleged perpetration.[21] The Defence argues that since it did not know that certain evidence was going to be

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[10] The Motion, para. 75, quoting *Prosecutor v. Kupreskic et al.*, Appeals Chamber, 23 January 2001, para. 122.
[11] The Motion, para. 55.
[12] The Motion, paras. 51, 61, quoting *Prosecutor v. Kupreskic et al.*, Judgement, 32 October 2001, para. 92 and *Prosecutor v. Kvocka et al.*, Appeals Chamber, Judgement, 25 February 2005, para. 30.
[13] The Motion, para. 78, quoting *Prosecutor v. Kupreskic et al.*, Appeals Chamber, 23 January 2001, para. 114. The Defence also relies on the Separate Opinion of Judge Dolenc in the *Ntagerura* Judgement, 25 February 2004, para. 24.
[14] The Motion, paras. 70, 73, 80, quoting *Prosecutor v. Zigiranyirazo*, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-trial Brief, 30 September 2005, paras. 13-14; *Prosecutor v. Gacumbitsi*, Judgement, 17 June 2004, para. 188; *Prosecutor v. Bagosora et al.*, Decision on Exclusion of Testimony Outside the Scope of the Indictment, 27 September 2005, Fn 7.
[15] The Motion, paras. 66, 81, 83-84, quoting *Prosecutor v. Niyitegeka*, Appeals Chamber, Judgement, 9 July 2004, para. 197. The Defence also relies on *Prosecutor v. Kordic*, Appeals Chamber, Judgement, 17 December 2004, paras. 170-172; *Prosecutor v. Casimir Bizimungu*, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GPC, GKD and GFA, 23 January 2004, para. 13; *Prosecutor v. Ntagerura*, Separate Opinion of Judge Dolenc, 25 February 2004, Fn 27.
[16] The Motion, paras. 68, 77, 90, 93, 95, 101.
[17] The Motion, paras. 108-123.
[18] The Motion, paras. 49, 125-132.
[19] The Motion, paras. 49, 134-135, 399, quoting *Prosecutor v. Bagosora et al.*, Decision on Exclusion of Testimony Outside the Scope of the Indictment, 27 September 2005, para. 5; *Prosecutor v. Casimir Bizimungu*, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GPC, GKD and GFA 23 January 2004, para. 18.
[20] The Motion, para. 49.
[21] The Motion, para. 372, 379.

presented, it could not direct its investigations or efficiently confront Prosecution witnesses as regards this evidence.[22] This prejudice cannot be remedied by merely presenting witnesses.[23]

8. The Defence also submits that vague indictments infringe upon judicial economy,[24] whereas the identification of persons in the indictment contributes to the efficient conduct of proceedings.[25] Apart from respecting the rights of the Accused, the exclusion of the abundant evidence regarding facts not pleaded in the Indictment will diminish the length of proceedings, which is a constant concern of the Chamber.[26] Also, it is in the interest of justice that Prosecution as well as Defence witnesses are only heard insofar as their testimonies are relevant to the case.[27] In consequence, the analysis of the evidence by all Parties, their pleadings and the final deliberations would be shortened.[28]

Prosecution's Response

9. The Prosecution submits that the Motion is essentially predicated upon Rule 72 (A) of the Rules but has been filed out of time. Therefore, the Chamber should not hear the Motion, as it is time-barred.[29] However, should the Chamber rule that the Motion is admissible, the Prosecution relies on a number of arguments.[30]

10. The Prosecution submits that the appropriate time to object to the admissibility of evidence is when it is presented.[31] However, with regard to the impugned witnesses, the Defence did not object to the admissibility of their testimony, except for Witnesses RV and QBZ. Therefore, there is now an onus on the Defence to show prejudice, as the Motion is untimely.[32] The Prosecution submits that failure to object before the Chamber will usually result in the Appeals Chamber disregarding the argument.[33]

11. For instance, the Prosecution notes that there was no contemporaneous objection by the Defence when Witness QAR testified. Rather, the Defence exhaustively cross-examined him and had him recalled, without alleging that the witness's evidence related to Mugombwa church was inadmissible because it had not been pleaded in the Indictment.[34]

12. The Prosecution also submits that the absence of a material fact in the Indictment does not mean that it cannot be relied upon. Rather, the test for ascertaining whether such material fact should

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[22] The Motion, para. 376.
[23] The Motion, para. 377.
[24] The Motion, para. 414, quoting *Prosecutor v. Zigiranyirazo*, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment, 15 July 2004, para. 28.
[25] The Motion, para. 415, quoting *Prosecutor v. Nyiramasuhuko et al.*, Decision on Nyiramasuhuko's Preliminary Motion Based on Defects in the Form and in the Substance of the Indictment, 1 November 2000, para. 60.
[26] The Motion, paras. 416-417, quoting *Prosecutor v. Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings, 7 April 2006, para. 75; Scheduling Order of 14 December 2005, p. 2, paras. g, h.
[27] The Motion, para. 418.
[28] The Motion, para. 422.
[29] Prosecution's Response, para. 7, quoting *Proseutor v. Nyiramasuhuko et al.*, Decision on the Motion for Separate Trial, 25 April 2001.
[30] Prosecution's Response, para. 7.
[31] Prosecution's Response, para. 9, quoting *Prosecutor v. Nyiramasuhuko et al.*, Decision on Ntahobali's Motion to Rule Inadmissible the Evidence of Prosecution Witness TN, 1 July 2002.
[32] Prosecution's Response, paras. 9-10, quoting *Prosecutor v. Kayishema and Ruzindana*, Appeals Judgement, para. 91; *Prosecutor v. Niyitegeka*, Appeals Judgement, 9 July 2004, para. 199.
[33] Prosecution's Response, para. 10, quoting *Prosecutor v. Kamuhanda*, Appeals Judgement, 19 September 2005, para. 21.
[34] Prosecution's Response, para. 12, quoting Prosecutor v. Nyiramasuhuko et al., Requête afin d'inviter la Chambre à rappeler le témoin QAR en vertu de la décision de la Chambre d'Appel intitulée "Decision in the Matter of Proceedings under Rule 15 bis (D)", filed on 19 December 2003.

be admitted and/or relied upon is whether the accused received proper notice.[35] It further submits that the Indictment against Ndayambaje is not vague, but sets out the material facts with sufficient specificity. The Prosecution's case against Ndayambaje falls squarely within the ambit of the *Kupreskic et al*. definition of the sheer scale of the alleged crimes that may make it impracticable to require a high degree of specificity.[36] However, having regard to the complexity of the issues, the material facts have been pleaded with sufficient specificity to assist the Defence in the preparation of its case.[37]

13. The Prosecution submits that even if the Chamber were to find the Indictment deficient, such defects would have been cured by the Prosecution's timely, clear and consistent disclosure of information to the Defence. Therefore, no unfair prejudice has been caused to the Defence that would require the sought remedy, as is again supported by its defence strategy, involving extensive cross-examination of the impugned witnesses.[38]

14. The Prosecution recalls that the Defence submitted its Pre-Defence Brief on 23 October 2004 and that it contains a list of witnesses who will be called to rebut the evidence introduced by the impugned witnesses. Therefore, contrary to the Defence's allegations as to prejudice, it has had ample time to consider the Prosecution evidence and to prepare its defence case.[39]

15. The Prosecution submits that the Chamber should allow the impugned evidence to stand in its entirety, because in any event, it corroborates the factual allegations specifically pleaded in the Indictment.[40]

Ndayambaje's Reply

16. The Defence states that it is surprised that its Motion has been qualified as being both "time-barred" and premature by the Prosecution, as these are contradictory.[41] It reiterates that the Motion is not time-barred and contains no preliminary objections;[42] nor is it based on Rule 72 (A) of the Rules.[43] As to the Prosecutor's argument that the Motion is premature, the Defence refers to two decisions to indicate that this is not the case.[44]

17. The Defence submits that the fundamental legal question is whether the Prosecution could remedy the defects in the Amended Indictment by disclosure contained in the Pre-Trial Brief, the "*will-say*" statements, or the testimonies.[45] The Defence stresses that while the Prosecution alleges that the Indictment is not vague, on the other hand, it relies on a decision in *Kupreskic et al*. which states that "there may be instances where the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity".[46]

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[35] Prosecution's Response, para. 13, quoting *Prosecutor v. Kupreskic et al*., Appeals Judgement, paras. 77-125; *Prosecutor v. Stakic*, Appeals Judgement, 22 March 2006, paras. 105-132; *Prosecutor v. Naletilic*, Judgement, 3 May 2006; *Prosecutor v. Ntakirutimana*, Appeals Judgment, para. 27, citing *Prosecutor v. Kupreskic et al*., Appeals Judgment, paras. 117-120; *Prosecutor v. Niyitegeka*, Appeals Judgment, para. 197.
[36] Prosecution's Response, para. 14, quoting *Prosecutor v. Kupreskic et al*., Appeals Chamber, para. 89.
[37] Prosecution's Response, para. 15.
[38] Prosecution's Response, para. 17.
[39] Prosecution's Response, para. 27.
[40] Prosecution's Response, paras. 32, 34.
[41] Reply, para. 6.
[42] Reply, para. 7.
[43] Reply, para. 13.
[44] Reply, paras. 8-11, quoting *Prosecutor v. Bagosora et al*., Decision of 27 September 2005, para. 7, and *Prosecutor v. Kajelijeli*, Appeals Chamber, Decision of 23 May 2005, para. 200.
[45] Reply, para. 16.
[46] Reply, para. 19, quoting *Prosecutor v. Kupreskic*, Judgement, para. 89.

18. The Defence also submits that contrary to the Prosecution's arguments, the "exhaustive" cross-examinations of witnesses have not clarified the Indictment. Rather, faced with the multiple contradictions contained in the testimonies of Prosecution witnesses and the silence of the Indictment, the Defence does not know anymore on which elements it must base its case.[47]

19. Further, as to the Prosecution's submissions that the evidence should be kept as corroborative evidence of the facts pleaded in the Indictment, the Defence states that it is inappropriate for the Prosecution to sustain, 18 months after closing its case, that evidence which is inadmissible as direct evidence should be conserved as corroborative evidence of the vague and imprecise elements of the Indictment.[48]

20. The Defence submits that the absence of information in the Indictment, combined with the numerous contradictions and improbabilities in the testimonies, prevent it from presenting a full defence, particularly with regard to a defence of alibi.[49]

Deliberations

21. The Chamber has carefully considered the Parties' submissions. The Chamber observes that as a preliminary issue, it has to address the question of whether the Motion is brought at the right point in time.

22. The Chamber notes the Tribunal's jurisprudence to the effect that the appropriate time to object to the admissibility of evidence is when the evidence is introduced.[50] In the instant case, the Defence by its own admission did not object contemporaneously to the testimony of any of the impugned witnesses.[51] Even if the Chamber were to accept the Defence's argument that the decisions overruling the objections of other defence teams had the effect of *res judicata* for the Accused Ndayambaje,[52] such objections do not seem to have been raised with regard to the witnesses whose testimony the Defence seeks to have excluded.

23. Nonetheless, the Chamber recalls that the Accused is not barred from raising submissions regarding the vagueness of the indictment in support of the exclusion of evidence at a later stage in the trial proceedings.[53]

24. The Chamber recalls the Appeals Chamber's holding in the *Butare* case, according to which there can be no conviction of an Accused on the basis of facts not charged in the indictment but introduced by testimonies.[54] However, the Chamber underscores that whilst an allegation may not have been specifically pleaded, this does not in itself render such evidence inadmissible because it may be relevant to the proof of any allegation pleaded in the indictment.The Chamber recalls the Appeals Chamber's Decision that

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[47] Reply, para. 29.
[48] Reply, para. 31.
[49] Reply, para. 36.
[50] *Prosecutor v. Nyiramasuhuko et al.*, Decision on Ntahobali's Motion to Rule Inadmissible the Evidence of Prosecution Witness TN, 1 July 2002, para. 18; *Prosecutor v. Niyitegeka*, Appeals Chamber, Judgment, 9 July 2004, para. 199; *Prosecutor v. Bizimungu et al.*, Decision on Casimir Bizimungu's Motion to Declare Part of the Testimony of Witness GTD Inadmissible, 30 November 2004, paras. 11, 13; *Prosecutor v. Ntakirutimana et al.*, Appeals Chamber, Judgment, 13 December 2004, para. 22.
[51] The Motion, para. 109, 110, 115, 117-119.
[52] The Motion, paras. 126, 127, 129.
[53] *Prosecutor v. Niyitegeka*, Appeals Chamber, Judgment, 9 July 2004, para. 199.
[54] *Prosecutor v. Nyiramasuhuko et al.*, Appeals Chamber, 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", 2 July 2004, para. 13.

> [i]ndeed, pursuant to Rule 89 (C) of the Rules, the Trial Chamber may admit any relevant evidence which it deems to have probative value. It should be recalled that admissibility of evidence should not be confused with the assessment of the weight to be accorded to that evidence, an issue to be decided by the Trial Chamber after hearing the totality of the evidence. Consequently, although on the basis of the present indictment it is not possible to convict Nyiramasuhuko in respect of her presence at the installation of Ndayambaje, evidence of this meeting can be admitted to the extent that it may be relevant to the proof of any allegation pleaded in the Indictment.[55]

25. The Chamber notes that some Trial Chambers' decisions are to the effect that it is appropriate to treat questions regarding the exclusion of evidence based on a vague indictment during trial proceedings.[56] However, on the basis of the cited jurisprudence of the Appeals Chamber, and with regard to the particular circumstances of this case, as well as the interests of justice, the Chamber is not satisfied that there is a basis to exclude the concerned testimonies at this stage. Some of the matters raised may be considered at a later stage of the proceedings.

26. Finally, the Chamber has noted that issues relating to the credibility and evaluation of evidence have been raised in the Motion, whereas they also ought to be considered at a later stage with the totality of the evidence.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion in every respect.

Arusha, 1 September 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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[55] *Prosecutor v. Nyiramasuhuko et al.*, Appeals Chamber, 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", 2 July 2004, para. 15, recalled in *Prosecutor v. Nyiramasuhuko*, Appeals Chamber, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004, para. 12, and *Prosecutor v. Nyiramasuhuko*, Appeals Chamber, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004, para. 7, quoting *Prosecutor v. Rutaganda*, Appeal Judgement, 26 May 2003, para. 33, citing *Prosecutor v. Delalić*, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, para. 31.

[56] *Prosecutor v. Niyitegeka*, Appeals Chamber, Judgment, 9 July 2004, para. 196; *Prosecutor v. Bagosora et al.*, Decision on Motions for Judgement of Acquittal, 2 February 2005, para. 7; *Prosecutor v. Bagosora et al.*, Decision on Exclusion of Testimony Outside the Scope of the Indictment, 27 September 2005, para. 7.

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Decision on Sylvain Nsabimana's Extremely Urgent Motion to Reconsider the Decision on Sylvain Nsabimana's Extremely Urgent-Strictly Confidential-Under Seal-Motion to Have Witness AGWA testify via Video-Link 5 September 2006 (ICTR-97-29-T ; Joint Case : ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Sylvain Nsabimana – Reconsideration of prior decision : video-link testimony denied because of the lack of information regarding the illness of the witness, Production of a detailed Medical Certificate – Video-link from Brussels granted

International Instrument cited :

Rules of Procedure and Evidence, rules 71 (A), 71 (D) and 73 (A)

International Case cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E)", 15 June 2004 (ICTR-98-41)

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

SITTING as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy B. Bossa (the "Chamber");

BEING SEIZED of the "*Requête en extrême urgence de Sylvain Nsabimana aux fins de reconsidération de la décision intitulée* 'Decision on Sylvain Nsabimana's Extremely Urgent-Strictly Confidential Under Seal – Motion to have Witness AGWA Testify Via Video-Link'", filed on 25 August 2006 (the "Motion") AND the annexes entitled: "*Avis médical du 23 août 2006 délivré par le Docteur Graux Carios, Hématologue au Centre d'Hématologie aux cliniques universitaires Saint Luc de Bruxelles*" and "*Avis d'interprétation du Docteur Epée Hernandez du 25 Août 2006 à la demande de la Défense de Sylvain Nsabimana*" (the "Annexes");

CONSIDERING the "Prosecutor's Response to the *Requête en extrême urgence de Sylvain Nsabimana aux fins de reconsideration de la décision intitulée* 'Decision on Sylvain Nsabimana's Extremely Urgent-Strictly Confidential Under Seal – Motion to have Witness AGWA Testify Via Video-Link'", filed on 29 August 2006 (the "Prosecution Response");

NOTING the "Decision on Sylvain Nsabimana's Extremely Urgent-Strictly Confidential Under Seal- Motion to have Witness AGWA Testify Via Video-Link", issued on 17 August 2006 (the "Decision of 17 August 2006");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Rules 71 (D) and 71 (A) of the Rules;

NOW DECIDES the matter, pursuant to Rule 73 (A), on the basis of the written submissions of the Parties.

Submissions of the Parties

The Defence

1. The Defence moves the Chamber to reconsider its Decision of 17 August 2006 to allow Defence Witness AGWA to testify by means of video-conference from Brussels, in the week starting 18 September 2006.

2. The Defence submits that shortly after the issuance of the Decision of 17 August 2006, it received a document providing further details concerning Witness AGWA's actual state of health from Dr. Graux Carios. The Defence indicates that Witness AGWA is currently being treated for a very serious disease which prevents him from travelling for at least six months starting from 23 August 2006, the date of the medical certificate.

3. The Defence stresses that the details contained in the medical certificate dated 23 August 2006 were totally unknown to it when it filed its initial Motion leading to the Decision of 17 August 2006; the Defence adds that those details constitute new and exceptional circumstances warranting the reconsideration of the Decision of 17 August 2006.

The Prosecution

4. The Prosecution submits that the medical certificate contains information which was always available to the Defence and which should have been transmitted to the Chamber with its earlier Motion. Therefore, the requirements for reconsideration are not met. The Prosecution however asserts that it is entirely within the Chamber's discretion to reconsider its own Decision.

Having deliberated

5. The Chamber recalls the Tribunal's jurisprudence on reconsideration:

> The fact that the Rules are silent as to reconsideration, however, is not, in itself, determinative of the issue whether or not reconsideration is available in "particular circumstances" and a judicial body has inherent jurisdiction to reconsider its decision in "particular circumstances". Therefore, although the Rules do not explicitly provide for it, the Chamber has an inherent power to reconsider its own decisions. However, it is clear that reconsideration is an exceptional measure that is available only in particular circumstances.[1]

6. The Chamber recalls its 17 August Decision in which it found that Witness AGWA's testimony was sufficiently important to the Accused's defence but since the Defence did not specify the nature or gravity of his illness, its video-link request was denied.[2]

7. The Chamber notes that the Defence has now produced a Medical Certificate allegedly issued by Doctor Graux Carios on 23 August 2006. According to this certificate, Witness AGWA apparently suffers from a very serious disease that does not allow him to travel for at least six months. In the Chamber's view, the details contained in this newly provided document do not amount to "particular circumstances" within the meaning of the aforesaid jurisprudence given that they could and should have been known by the Defence when filing their initial motion for video-link testimony. The Motion for reconsideration is therefore denied.

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[1] *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E)" (TC), 15 June 2004, para. 7.

[2] The Decision of 17 August 2006, paras. 9 and 10.

8. However, the Chamber *proprio motu* and in the interests of justice, considers that the conditions for hearing Witness AGWA's testimony by means of video-conference from Brussels are met and urges the Defence with the assistance of the Registry to take all appropriate measures for it to be carried out without undue delay.

9. Finally, the Chamber urges the Defence for Nsabimana to act with more diligence in the preparation of its work and in the filing of motions to avoid wasting time and resources.

FOR THE ABOVE REASONS, THE TRIBUNAL,

DENIES the Motion for reconsideration of the "Decision on Sylvain Nsabimana's Extremely Urgent-Strictly Confidential Under Seal- Motion to have Witness AGWA Testify Via Video-Link" of 17 August 2006.

RULES *proprio motu* that Witness AGWA's testimony be taken by means of video-conference from Brussels.

URGES the Defence with the assistance of the Registry to take all appropriate measures for Witness AGWA's video-conference testimony to be carried out without undue delay.

Arusha, 5 September 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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Decision on the Prosecution's Urgent Motion to Compel Compliance with the Trial Chamber's Decision of 17 August 2006
5 September 2006 (ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Joseph Kanyabashi, Elie Ndayambaje, Sylvain Nsabimana, Alphonse Nteziryayo, Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Issue of the compliance with the Chamber's Order regarding Witness' will-Say statement, Witness called to give testimony in contradiction to other witnesses already heard before the Chamber : necessary for the calling party to give sufficient and specific information regarding the contradictory testimony, Defence required to comply the requested disclosure – Issue of the compliance with the Chamber's Order regarding the calling of the Witness towards the end of its case, Request moot

International Instrument cited :

Rules of Procedure and Evidence, rule 73 (A)

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy B. Bossa (the "Chamber");

SEISED of the "Prosecutor's Urgent Motion to Compel Compliance With the Trial Chamber's Decision of 17 August 2006", filed on 30 August 2006 (the "Motion");

HAVING RECEIVED the "Réponse de Sylvain Nsabimana à la requête du Procureur intitulée "Prosecutor's Urgent Motion to Compel Compliance with the Trial Chamber's Decision of 17 August 2006"", filed on 31 August 2006 ("Nsabimana's Response");

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

RECALLING the Chamber's Decision on Sylvain Nsabimana's Extremely Urgent Motion to Drop and Add Witnesses of 17 August 2006;

NOW DECIDES the Motion, pursuant to Rule 73 (A) of the Rules, on the basis of the written submissions of the Parties.

Submissions of the Parties

The Prosecution

1. The Prosecution moves the Chamber to order the Defence for Nsabimana to comply with the Chamber's Decision of 17 August 2006 and to make further disclosure regarding Witness DEDE, in particular with regard to the exact place where according to Witness DEDE, Prosecution Witness SJ allegedly sought refuge between April and July 1994, and to the alleged aid Witness SJ received from the Accused Nsabimana. Further, the Prosecution moves the Chamber to order the Defence to disclose the names of the "MRND dignitaries" to whom Witness DEDE is expected to refer, if they include any person/s accused in these proceedings. Finally, the Prosecution moves the Chamber to remind the Defence of its order to call Witness DEDE "towards the end of its case".

2. The Prosecution submits that the "supplementary *will-say*" filed fails to comply with the Chamber's order of 17 August 2006, as it does not provide "further and better particulars" regarding the place where Witness SJ allegedly hid and it only speaks of "aid" the witness allegedly received from Nsabimana, without specifics.[1]

3. The Prosecution argues that the Defence intentionally used vague expressions as an attempt to avoid disclosure requirements and to deny the other Parties fair and adequate preparation.[2] In particular, the Prosecution states that it cannot adequately prepare its cross-examination without sufficient information regarding the location where Witness SJ sought refuge.[3] The Prosecution also submits that the alleged "aid" the Accused provided to Witness SJ does not appear in the first *will-say* regarding Witness DEDE, revealing a further intentional failure to disclose.[4] The repeated failures to fully disclose required information in the *will-says* for Nsabimana's witnesses reveal a pattern of non-compliance, according to the Prosecution.[5]

4. The Prosecution recalls that Rule 90 (G) (ii) of the Rules requires that "counsel shall put to the witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness" and submits that these propositions were not put to Witness SJ

[1] The Motion, paras. 12, 13, 16.
[2] The Motion, paras. 14, 17, 18.
[3] The Motion, paras. 15, 21.
[4] The Motion, para. 19.
[5] The Motion, para. 22.

during her testimony. Rather, the Defence seeks to impeach her collaterally at this late stage, despite the provisions of Rule 90 (G) (ii) of the Rules.[6]

5. The Prosecution also points out that Witness DEDE's *will-say* filed on 21 August 2006 mentions "some MRND dignitaries" and therefore asks that the Defence disclose which persons Witness DEDE is expected to refer to, if they include persons accused in this trial.[7]

Nsabimana's Response

6. The Defence for Nsabimana submits that the Chamber's Decision ordered it to disclose details with regard to the statement that Witness DEDE would contradict Prosecution Witness SJ, and that this has been adequately done in the additional will-say.[8] According to the Defence, further information need not be included in the *will-say*, and there is no basis for the Prosecution's request in that matter,[9] especially as by its own admission, Witness SJ is still alive.[10]

7. As to the Prosecution's submissions regarding the aid the Accused Nsabimana allegedly provided, the Defence submits that the disclosures made so far enable all Parties to undertake all necessary investigations.[11] The Defence argues that not only does the Chamber's Decision of 17 August 2006 not address this issue, but the additional *will-say* for Witness DEDE indicates that the Accused assisted that witness after his house had been set on fire.[12] Besides, the Defence indicates that assistance was provided at Mbazi.[13]

8. The Defence submits that among the MRND dignitaries mentioned is Pauline Nyiramasuhuko, Minister of the Interim Government at the time of the events.[14]

9. With regard to the order of appearance of its witnesses, the Defence refers to the Chamber's invitation to avoid gaps between witnesses.[15] The Defence submits that the current order of appearance has been worked out in order to implement this invitation.[16] It also recalls that the Chamber ordered it to call Witness DEDE towards the end of the Defence case and submits that there are only four witnesses left to be called, one of whom is Witness DEDE.[17] The Defence therefore submits that it has entirely complied with the orders of the Chamber and that all has been done to enable Witness DEDE to testify from 11 September 2006, 21 days after the disclosure of his identity.[18]

Deliberations

10. In its Motion, the Prosecution requests that the Defence complies with the Chamber's order (1) to give further and better particulars to Witness DEDE's *Will-say* statement; and (2) to call Witness DEDE towards the end of its case.

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[6] The Motion, para. 20.
[7] The Motion, para. 23.
[8] Nsabimana's Response, paras. 11-13.
[9] Nsabimana's Response, paras. 14-16.
[10] Nsabimana's Response, para. 17.
[11] Nsabimana's Response, para. 22.
[12] Nsabimana's Response, paras. 18-21.
[13] Nsabimana's Response, para. 24.
[14] Nsabimana's Response, para. 26.
[15] Nsabimana's Response, para. 27, quoting French Draft Transcripts, 21 August 2006, p. 11.
[16] Nsabimana's Response, para. 28.
[17] Nsabimana's Response, para. 31.
[18] Nsabimana's Response, paras. 31-32.

Regarding Compliance with the Chamber's Order to Give Further and Better Particulars to Witness DEDE's Will-Say Statement

11. The Chamber recalls its Decision of 17 August 2006 in which it ordered the Defence to provide further and better particulars to Witness DEDE's *Will-Say* statement because the wording of its Paragraph 9 indicating that Witness DEDE will contradict 'certain allegations' of Prosecution Witness SJ is imprecise and may impede the other Parties's right to sufficiently investigate the allegations and conduct cross-examination.

12. The Chamber notes that the Defence filed a supplementary *Will-Say* Statement of Witness DEDE on 29 August 2006 (the "supplementary *will-say* statement").[19]

13. As for the alleged contradictions between Witness DEDE and Prosecution Witness SJ's testimony, the Chamber notes the Prosecution submissions that the Defence has failed to comply with its order for further and better particulars regarding the exact place where Prosecution Witness SJ was alleged to have hidden during the events, and what assistance préfet Nsabimana is alleged to have provided Prosecution Witness SJ. Furthermore, the Prosecution requests for the Defence to disclose the names of the "MRND dignitaries" to whom Witness DEDE is expected to refer, if they include any person/s accused in these proceedings.

14. In the Chamber's opinion, when a party decides to call a witness to give testimony in contradiction to any other witnesses already heard before the Chamber, it is necessary for the calling party to give sufficient and specific information regarding the contradictory testimony so that all the parties in the case may prepare their cross-examination.[20]

15. In the instant case, the Chamber notes that although the supplementary *will-say* statement of Witness DEDE states that the latter knew where Prosecution Witness SJ hid during the events and that he never left that hiding place to go to the prefectural office, the supplementary *will-say* is silent about the alleged hiding place of Prosecution Witness SJ. Furthermore, even though the Defence submitted that Nsabimana aided Prosecution Witness SJ when his house was burnt down in Mbazi, the Chamber finds that this kind of information should be detailed in the *will-say* of Witness DEDE. Regarding the submission that Pauline Nyiramasuhuko was one of the 'MRND dignitaries' mentioned, the Chamber also finds that this kind of information should be detailed in the *will-say*.

16. Accordingly, the Chamber orders the Defence of Nsabimana to give details regarding the contradictions between DEDE's testimony and that of Prosecution Witness SJ, in particular, the location he alleges Prosecution Witness SJ was hiding; details regarding the 'aid' Nsabimana allegedly gave to Prosecution Witness SJ. The Chamber also orders the Defence of Nsabiman to specifically mention by name or by position held, the 'MRND dignitaries' mentioned in the supplementary will-say and if those 'MRND dignitaries' include Accused person/s before the Chamber, the Defence is ordered to name the said Accused person/s.

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[19] The supplementary Will-say indicated that *inter alia*; Prosecution Witness SJ's hiding place during the events of April to July 1994 and that SJ had never left this hiding place throughout the period of the events in order to go to the *prefectural* office; and how *prefet* Nsabimana helped Prosecution Witness SJ following the burning down of her house.

[20] The Chamber recalls that during Ntahobali's case, the Will-Say statements of Defence Witnesses WUNHF and WUNJN detailed the exact areas where these two witnesses would contradict the testimony of Prosecution Witness QBP, by indicating how they knew the witness and by giving the alleged exact location where they saw QBP during the events, contrary to her testimony. Similarly the Will-Say statement of Witness WUNJN detailed the alleged exact areas where he would contradict the testimony of Prosecution Witness TA, by stating how he knew Witness TA and the alleged exact locations where he saw her during the events of 1994, contrary to the latter's testimony

17. The Chamber orders the Defence to make the required disclosures regarding the proposed testimony of Witness DEDE as soon as possible and in any case before the close of business on Friday, 8 September 2006.

Regarding Compliance with the Chamber's Order to Call Witness DEDE Towards the End of its Case

18. The Chamber recalls that in its order of 17 August 2006, the Defence was required to call Witness DEDE towards the end of its case.

19. During the course of trial on 31 August 2006, the Chamber discussed the Defence of Nsabimana's correspondence of 29 August 2006[21] noting that there was a pending Motion on the matter and in order to avoid unnecessary delays, it directed the registry to make all the necessary arrangements so that Witness OYO testifies as from 11 September 2006, as originally scheduled.[22]

20. Accordingly, the Chamber finds the Prosecution request moot and reminds the Parties of its order of 31 August 2006 that Witness OYO testifies as from 11 September 2006.

FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS the Prosecution Motion in part and,

I. ORDERS the Defence of Nsabimana to provide detailed information, regarding the areas where Witness DEDE expects to contradict the testimony of Prosecution Witness SJ, in particular, the location he alleges Prosecution Witness SJ was hiding;

II. ORDERS the Defence of Nsabimana to give details regarding the 'aid' Nsabimana allegedly gave to Prosecution Witness SJ and where it was given;

III. ORDERS the Defence of Nsabimana to specifically mention by name or by position held, the 'MRND dignitaries' mentioned in the supplementary *will-say* and if those 'MRND dignitaries' include Accused person/s before the Chamber, the Defence is ordered to name the said Accused person/s;

IV. ORDERS the Defence to make the required disclosures regarding the proposed testimony of Witness DEDE as soon as possible and in any case before the close of business on Friday, 8 September 2006;

DENIES the Motion in all other respects.

Arusha, 5 September 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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[21] In the correspondence, the Defence listed its order of calling witnesses so that Witness DEDE was expected to give testimony during the week beginning on 11 September 2006, immediately after Charles Karemano (formerly Witness BURU) and before OYO, AGWA and the Accused Nsabimana.

[22] T. 31 August 2006 pp. 64: "So, in the circumstances, in order to avoid problems and that we do not - the Trial Chamber - we do not have a witness to testify, maybe OYO, who was scheduled for 11th, should be - everything else should be done to make sure he is available on the 11th of September so that he can continue with the evidence, in the light of the fact that there is a pending motion which we are not going to - we cannot sure, we cannot be certain, and we cannot tell which way it will go.

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Decision on Ntahobali's Motion to admit Kanyabashi's Custodial Statements 15 September 2006 (ICTR-97-21-T ; Joint Case : ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Joseph Kanyabashi and Arsène Shalom Ntahobali – Contestation of the Kanyabashi's custodial statements, Discretionary power of the Trial Chamber to admit evidence, Prior statement of an Accused person is not evidence per se, Practice of the Trial Chamber to grant the admission into evidence only of those portions of the Accused's prior statement which were used in cross-examination – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 7 ter (B), 73 (A) and 89 (C)

International and National Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Alfred Musema, Judgement, 16 November 2001 (ICTR-96-13) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89 (C), 14 October 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Joseph Kanyabashi, Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997, 15 May 2006 (ICTR-98-42)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Zdravko Mucić, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, 2 September 1997 (IT-96-21) ; Trial Chamber, The Prosecutor v. Sefer Halilović, Decision on Motion for Exclusion of Statements of Accused, 8 July 2005 (IT-01-48) ; Appeals Chamber, The Prosecutor v. Sefer Halilović, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005 (IT-01-48)

United Kingdom : House of Lords, Regina Respondent v. Myers Appellants, [1997] 3 W.L.R. 552; [1998] A.C. 124

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

SEISED of *"Requête de Arsène Shalom Ntahobali afin de déposer la déclaration de Joseph Kanyabashi en vertu de l'article 89 (C)"*, annexed to which are documents bearing K-numbers, consisting of Kanyabashi's custodial statements, filed on 26 June 2006 (the "Motion");

CONSIDERING the

(i) "Prosecutor's Response to the "Requête de Arsène Shalom Ntahobali afin de déposer la déclaration de Joseph Kanyabashi en vertu de l'article 89 (C)"", filed on 3 July 2006 (the "Prosecutor's Response");

(ii) "Réponse de Kanyabashi à la Requête de Arsène Shalom Ntahobali afin de déposer la déclaration de Joseph Kanyabashi en vertu de l'article 89 (C)",

attached to which are three annexes consisting of a report and curriculum vitae of Professor G. Stessens, an ICTY Decision and a House of Lords Judgment, filed on 3 July 2006 ("Kanyabashi's Response");

(iii) « Réplique consolidée de Arsène Shalom Ntahobali aux réponses de Joseph Kanyabashi et du Procureur à la Requête de Arsène Shalom Ntahobali afin de déposer la déclaration de Joseph Kanyabashi en vertu de l'article 89 (C) » of 10 July 2006 ("Ntahobali's Reply").

CONSIDERING the Statute of the Tribunal (the "Statute") in particular Article 19 of the Statute and the Rules of Procedure and Evidence (the "Rules"), specifically Rule 89 (C) of the Rules;

NOW DECIDES the Motion on the basis of the written submissions of the Parties pursuant to Rule 73 (A).

Submissions of the Parties

Defence for Ntahobali

1. The Defence for Ntahobali requests the admission under Rule 89 (C) of the custodial statements allegedly made by Kanyabashi to Belgian authorities, upon his arrest in Belgium on 28 June 1995. Recalling Articles 19 and 20 of the Statute and Rule 89 of the Rules, the Defence submits that to exercise his right to a full defence, the Accused must have the necessary facilities and be able to use and file all exculpatory material, in particular Kanyabashi's custodial statements. The Defence argues that it cannot wait for Kanyabashi's possible testimony before tendering these documents, because there is no guarantee that he will testify.

2. The Defence claims that, in his custodial statements, Kanyabashi stated that Hutu extremists from Kigali committed the massacres at Butare, and that, apart from Captain Nizeyimana, he did not know anybody else from Butare who participated in the massacres; and those who did not like "our" prefecture came to set it alight, mentioning militiamen and soldiers coming from Butare.[1] Finally, Kanyabashi stressed that as far as he knew, nobody disobeyed his orders.[2]

3. The Defence recalls that Kanyabashi's strategy, as highlighted in his Pre-Defence Brief, is to implicate Ntahobali.[3]

4. The Defence argues that under Rule 89 (C), evidence need only be relevant and have probative value, and that ICTY jurisprudence clearly allows indirect evidence so long as that evidence consists of prior statements.[4]

Prosecutor's Response

5. The Prosecution submits that the Motion is time-barred given that the Kanyabashi's custodial statements were disclosed in September 2001. The Prosecution argues that, if the custodial statements were exculpatory under Rule 68, Ntahobali should have used them prior or during the presentation of his evidence, but in any case before the close of his case.

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[1] The Motion, para. 23.
[2] The Motion, para. 24.
[3] That is, during the presentation of the Prosecution case, Nyiramasuhuko's and Ntahobali's defence cases.
[4] See inter alia Prosecutor v. Tadic, Décision relative à la requête concernant les preuves par ouï-dire, 5 August 1996; Prosecutor v. Blaskic, Décision sur la requête de la Défense portant opposition de principe à la recevabilité de témoignages par ouï-dire sans conditions quant à leur fondement et à leur fiabilité, 26 January 1998; Prosecutor v. Stakic, Ordonnance relative aux normes régissant l'admission d'éléments de preuve, 16 April 2002.

6. Should the Chamber rule that the Motion is not time-barred, the Prosecution objects to it. Although it agrees with the Defence that it is not necessary to admit documents through a witness giving *viva voce* evidence, the Prosecution nonetheless argues that there are several other indicia which should inform the discretion of the Chamber as to whether to admit any document or otherwise.

7. The Prosecution argues that Kanyabashi's custodial statements are not relevant to Ntahobali's case because nowhere in the statements is Ntahobali's name mentioned to suggest either wrongdoing or innocence. Further, it is farfetched to rely on a sentence suggesting that the killings in Butare were perpetrated by people from Kigali as proof that the entirety of Kanyabashi's custodial statements isexculpatory.

8. The Prosecution submits that Ntahobali has been given every 'practicable facility' in the preparation and presentation of his defence and that therefore the non-admission of Kanyabashi's custodial statements does not in any way affect Ntahobali's rights under Articles 19 and 20. In any case, since the Chamber has given each Party an opportunity to cross-examine witnesses brought before it, Ntahobali will have ample opportunity and time to cross-examine the defence witnesses for Kanyabashi, when the time comes.

Kanyabashi's Response

9. The Defence for Kanyabashi notes that the admission of Kanyabashi's custodial statements is requested not to attack his credibility but to show the veracity of the statements made by Kanyabashi in 1995.

10. The Defence recalls that it intends to contest the admissibility of Kanyabashi's custodial statements through its expert Professor G. Stessens[5] who will explain that when Kanyabashi was interrogated by the Belgian authorities, said interrogation was conducted contrary to the requirements of Rules 42 and 43.

11. The Defence, relying on the jurisprudence from the Tribunal, the ICTY and the House of Lords, thus submits that the custodial statements cannot be admitted pursuant to Rule 89 (C), because the interrogations were conducted in contravention of Articles 17 and 20 of the Statute and Rules 42 and 43 of the Rules.[6]

Ntahobali's Reply to Kanyabashi and to the Prosecutor's Responses

12. As a preliminary matter, Ntahobali submits that it filed its Reply on 10 July 2006 as the deadline for filing its reply expired on Sunday 9 July 2006.

13. In Reply to Kanyabashi's Response, Ntahobali submits that when Kanyabashi was arrested in Belgium on 28 June 1995, the Rules of Procedure and Evidence had not been adopted. The Rules were adopted on 29 June 1995, a day after Kanyabashi's arrest. Consequently, when Kanyabashi was interrogated by the Belgian authorities, adherence to Rules 42 and 43, 63, 89 (C) and (D), 92 and 95 could not have been envisaged.

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[5] The Defence notes that only the Prosecution filed a notice on 20 January 2003 pursuant to Rule 94 *bis* (B) (ii) , indicating that it will cross-examine the proposed expert and that none of the co-Accused filed a notice in this regard.

[6] *Prosecutor v. Kanyabashi*, Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997, (TC) of 15 May 2006; *Prosecutor v. Bagosora et al.*, Decision on the Prosecutor's Motion for the Admission of Certain materials under Rule 89 (C), (TC) of 14 October 2004; *Prosecutor v. Halilovic*, Decision on Motion for Exclusion of Statements of Accused, (TC) of 8 July 2005; Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, (AC) of 19 August 2005; *Prosecutor v. Mucic*, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, (TC) of 2 September 1997 (the "*Mucic* Decision"); *Regina Respondent v. Myers Appellants*, House of Lords, [1997] 3 W.L.R. 552; [1998] A.C. 124.

14. In addition, the Defence argues that the Report of Professor Stessens cannot be relied upon to demonstrate the manner in which the interviews were conducted, because said Report is not in evidence and notice of it under Rule 94 *bis* has not been filed. The *Mucic* Decision[7] cited by Kanyabashi is distinguishable from the case at bar because at the time when *Mucic* was interviewed, the ICTY Rules of Procedure and Evidence had already been adopted.

15. In Reply to the Prosecution Response, Ntahobali submits that it is not sufficient for the Prosecution to read parts of the custodial statements to conclude that they are irrelevant. Rather it is necessary to read them in their entirety because they provide a context which is useful to Ntahobali's defence strategy. The Defence submits that nowhere has it relied on Rule 68 which requires a showing of 'good cause,' rather it has relied on Rule 89 (C) because the custodial statements are exculpatory.

Having deliberated

16. As a preliminary matter, the Chamber considers Ntahobali's Reply to be admissible pursuant to Rule 7 *ter* (B) of the Rules.

17. The Chamber notes that Kanyabashi does not contest that he made the custodial statements but contests the manner in which they were made and objects to the Motion.

18. Despite the provisions of Rule 89 (C) that a Chamber may admit any relevant evidence which it deems to have probative value, a prior statement of a witness (including that of an Accused person) is not evidence *per se*. The Tribunal's practice has consistently been to grant the admission into evidence only of those portions of the Accused's prior statement which were used in cross-examination to test his/ her credibility.[8] The Chamber sees no reason why it should depart from its practice in the instant case.

19. The Trial Chamber takes note of the Appeals Chamber Decision that evidence may be deemed inadmissible where it is found to be so lacking in terms of the indicia of reliability, such that it is not probative.[9] In the Chamber's opinion, Kanyabashi's custodial statement as it is, does not have sufficient indicia of reliability and thus may not be admitted.

20. Accordingly, the Chamber denies the Defence Motion to admit Kanyabashi's custodial statements.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES Defence Motion to admit Kanyabashi's custodial statements.

Arusha, 15 September 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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[7] The *Mucic* Decision.
[8] See in particular, the *Prosecutor v. Nyiramasuhuko et al*. ICTR-98-42-T, (TC) Decision on Kanyabashi's Oral Motion to Cross-examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997, of 15 May 2006 at para. 82.
[9] *Nyiramasuhuko v. Prosecutor*, ICTR-98-42-AR73.2, (AC), Decision on Pauline Nyiramasuhuko's Appeal on Admissibility of Evidence, of 4 October 2004 at para. 7; See also the Appeals Chamber Judgment in *Musema* at para. 46.

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Decision on Nsabimana's Motion to Admit the Written Statement of Witness JAMI in Lieu of Oral Testimony Pursuant to Rule 92 bis 15 September 2006 (ICTR-97-29-T ; Joint Case : ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Sylvain Nsabimana and Arsène Shalom Ntahobali – Admission of Written Statement in Lieu of Oral Testimony, Statements to be admitted must also comply with the requirements of relevance and probative value, Threshold requirement : evidence to proof of a matter other than the acts and conduct of the accused as charged in the indictment – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rules 73 (A), 89 (C), 90 (A), 90 (G), 92 bis, 92 bis (A) (ii) (c) and 92 bis (A) (ii) (E) ; Statute, art. 20 (4) (e)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Prosecutor's Motion to Remove from her Witness List Five Deceased Witnesses and to Admit into Evidence the Witness Statement of Four of Said Witnesses, 22 January 2003 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Joseph Serugendo, Decision on Defense Motion for the Admission of Written Witness Statements Under Rule 92 bis, 1 June 2006 (ICTR-2005-84)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Stanislav Galić, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), 7 June 2002 (IT-98-29)

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

SEISED of the Strictly Confidential "Requête en extrême urgence de Sylvain Nsabimana en admission de la déclaration écrite du témoin JAMI en application de l'Article 92 bis du Règlement de Preuve et de Procédure," attached to which is Witness JAMI's statement of 13 July 2006, an Attestation of 28 July 2006 delivered by Mr. Dunia, an advocate in Goma (DRC) and an identification sheet for Witness JAMI, filed on 31 July 2006 (the "Motion");

CONSIDERING the

(i) "Prosecutor's Response to the "Requête en extrême urgence de Sylvain Nsabimana en admission de la déclaration écrite du témoin JAMI en application de l'Article 92 bis du Règlement de Preuve et de Procédure," of 2 August 2006 (the "Prosecutor's Response")

(ii) « Duplique de Sylvain Nsabimama au Prosecutor's Response to the 'Requête en extrême urgence de Sylvain Nsabimana en admission de la déclaration écrite du témoin JAMI en application de l'Article 92 bis du Règlement de Preuve et de Procédure,'» filed on 7 August 2006 (« Nsabimana's Reply to the Prosecution Response »); and

(iii) « Corrigendum à la Duplique de Sylvain Nsabimama au Prosecutor's Response to the 'Requête en extrême urgence de Sylvain Nsabimana en admission de la déclaration écrite du témoin JAMI en application de l'Article 92 bis du Règlement de Preuve et de Procédure' », filed on 7 August 2006 (the « Corrigendum ») ;

(iv) « Réponse de Arsène Shalom Ntahobali à la requête de Sylvain Nsabimana afin de déposer la déclaration du témoin JAMI en vertu de l'Article 92 bis, » filed on 2 August 2006 («Ntahobali's Response);

(v) « Duplique de Sylvain Nsabimana à la 'Réponse de Arsène Shalom Ntahobali à la requête de Sylvain Nsabimana afin de déposer la déclaration du témoin JAMI en vertu de l'Article 92 bis' » filed on 14 August 2006 ("Nsabimana's Reply to Ntahobali")

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), specifically Rule 89 (C) and 92 *bis of* the Rules;

NOW DECIDES the Motion on the basis of the written submissions of the Parties pursuant to Rule 73 (A).

Submissions of the Parties

Defence for Nsabimana

1. The Defence recalls that it started presenting its evidence on 27 June 2006.[1] On the eve of calling Witness JAMI, the said witness, a member of a religious order, indicated his unwillingness to give testimony because his hierarchy refuses that he testifies on the events of 1994.[2] Nonetheless, the Witness has accepted to give his testimony in writing.

2. On the basis of Rules 89 (C) and 92 *bis* (i) (a) and the jurisprudence of the Tribunal and the ICTY in the *Bagosora*,[3] *Muhimana*[4] and *Blagojevic and Jokic*[5] cases, the Defence requests the admission of Witness JAMI's written statement in lieu of his oral evidence.[6] The Defence argues that Witness JAMI's statement has probative value because it relates the Accused's humanitarian efforts.[7] The Defence argues that Witness JAMI's statement does not talk of any of the acts for which the Accused or any one of his co-Accused in the Butare trial is charged with.[8]

3. The Defence points out that some of the evidence found in Witness JAMI's statement are cumulative to the testimony of its forthcoming Witness UMA[9]

4. The Defence submits that the statement may be admitted because it is attested.[10]

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[1] Para. 4 of the Motion.
[2] Para. 6 of the Motion.
[3] *Prosecutor v. Bagosora et al.,* ICTR-98-41-T, (TC) Decision on Prosecutor's Motion for the Admission of Written Statements under Rule 92 *bis* of 9 March 2004.
[4] *Prosecutor v. Muhimana*, ICTR-95-1B-T, (TC), Decision on the Prosecution Motion for Admission of Witness Statements (Rule 89 (C) and 92 *bis*), of 20 May 2004, at para. 23, (the "*Muhimana* Decision of 20 May 2003").
[5] *Prosecutor v. Blagojevic and Jocic*, IT-02-60-PT, (TC), First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony pursuant to Rule 92 *bis* of 12 June 2003, (the "*Blagojevic and Jocic* Decision").
[6] Paras. 9 -11 of the Motion.
[7] Para. 16-18, 24 of the Motion.
[8] Para. 19 of the Motion.
[9] Witness UMA is scheduled to testify for the Accused during the forthcoming session; Paras. 21 and 22 of the Motion.
[10] Para. 23 of the Motion.

5. The Defence recalls the jurisprudence of the ICTY in the *Blagojevic and Jokic* Decision and submits that Witness JAMI's statement is sufficiently detailed not to require any cross-examination. In any case, admitting the statement without cross-examination will be in the interests of judicial time because of the absence of excessively long examinations of the witness.[11]

Prosecutor's Response

6. In objection to the Motion, the Prosecution mainly relies on the *Bagosora* Decision of 9 March 2004[12] and argues that the Defence has not satisfied the requirements of Rule 92 *bis* (A).

7. The Prosecution submits that contrary to the provisions of Rule 92 *bis*[13]. Witness JAMI's statement will essentially refute the allegation of Prosecution Witness TQ and also goes to contradict paragraph 6.60 of the Indictment which alleges that the Accused knew of the massacres and yet took no steps to assist the refugees.

8. Referring to the *Blagojevic* and *Jokic* Decision, the Prosecution submits that the admission of Witness JAMI's statement would amount to admitting the repetitive evidence of Defence witnesses UMA and OYO.

9. Recalling Witness JAMI's statement that civil leaders lacked authority when faced with the atrocities committed by the *Interahamwe*,[14] the Prosecution refers to the *Bagosora* Decision of 9 March 2004 on the meaning of "conduct" under Rule *92 bis* and argues that such a statement is reminiscent of the whole defence case and thus contrary to its provisions.

10. The Prosecution alternatively argues that, if the Chamber decides to admit the statement, then the reason given for the witness's refusal to testify – because of his religious community – should not be accepted since other means for procuring the witness' testimony can be had.

11. In any event, the Prosecution submits that Witness JAMI should be cross-examined because the Witness speaks to the pivotal issue of what forms of authority could and were exercised by the Accused.

12. Citing the *Serugendo* Decision of 1 June 2006,[15] the Prosecution submits that even if a statement is admissible under Rule 92 *bis,* a consideration should still be made whether it should be admitted or otherwise. Here, the content of the witness testimony is contested and in the interests of justice, at the very least, Witness JAMI should be cross-examined by the other Parties.

13. The Prosecution disagrees with the Defence interpretation of the *Blagojevic* and *Jokic* Decision, and submits that there is no general rule that in any case where the statement is detailed, there would be no need for cross-examination. It argues that cross-examination is the only avenue to challenge the credibility of a witness.

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[11] Paras. 29-32 of the Motion.
[12] *Prosecutor v. Bagosora et. al.,* ICTR-97-28-T, (TC) Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92*bis*, of 9 March 2004 (the "*Bagosora* Decision of 9 March 2004") at para. 16.
[13] *Prosecutor v. Galic*, (AC) Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), of 7 June 2002 (the "*Galic* Appeals Chamber Decision") at para. 31, which was referred to in the *Prosecutor v. Nyiramasuhuko et al.* ICTR-98-42-T, (TC), Decision on the Prosecutor's Motion to Remove from her Witness List Five Deceased Witnesses and to Admit into Evidence the Witness Statements of four of said Witnesses, of 22 January 2003, (the "*Nyiramasuhuko* Decision of 22 January 2003") at para. 20.
[14] See para. 12 of the Prosecution Response.
[15] *Prosecutor v. Serugendo*, ICTR-05-84-I, (TC) Decision on Defence Motion for the Admissibility of Written Statements Under Rule 92 *bis*, of 1 June 2006 (the "*Serugendo* Decision of 1 June 2006") at para. 5.

14. The issues to which Witness JAMI speaks, such as the location of roadblocks, the presence of Robert Kajuga, and the presence of *Interhamwe* in Butare, are important to this case and therefore, such pivotal matters require that Witness JAMI be present in person to give evidence before the Trial Chamber.

Ntahobali Response

15. The Defence of Ntahobali objects to the Defence of Nsabimana's request arguing that parts of Witness JAMI's statement contain facts concerning the co-Accused.[16] The Defence argues that although the statement does not make direct allegations against the Accused Ntahobali, it effectively affects his defence.[17]

16. The Defence submits that, since the Prosecution alleges that the Accused had an association with Robert Kajuga and the *Interahamwe*,[18] it should be given an opportunity to cross-examine Witness JAMI.[19]

17. In the Defence's opinion, Witness JAMI's statement, contrary to the provisions of Rule 92 *bis*, goes to prove the positive acts of the Accused Nsabimana during the events of 1994 contrary to his Indictment.[20] This situation goes to establish the negative acts of the co-Accused.[21] It recalls the *Bagosora* Decision of 9 March 2004, and submits that it respects Nsabimana's rights to bring evidence which exculpates him but it argues that this does not authorise Nsabimana to bring evidence which affects the defence strategy of the Accused Ntahobali particularly when they are prejudicial to him.[22] The Defence agues that the general interests demand that the Witness gives testimony orally before the court.[23]

18. Regarding the reasons why Witness JAMI cannot testify,[24] the Defence argues that the Witness' religious order must adhere to the Rule of Law and the fundamental obligations found within the society that surround it.[25] Furthermore, Rule 54 gives the Trial Chamber the power to issue orders or summonses that may be necessary for the preparation or conduct of the trial.[26] Consequently, if the testimony of the Witness is essential, the Chamber should issue the appropriate orders to ensure his oral testimony.[27]

19. The Defence questions the authority of the person who attested the statement of Witness JAMI.[28]

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[16] Para. 3 of Ntahobali's Response.
[17] Para 13 of Ntahobali's Response.
[18] Para. 8 of Ntahobali's Response.
[19] Paras. 4, 5, 7, 11 and 12 of Ntahobali's Response; The Defence submits that Witness JAMI should be cross-examined on: the suggested statement that Robert Kajuga and the *Interahamwe* were staying at the Hotel Faucon from the beginning of the events in April 1994, contrary to the Defence case that Kajuga arrived in Butare towards May 1994; and the advise of Father Gahamanyi to Witness JAMI that he stay close to the priests to avoid attacks from the *Interahamwe*.This is particularly as nowhere in the statement is it stated what type of people these *Interahamwe* referred to in Witness JAMI's statement were; The Defence should also be given an opportunity to cross-examine Witness JAMI on: the new allegation that there were 1600 orphan children at the *Groupe Scolaire* in Butareand the allegations that the massacres were committed by 'a group of people' or 'an angry group'.
[20] Para. 16 of Ntahobali's Response.
[21] Para. 18 of Ntahobali's Response.
[22] Paras. 19, 20 and 21 of Ntahobali's Response.
[23] Para. 22 of Ntahobali's Response.
[24] Para. 24 of Ntahobali's Response.
[25] Para. 25 and 26 of Ntahobali's Response.
[26] Para. 27 of Ntahobali's Response.
[27] Para. 28 of Ntahobali's Response.
[28] Para. 29 of Ntahobali's Response.

20. The Defence thus prays that the Chamber reject the Motion, or alternatively that the Chamber assure the Defence an opportunity to cross-examine Witness JAMI.

Nsabimana's Replies to the Prosecution and Ntahobali's Responses

21. Recalling the Prosecution argument that Witness' JAMI's statement goes to prove or refute certain facts for which the Accused is charged within the Indictment, the Defence counters the argument submitting that whereas the Prosecution mission's is to prove the charges against the Accused, the Defence has the mission of proving his innocence.[29] The Defence thus submits that Rule 92 *bis* has been enacted to protect the interests of the Accused and not those of the Prosecution.[30] For this reason, the Defence requests the admission into evidence of witness statements which talk to the Accused's conduct during the Rwandan events of April to July 1994.[31]

22. In the Defence's opinion, the *Bagosora* Decision of 9 March 2004, which is erroneous, is the only one in which it was opined that Rule 92 *bis* excludes all evidence which tends to prove or refute the acts and conduct of the accused.[32] The Defence underscores that it will be bringing evidence of events of April to July 1994 which will always have an impact on the allegations found within the Indictment.[33]

23. The Defence disagrees with the Prosecution submission that Witness JAMI will essentially refute the allegation of Prosecution Witness TQ,[34] and it argues that Witness JAMI's statement goes to prove mitigating circumstances.[35]

24. Regarding paragraph 6.60 of the Indictment, the Defence submits that this paragraph does not support any of the charges in the Indictment.[36]

25. Regarding the Prosecution argument that Witness JAMI's statement essentially encapsulates the whole Defence case, the Defence argues that the Chamber is free to decide to admit in whole or in part the said witness' statement.[37] Accordingly, the Defence requests the Chamber to admit Witness JAMI's statement save for the part objected to by the Prosecution in paragraph 12 of its Response.[38]

26. Regarding the allegations that Witness JAMI's statement is repetitive of the testimony of other witnesses, the Defence argues that the said statement contains supplementary information to that which Witnesses OYO and UMA.[39]

27. Regarding the Prosecution objection to the Defence request that Witness JAMI's statement be admitted without him being cross-examined, the Defence essentially submits that had it been its wish, it would have wanted Witness JAMI to testify orally in Arusha or even by video-conference.[40]

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[29] Paras. 4 – 7 of the Reply to the Prosecution.
[30] Para. 8 of the Reply to the Prosecution.
[31] Paras. 9 and 10 of the Reply to the Prosecution; The Defence notes that in the *Serugendo* Decision cited, the situation is different from the instant case because therein was a request to admit statements which went to the acts and conduct of the Accused which occurred prior to the events of 1994.
[32] Para. 12 of the Reply to the Prosecution.
[33] Para. 15 of the Reply to the Prosecution.
[34] Para. 17 – 21 of the Reply to the Prosecution ; Para. 1- 5 of the Corrigendum of the Reply to the Prosecution.
[35] Para. 26 of the Reply to the Prosecution.
[36] Para. 27 – 29 of the Reply to the Prosecution.
[37] Para. 30 – 32 of the Reply to the Prosecution.
[38] Para. 12 of the Prosecution Response states: The Prosecution notes that the witness makes statement about the supposed lack of authority of the civil authorities when faced with the atrocities of the *Interahamwe*. Thus it is stated: "Personellement, j'ai eu l'impression que les autorités civiles n'ont eu rien à dire face à toute pissances des *Interahamwe*."
[39] Paras. 33 – 36 of the Reply to the Prosecution Response; Witness JAMI's statement has the supplementary information regarding his proposal to the Accused and Bourgmestre Kanyabashi to move the refugees to the Brothers of *St. Croix* in Rango.

28. Regarding the Defence of Ntahobali's objection to the mention of the leadership of the *Interahamwe* during the events of April 1994, the Defence points out that nowhere in the statement of Witness JAMI is there mention of the Accused Ntahobali.[41] In any case, the Defence recalls its request at para. 25 above.[42]

29. Regarding the Defence of Ntahobali's submissions on Mr. Dunia's authority, the Defence recalls Rule 92 *bis* and argues that this Rule is very straightforward.[43]

30. Regarding Witness JAMI's reasons hindering him from giving testimony on the events of 1994, the Defence submits that it is the Chamber's discretion to decide whether the reasons provided for the inability of giving oral testimony are sufficient for it to decide to admit a statement under Rule 92 *bis*.[44]

Having deliberated

31. The Chamber notes that the Motion is premised under Rules 89 (C) and 92 *bis* whose relevant provisions state:

> Rule 89: General Provisions
>
> […]
>
> A Chamber may admit any relevant evidence which it deems to have probative value.
>
> […]
>
> Rule 92 *bis*: Proof of Facts Other Than by Oral Evidence
>
> A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.
>
> […]
>
> Factors against admitting evidence in the form of a written statement include whether:
>
> […]
>
> (c) there are any other factors which make it appropriate for the witness to attend for cross-examination.
>
> […]
>
> (E) […]The Trial Chamber shall decide, after hearing the parties, whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.

Recalling the *Galic*[45] Decision, the Chamber finds that statements sought to be admitted under Rule 92 *bis* must also comply with the requirements of relevance and probative value required by Rule 89 (C).

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[40] Paras. 41, 42 and 45 of the Reply to the Prosecution Response.
[41] Paras. 19 and 20 of the Reply of Ntahobali.
[42] Para. 21 of the Reply of Ntahobali.
[43] Paras. 31 – 35 of the Reply of Ntahobali; Rule 92 *bis* imposes no other requirements other than that a certifying officer needs to certify the written statement sought to be admitted.
[44] Paras. 36 and 37 of the Reply to Ntahobali.
[45] *Galic*, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002, para. 31; See also *Serugendo*, Decision on Defense Motion for the Admission of Written Witness Statements Under Rule 92 *bis*, 1 June 2006, para. 3.

32. The Chamber notes, that the Defence requests it to admit only parts of the written statement of Witness JAMI: the Defence seeks to exclude those parts where the Witness mentions the lack of authority of the civil leaders when they were faced with the atrocities committed by the *Interahamwe*. Accordingly, the Chamber shall consider only those portions of the statement sought to be admitted.[46]

33. The Chamber recalls that the threshold requirement for evidence to be admitted under Rule 92 *bis* are those found in sub-Rule (A) – whether that evidence goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.[47]

34. After a careful perusal of the statement sought to be admitted, the Chamber notes that, not only does it concern the conduct of the Accused Nsabimana when he allegedly assisted in the evacuation of children during the events of 1994 it also includes conduct of other co-Accused persons and specifically mentions the conduct of the Accused Kanyabashi during the same event. This statement also concerns the aid the Accused Nsabimana allegedly gave to the witness and other refugees while they were at the *prefectural* office. In the Chamber's opinion, the statement goes to prove the acts and conduct of the Accused and thereby to refute allegations laid against him particularly those found at Paragraph 6.60 of the Indictment, which essentially alleges that the Accused knew of the massacres and yet took no steps to assist the refugees.[48] The Chamber thus finds that the portions sought to be admitted fail to meet the threshold requirement of Rule 92 *bis* (A).

35. Pursuant to Rules 92 *bis* (A) (ii) (c) and (E), outlined above, the Chamber is of the view that the party seeking to produce a witness' statement in lieu of his oral testimony must satisfy it that there is no other way of admitting the witness' evidence, which is relevant and has probative value, except by way of Rule 92 *bis*. In the Chamber's opinion, the said party must provide the Chamber with compelling reasons why said witness should not be cross-examined, if that is its request.

36. The Chamber notes that the Defence not only requests that the statement be admitted under Rule 92 *bis,* it also requests that Witness JAMI not be cross-examined because; (1) his hierarchy does not allow him to give testimony on the events of 1994; and (2) the statement is so complete that it does not require cross-examination.

37. On the basis of the provisions of Rule 90 (A), which provides that witnesses should be heard directly by the Chamber, the Chamber finds that the Defence has not demonstrated the reasons why Witness JAMI's hierarchy, would prevent him from testifying. Furthermore, the Chamber is not convinced that the Defence has considered all the available avenues provided under the Rules and in particular those under Rule 75 which would enable further protection of a witness and thus facilitate the oral testimony of a protected witness, such as Witness JAMI.

38. The Chamber underscores that cross-examination is a fundamental right enshrined under Article 20 (4) (e) of the Statute, whose purpose is to *inter alia* test the credibility of the witness. On this basis, the Defence's submission that Witness JAMI's statement is complete in and of itself such that it does not require cross-examination would infringe upon the other Parties' fundamental rights to confront the witness in a bid to challenge his credibility or to present their cases, pursuant to Rule 90 (G).

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[46] See also para. 25 of the *Nyiramasuhuko* Decision of 22 January 2002.
[47] See para. 21 of the *Nyiramasuhuko* Decision of 22 January 2003 ; See also para. 24 of the *Galic* Decision.
[48] Para. 6.60 of the Indictment states: Knowing that massacres of the civilian population were being committed, political and military authorities, including Sylvain Nsabimana and Alphonse Nteziryayo took no measures to stop them. On the contrary, they refused to intervene to control and appeal to the population as long as a cease-fire had not been declared. This categorical refusal was communicated to the Special Rapporteur via the Chief of Staff of Rwandan Army, Major-General Augustin Bizimungu.

39. Accordingly, the Chamber denies the Defence request to admit any portion of the statement of Witness JAMI and therefore dismisses the Motion in its entirety.

FOR THE ABOVE REASONS, THE TRIBUNAL

DISMISSES the Motion in its entirety.

Arusha, 15 September 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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Decision on Pauline Nyiramasuhuko's Extremely Urgent Motion for Exclusion of Evidence or Subsidiarily for Further Disclosure Regarding Witness DEDE's Expected Testimony
19 September 2006 (ICTR-97-29-T ; Joint Case : ICTR-98-42-T

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Joseph Kanyabashi, Elie Ndayambaje, Sylvain Nsabimana, Alphonse Nteziryayo, Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Purpose of the will-say statement, Will-say statement has to be full and comprehensive in the sense of laying out the scope of the testimony – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 73 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Arsène Shalom Ntahobali's Motion to Amend His Witness List and to Reconsider the Decision of 26 August 2005 Titled: "Decision on the Defence Motion to Modify the List of the Defence Witnesses For Arsène Shalom Ntahobali", 27 January 2006 (ICTR-98-42)

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

SITTING as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy B. Bossa (the "Chamber");

BEING SEIZED of the "Requête d'extrême urgence de Pauline Nyiramasuhuko aux fins d'exclusion totale de preuve ou subsidiairement, en divulgation supplémentaire d'informations concernant le témoignage éventuel de DEDE ", filed on 8 September 2006 (the "Motion");

CONSIDERING:

(a) the "Prosecutor's Response to Nyiramasuhuko's Motion to Exclude Part of DEDE's Forthcoming Evidence or Alternatively for Further Disclosure", filed on 11 September 2006 (the "Prosecution Response");
(b) the "Réplique de Sylvain Nsabimana à la requête d'extrême urgence de Pauline Nyiramasuhuko aux fins d'exclusion totale de preuve ou subsidiairement, en

divulgation supplémentaire d'informations concernant le témoignage éventuel de DEDE", filed on 13 September 2006 ("Nsabimana's Response");

(c) the "Réplique de Pauline Nyiramasuhuko à la réponse du Procureur et à la 'Réplique de Sylvain Nsabimana à la requête d'extrême urgence de Pauline Nyiramasuhuko aux fins d'exclusion totale de preuve ou subsidiairement, en divulgation supplémentaire d'informations concernant le témoignage éventuel de DEDE'", filed on 14 September 2006 ("Nyiramasuhuko's Reply");

RECALLING:

(i) the "Decision on the Prosecution's Urgent Motion to Compel Compliance With the Trial Chamber's Decision of 17 August 2006", issued on 5 September 2006 (the "Decision of 5 September 2006");

(ii) the document entitled "*Complément d'informations*" filed by the Defence for Nsabimana on 7 September 2006 (the "Additional Information of 7 September 2006");

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

NOW DECIDES the matter, pursuant to Rule 73 (A), on the basis of the written submissions of the Parties.

Introduction

In its Decision of 5 September 2006, the Chamber ordered the Defence for Nsabimana to specifically mention by name or by position, the 'MRND dignitaries' mentioned by Witness DEDE in his supplementary will-say of 29 August 2006. Additionally, if those 'MRND dignitaries' include Accused before the Chamber, the Defence is ordered to name the said Accused. Subsequently, the Defence of Nsabimana filed an additional information on 7 September 2006 in which it indicated that the "MRND dignitaries" referred to by Witness DEDE are, among others, Pauline Nyiramasuhuko and President Theodore Sindikubwabo. On 8 September 2006, the Defence for Nyiramasuhuko filed a motion in connection to the additional information mentioned above and which is the subject of the instant Decision.

Submissions of the Parties

Defence for Nyiramasuhuko

1. The Defence moves the Chamber to prohibit Witness DEDE from testifying on facts related to the Accused Pauline Nyiramasuhuko or subsidiarily, to order the Defence for Nsabimana to disclose further information in this regard.

2. The Defence submits that the additional information concerning the fact that Pauline Nyiramasuhuko is among the "MRND dignitaries" lacks precision and prevents it from conducting an effective cross-examination of Witness DEDE. The Defence alleges that the following information is lacking: When and where did Witness DEDE purportedly see Pauline Nyiramasuhuko moving about in Butare town under escort? Who was Pauline Nyiramasuhuko's escort? Was Pauline Nyiramasuhuko accompanied and if so by whom? How was Pauline Nyiramasuhuko moving about? Was she in a vehicle? If so which type?

Prosecution

3. The Prosecution prays the Chamber to deny the Motion given that Nyiramasuhuko will have sufficient time to prepare the cross-examination of Witness DEDE on the basis of existing disclosure. However, the Prosecution asserts that it rests with the Chamber to assess if the additional information complies with its earlier Decision or otherwise.

Defence for Nsabimana

4. The Defence submits that the additional information did comply with the Decision of 5 September 2006 and the further information sought by the Defence for Nyiramasuhuko is a matter for cross-examination. Moreover, the Defence indicates that when the Accused Nyiramasuhuko testified on her own behalf, she indicated that, between April and July 1994, she was present in Butare many times.

Nyiramasuhuko's Reply

5. The Defence submits that Witness DEDE's will-say upon which the Chamber relied to grant the request for addition to Nsabimana's list of witnesses did not refer to "MRND dignitaries" nor to the Accused Nyiramasuhuko herself and any subsequent *will-say* and/or additional information should not do so, either. According to the Defence, no cross-examining party be allowed to raise those issues during the expected testimony of Witness DEDE.

6. Finally, the Defence stresses that the supplementary will-say and/or additional information regarding Witness DEDE should be in connection with what is set out in the Decision of 17 August 2006 granting his addition as a Defence Witness for Nsabimana.

Having deliberated

7. The Chamber recalls that since the sole purpose of the *will-say* statement is to enable the other party or the other parties to prepare and to raise issues, it must be clear enough to cover the scope of the proposed testimony of the witness. Accordingly, *will-say* statements must be full and comprehensive, not in the sense of giving all the details, but at least laying out the scope of what the witness is expected to cover in clear terms.[1]

8. The Chamber sees no reason to depart from this standard and notes that the disclosure made thus far in connection with Witness DEDE's expected testimony meets the requirements as enunciated above, allowing any other party to conduct an effective cross-examination of that witness. The Chamber therefore denies the Motion in its entirety.

FOR THE ABOVE REASONS, THE TRIBUNAL,

DENIES the Motion.

Arusha, 19 September 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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[1] *Prosecutor v. Nyiramasuhuko et al.;* Decision on Arsène Shalom Ntahobali's Motion to Amend His Witness List and to Reconsider the Decision of 26 August 2005 Titled: "Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali", 27 January 2006, para. 24.

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Decision on Elie Ndayambaje's Motion for Certification to Appeal the Decision on Ndayambaje's Motion for Exclusion of Evidence Issued on 1st September 2006 5 October 2006 (ICTR-96-8-T ; Joint Case : ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Elie Ndayambaje – Rule 73 Motions are without interlocutory appeal, Discretionary power of the Trial Chamber to grant certification to appeal, Matters concerning admissibility of evidence are the responsibility of the Trial Chamber as triers of facts, No responsibility of the Appeals Chamber – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A) and 73 (B)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible', 18 March 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Defence Motion for Certification to Appeal the 'Decision on Defence Motion for a Stay of Proceedings and Abuse of Process', 19 March 2004 (ICTR-98-42) ; Appeals Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 (ICTR-98-42)

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the "*Requête d'Élie Ndayambaje aux fins de certification d'appel de la décision intitulée:* Decision on Ndayambaje's Motion for Exclusion of evidence, of 1 September 2006," filed on 6 September 2006 (the "Motion");

CONSIDERING the "Prosecutor's Response to the *Requête d'Élie Ndayambaje aux fins de certification d'appel de la décision intitulée:* Decision on Ndayambaje's Motion for Exclusion of evidence, of 1 September 2006, filed on 11 September 2006 (the "Prosecutor's Response");

CONSIDERING the "Replique de Élie Ndayambaje à la Réponse du Procureur à sa Requête d'Élie Ndayambaje aux fins de certification d'appel de la décision intitulée: Decision on Ndayambaje's Motion for Exclusion of Evidence, of 1 September 2006" of 18 September 2006 ("Ndayambaje's Reply") ;

NOTING the Chamber's "Decision on Ndayambaje's Motion for Exclusion of evidence" of 1 September 2006 (the "Impugned Decision");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") in particular Rule 73 (B) of the Rules;

CONSIDERING that pursuant to Rule 73 (A) of the Rules, the Motion will be decided on the basis of the written briefs only, as filed by the Parties.

Submissions of the Parties

THE DEFENCE

1. The Defence moves under Rule 73 (B) for certification to appeal the Impugned Decision.

The issues involved significantly affect the fairness of the trial and its expeditiousness

2. Defence submits that a large amount of evidence admitted against the Accused is evidence for which the Accused has not been charged with. If this evidence were to be expunged from the record, the Accused would not need to bring evidence to counter it and this will significantly affect the fairness and expeditiousness of the trial.

3. Defence submits that the expression "Some of the matters raised may be considered at a later stage of the proceedings" used at para. 25 of the Impugned Decision renders the whole Decision vague and ambiguous regarding which of the matters the Defence ought to respond to when preparing its defence.[1] The Defence argues that it is not in the interests of justice for the Chamber to delay its decision to reject evidence which it knows was admitted contrary to the jurisprudence of the Tribunal.[2]

The issues involved significantly affect the conduct of the proceedings

4. The Defence makes reference to the Chamber's Decision of 18 March 2004 and argues that if the Chamber admits so much evidence which is outside of the scope of the indictment, it could unjustly condemn the Accused on the basis of this evidence, and therefore significantly affect the outcome of the trial.[3] For this reason, if the Chamber were to rule this evidence inadmissible at this stage of the proceedings, the Defence case would be simplified.

An immediate resolution by the Appeals Chamber may materially advance the proceedings

5. The Defence submits that an immediate resolution of the matter will materially advance the proceedings for the following reasons: (1) The Defence will need less preparation and presentation time; (2) The Prosecution's task will also be reduced; and (3) The Chamber will not be required to analyze evidence which is outside of the Indictment.[4]

THE PROSECUTION

6. The Prosecution notes the provisions of Rule 73 (B) and submits that the standard of proof that is required to warrant certification to appeal a Decision is very high,[5] so as to ensure finality of trials.

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[1] Para. 16 of the Motion
[2] Para. 17 of the Motion
[3] Para. 19, 20 of the Motion, quoting *Prosecutor v. Nyiramasuhuko et al*. ICTR-97-21-T, (TC) Decision on Ntahobali and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible," of 18 March 2004 (the *Ntahobali and Nyiramasuhuko* Decision of 18 March 2004") at para. 25
[4] Paras. 23 – 29 of the Motion
[5] The Rule provides that certification may be granted if the decision involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

7. The Prosecution, making reference to the jurisprudence of the Tribunal,[6] argues that none of the grounds proffered by the Defence are sufficient to move the Chamber to grant certification of the Impugned Decision. It argues that a grant of the Motion would lead to a delay of the proceedings.

8. The Prosecution argues that the Defence merely repeats its arguments made in the motion which gave rise to the Impugned Decision and thus attempts to re-litigate the issues. In any case, the Prosecution objects to the Defence contention that the Impugned Decision is vague and ambiguous and rather argues that the Chamber is consistent in its jurisprudence that admissibility of evidence and the weight to be attached to it are two separate issues. The Prosecution argues that the Chamber's practice cannot raise an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

9. Regarding the Defence argument that the evidence admitted is outside the scope of the indictment, the Prosecution recalls the provisions of Rule 93 which allows the admission of evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law in the interests of justice and the jurisprudence of the Tribunal.

10. The Prosecution recalls the Appeals Chamber Decision of 4 October 2004 in *Nyiramasuhuko*[7] and argues that the admissibility of evidence is within the sole precinct of the Trial Chamber and that issues of admissibility are not fit for certification. It argues that the Defence is in fact requesting the Appeals Chamber to intervene in a matter which is at the discretion of the Trial Chamber, and thus in the absence of exceptional circumstances and clear reasons indicating that a discretion was wrongly exercised or that the Trial Chamber did not consider a material fact, the Appeals Chamber would not usually determine issues touching upon the exercise of judicial discretion by the Trial Chamber.

THE DEFENCE REPLY

11. The Defence reiterates its submissions and denies the Prosecution's allegations that the Motion is an attempt to re-litigate the Defence's earlier Motion which gave rise to the Impugned Decision.

12. The Defence opposes the Prosecution's reliance on the Appeals Chamber Decision of 4 October 2004 in *Nyiramasuhuko*[8] arguing that there is a difference between admissibility of witness testimonies and admissibility of other pieces of evidence. The Defence recalls that, in the *Nyiramasuhuko* Decision of 18 March 2004, certification to appeal the Chamber's Decision on the admissibility of the testimonies of QBZ and RV was granted because the Chamber was of the view that the issue of admissibility of testimonies of Prosecution Witnesses significantly affect the outcome of the trial against the accused.

Having deliberated

13. The Chamber recalls Rule 73 (B), which stipulates:

> Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

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[6] The *Ntahobali and Nyiramasuhuko* Decision of 18 March 2004.
[7] *Prosecutor v. Nyiramasuhuko et al.,* ICTR-98-42-T (TC) Decision on Nyiramasuhuko's Appeal on the Admissibility of Evidence, of 4 October 2004.
[8] *Prosecutor v. Nyiramasuhuko et al.,* ICTR-98-42-T (TC) Decision on Nyiramasuhuko's Appeal on the Admissibility of Evidence, of 4 October 2004.

14. The Chamber, recalling its jurisprudence[9] notes that decisions rendered under Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for the very limited circumstances stipulated in Rule 73 (B). The Chamber may grant certification to appeal if both conditions of Rule 73 (B) are satisfied.[10] Both of these conditions require a specific demonstration, and are not met through a general reference to the submissions on which the Impugned Decision was rendered.

15. Having reviewed the submissions of the Parties, the Chamber is of the opinion that in its Motion, the Defence has generally revisited the thrust of its previous arguments which led to the Impugned Decision rather than demonstrating the conditions required for the Chamber to grant certification to appeal the Impugned Decision.

16. Moreover, the Chamber recalls the Appeals Chamber opinion[11] and underscores that matters concerning admissibility of evidence are the responsibility of the Trial Chamber, as triers of facts, and therefore the Appeals Chamber may not assume this responsibility.

17. The Chamber finds therefore that the Defence has failed to satisfy the criteria for the grant of certification under Rule 73 (B) and denies the Motion accordingly

FOR THE ABOVE REASONS, THE TRIBUNAL,

DENIES the Motion.

Arusha, 5 October 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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[9] *Prosecutor v. Nyiramasuhuko,* Case N°ICTR-97-21-T, "Decision on Defence Motion for Certification to Appeal the "Decision on Defence Motion for a Stay of Proceedings and Abuse of Process", 19 March 2004 paras. 12 – 16; *Prosecutor v. Ntahobali and Nyiramasuhuko,* Case N°ICTR-97-21-T, "Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 18 March 2004, paras. 14 – 17.

[10] Under the first limb of Rule 73 (B), the applicant must show how an appellate review would significantly affect (a) a fair and expeditious conduct of the proceeding, or (b) the outcome of the trial. This condition is not determined on the merits of the appeal. Second, the applicant has the burden of convincing the Chamber that an "immediate resolution by the Appeals Chamber may materially advance the proceedings."

[11] See Para. 5 of the Appeals Chamber Decision of 4 October 2004 in *Nyiramasuhuko*.

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Scheduling Order
Rule 54 of the Rules of Procedure and Evidence
5 October 2006 (ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Joseph Kanyabashi, Elie Ndayambaje, Sylvain Nsabimana, Alphonse Nteziryayo, Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Schedule, Reduction of the Defence witness list

International Instrument cited :

Rules of Procedure and Evidence, rules 54, 73 ter (B) and 73 ter (D)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Alphonse Nteziryayo, Decision on Alphonse Nteziryayo's Motion to Modify His Witness List, 14 July 2006 (ICTR-98-42)

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber") pursuant to Rule 54 of the Rules of Procedure and Evidence (the "Rules")

RECALLING the Scheduling order of 14 December 2005 in which the Chamber ordered five Defence teams in this case

> "to seriously review their witness list with a view to reducing the total number of witnesses as well as reducing the number of witnesses who are being called to prove the same facts and to file an updated precise list of witnesses by Monday 23 January 2006 pursuant to Rule 73 *ter* (D) of the Rules."

NOTING that the presentation of the Defence case is scheduled to be completed by mid-2007 and that all efforts should be made to ensure the efficient conduct of the proceedings until then and to comply with that deadline.

CONSIDERING that as of 27 July 2006, the Defence for Nteziryayo has listed 28 witnesses[1] and that on 14 July 2006, the Chamber had urged the Defence to reduce significantly its list.[2]

CONSIDERING that as of 23 January 2006, the Defence for Ndayambaje has listed 51 witnesses.[3]

CONSIDERING that the Defence for Kanyabashi has listed 110 factual witnesses and seven expert witnesses in its Pre-Defence Brief; that on 20 January 2006, the Defence for Kanyabashi indicated that a total of 32 factual witnesses were to be removed from its list but indicated that it

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[1] The Prosecutor v. Nteziryayo, Liste révisée des témoins de la défense de Alphonse Nteziryayo, 27 July 2006.
[2] *The Prosecutor v. Nteziryayo*, Decision on Alphonse Nteziryayo's Motion to Modify his Witness List, 14 July 2006.
[3] The Prosecutor v. Ndayamabaje, Réponse au Scheduling Order du 14 décembre 2005, 23 January 2006.

would file a motion to add and remove witnesses at a later stage;[4] that today, a total of 78 factual witnesses and seven experts still appear on the list of potential witnesses.

HEREBY

STATES that the presentation of the Defence case is scheduled to be completed by mid-2007;

ORDERS the Defence for Alphonse Nteziryayo, Elie Ndayambaje and Joseph Kanyabashi to review their witness list with a view to significantly reducing the total number of witnesses as well as reducing the number of witnesses who are being called to prove the same facts, and to file a realistic and updated list of witnesses by Monday 6 November 2006 pursuant to Rule 73 *ter* (D) of the Rules;

ORDERS the Defence for Nteziryayo to proceed with the presentation of its case as soon as the Defence for Nsabimana is closed and to ensure that all relevant disclosures have been made in due time to avoid any delay in the proceedings.

Arusha, 5 October 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

[4] The Prosecutor v. Kanyabashi, Mise à jour de la liste des témoins du mémoire préalable (Scheduling Order du 14 Décembre 2005), 20 January 2006.

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Decision on "Appeal of Accused Arsène Shalom Ntahobali against the Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997" 27 October 2006 (ICTR-98-42-AR73)

(Original: English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge ; Mohamed Shahabuddeen ; Liu Daqun ; Andrésia Vaz ; Wolfgang Schomburg

Joseph Kanyabashi, Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Issues raised : "Whether the Trial Chamber erred in determining the admissibility of the Previous Statements without holding a voir dire procedure" and "Whether the Trial Chamber erred in ruling that the portions of the Previous Statements used in cross-examination to test Mr. Ntahobali's credibility were admissible as evidence", Decisions relating to the admissibility of evidence and the general conduct of proceedings fall within the discretion of the Trial Chamber, Interlocutory appeal is not a hearing de novo, No provisions in the Rules directing the Trial Chamber to adopt a formal procedure for determine whether to conduct a voir dire, No prejudice to the Accused regarding the presentation of his opinion to the Trial Chamber as he was given an opportunity to present submissions, Procedure relating to a confession – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 63, 89 (B), 92 and 95

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on the Prosecutor's Motion for Admission of Testimony of Expert Witness, 24 March 2005 (ICTR-2000-55A) ; Appeals Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Tharcisse Muvunyi v. The Prosecutor, Decision on Interlocutory Appeal, 29 May 2006 (ICTR-2000-55A)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Zdravko Mucić, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, 2 September 1997 (IT-96-21) ; Trial Chamber, The Prosecutor v. Slobodan Milošević, Decision on Interlocutory Appeals of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004 (IT-02-54) ; Appeals Chamber, The Prosecutor v. Sefer Halilović, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005 (IT-01-48)

473. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of an interlocutory appeal

filed by Arsène Shalom Ntahobali on 8 June 2006 ("Interlocutory Appeal").[1] The Defence for Mr. Ntahobali requests that the Appeals Chamber reverse the Trial Chamber's Decision rendered on 15 May 2006 ("Impugned Decision"), which allowed the Defence for the co-accused Mr. Kanyabashi to cross-examine Mr. Ntahobali using previous statements of Mr. Ntahobali made to Prosecution investigators in July 1997 ("Previous Statements").[2] The Defence for Mr. Ntahobali requests that the Appeals Chamber find the Previous Statements inadmissible or alternatively order the Trial Chamber to conduct a *voir dire* procedure to determine whether they were freely and voluntarily provided to the Prosecution investigators.[3] The Prosecution and the Defence for Mr. Kanyabashi filed their responses to the Interlocutory Appeal on 16 and 19 June 2006 respectively.[4] Contrary to the submissions of the Defence for Mr. Ntahobali,[5] both responses were timely filed pursuant to the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal ("Practice Direction").[6]

Background

474. During the cross-examination of Mr. Ntahobali, the Defence for Mr. Kanyabashi sought to challenge the credibility of Mr. Ntahobali using the Previous Statements.[7] The Defence for Mr. Ntahobali objected to the admissibility of the Previous Statements, arguing that they were not freely and voluntarily given[8] and that a *voir dire* procedure should be held in order to assess whether the Previous Statements had been obtained in accordance with the Rules of Procedure and Evidence of the Tribunal ("Rules").[9]

475. In the Impugned Decision, the Trial Chamber found the Previous Statements admissible through a "perusal of the transcripts of [the] interviews as well as through the normal procedure of admissibility of evidence provided under Rule 89 (C), and the conditions laid out in Rules 89 (D) and 95" on the basis that they fully complied with the requirements of Articles 18 and 20 of the Statute of the Tribunal ("Statute") and Rules 42, 43 and 63 of the Rules.[10] The Trial Chamber limited the

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[1] The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko, Case N°ICTR-97-21-AR73 (Joint Case N°ICTR-98-42-T), Appel de l'Accusé Arsène Shalom Ntahobali à l'Encontre de la Décision Intitulée "Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997", 8 June 2006 ("Interlocutory Appeal").

[2] *The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Joint Case N°ICTR-98-42-T, Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997, 15 May 2006 ("Impugned Decision").

[3] Interlocutory Appeal, pp. 11-12.

[4] The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko, Case N°ICTR-97-21-AR73, Prosecutor's Response to the "Appel de l'Accusé Arsène Shalom Ntahobali à l'Encontre de la Décision Intitulée 'Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997'", 16 June 2006, para. 16 ("Prosecutor's Response"); The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko, Case N°ICTR-97-21-AR73, Réponse de Joseph Kanayabashi à "l'Appel de l'Accusé Arsène Shalom Ntahobali à l'Encontre de la Décision Intitulée Joseph Kanyabashi's Response to the Appeal by the Accused Arsène Shalom Ntahobali Against the Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigator's in July 1997", 19 June 2006, para. 5 ("Kanyabashi's Response").

[5] The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko, Case N°ICTR-97-21-AR73, Réplique de Arsène Shalom Ntahobali à la Réponse du Procureur Intitulée "Appel de de l'Accusé Arsène Shalom Ntahobali à l'Encontre de la Décision Intitulée "Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997"", 23 June 2006, paras 4-5 ("Ntahobali's Reply to the Prosecutor"); The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko, Case N°ICTR-97-21-AR73, Réplique de Arsène Shalom Ntahobali à la Réponse de Joseph Kanayabashi à l'Appel de l'Accusé Arsène Shalom Ntahobali à l'Encontre de la Décision Intitulée "Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali using Ntahobali's Statements to Prosecution Investigators on July 1997", 23 June 2006, paras 2-6 ("Ntahobali's Reply to Kanyabashi ").

[6] Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, Section III (8) read together with Section I, permitting ten days from the filing of an interlocutory appeal for the filing of a response.

[7] T. 8 May 2006, p. 77; T. 9 May 2006, pp. 3-14. See also Kanyabashi's Response, para. 5; Impugned Decision, paras 1, 65.

[8] Impugned Decision, paras 27, 30, 31, 43.

[9] Impugned Decision, paras 32-33, 46-56.

[10] Impugned Decision, paras 54-55, 64-72, 73-78, 79-82.

admission of the Previous Statements to "cross-examining Ntahobali on issues relating to his credibility" and ruled that the actual admission of each Previous Statement into evidence would be done after the cross-examination of Mr. Ntahobali by each party.[11] In addition, the Trial Chamber granted "any other co-Accused's Motion as well as the Prosecution's Motion to cross-examine the Accused Ntahobali using his interviews to challenge his credibility".[12] The Trial Chamber denied the request of the Defence for Mr. Ntahobali to hold a *voir dire* procedure on the basis that it was not the only method by which the Previous Statements could be assessed for their compliance with the Rules and the Statute.[13] The Defence for Mr. Ntahobali sought leave to appeal the Impugned Decision, which the Trial Chamber granted in its Decision on Certification of 1 June 2006.[14]

Arguments of the Parties

476. The Defence for Mr. Ntahobali requests the Appeals Chamber to rule that the Trial Chamber erred in finding the Previous Statements admissible.[15] It argues that the Previous Statements, including signed documents by Mr. Ntahobali stating that he understood his rights under Rules 42 and 43 of the Rules, are contrary to his assertions during trial that the Previous Statements were not free and voluntary.[16] Upon that allegation, the Defence for Mr. Ntahobali submits that the burden was on the Prosecution to prove the free and voluntary nature of the Previous Statements beyond reasonable doubt, and it failed to do so.[17] The Defence for Mr. Ntahobali also argues that the Trial Chamber erred in not considering the alleged inducements or threats to give the Previous Statements on the basis that they occurred "prior to the Accused's 1997 interviews and his arrest".[18] In the alternative, it requests that the Appeals Chamber find the procedure adopted by the Trial Chamber in assessing the admissibility of the Previous Statements erroneous and order the Trial Chamber to conduct a *voir dire* procedure to properly determine admissibility.[19]

477. The Prosecution responds that the Trial Chamber was correct in concluding that it was not obliged to conduct a *voir dire*[20] and exercised its discretion reasonably in assessing the admissibility of the Previous Statements.[21] It submits that there is no evidence of coercion or inducements attributable to the Prosecution investigators[22] and argues that it is not relevant for the Trial Chamber to consider any subjective motivations held by Mr. Ntahobali.[23]

478. The Defence for Mr. Kanyabashi responds that the Trial Chamber correctly applied objective criteria in deciding there was nothing to suggest Mr. Ntahobali provided the Previous Statements as a result of inducements.[24] According to the Defence for Mr. Kanyabashi, Mr. Ntahobali voluntarily surrendered himself to representatives of the Tribunal upon his own assumption that this would secure his father's release from detention by national authorities.[25] The Defence for Mr. Kanyabashi also objects to the argument of Mr. Ntahobali that it was necessary for the Trial Chamber to hold a *voir*

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[11] Impugned Decision, para. 81.
[12] Impugned Decision, para. 82.
[13] Impugned Decision, para. 53.
[14] *The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*., Joint Case N°ICTR-98-42-T, Decision on Kanyabashi's Motion for Certification to Appeal the Chamber's Decision Granting Kanyabashi's Request to Cross-Examine Ntahobali Using 1997 Custodial Interviews, dated 1 June 2006, filed 2 June 2006 ("Decision on Certification").
[15] Interlocutory Appeal, paras 14-27, 66.
[16] Interlocutory Appeal, para. 17.
[17] Interlocutory Appeal, para. 18.
[18] Interlocutory Appeal, paras 22-26.
[19] Interlocutory Appeal, paras 3-13, 28-66.
[20] Prosecutor's Response, paras 9-15.
[21] Prosecutor's Response, para. 16.
[22] Prosecutor's Response, para. 18.
[23] Prosecutor's Response, para. 19.
[24] Kanyabashi's Response, paras 20-24.
[25] Kanyabashi's Response, para. 22.

dire[26] and argues that the Trial Chamber's "perusal" assessment of the Previous Statements was sufficient.[27]

479. In its reply to the Prosecution, the Defence of Mr. Ntahobali argues that it was not possible for Mr. Ntahobali to give evidence on the veracity of the Previous Statements whilst he was on the stand, as the Previous Statements were only raised during cross-examination and thus it was not open to him to reopen his examination-in-chief to offer evidence on the matter.[28]

480. In its reply to the Defence for Mr. Kanyabashi, the Defence for Mr. Ntahobali further submits that a *voir dire* procedure was necessary to bring forth further evidence on the veracity of the Previous Statements as a perusal of the transcripts of the relevant interviews would not necessarily provide sufficient indication if threats were indeed made.[29]

Discussion

481. This Interlocutory Appeal involves two issues: (i) whether the Trial Chamber erred in determining the admissibility of the Previous Statements without holding a *voir dire* procedure; and if the answer to this question is in the negative, (ii) whether the Trial Chamber erred in ruling that the portions of the Previous Statements used in cross-examination to test Mr. Ntahobali's credibility were admissible as evidence. While the Interlocutory Appeal raises these two issues, they will not be addressed separately as they are inextricably linked: the Defence for Mr. Ntahobali argues that a *voir dire* was necessary because there were sufficient indicia to show that the Previous Statements were made by him upon impermissible inducements and threats, which would also render the Previous Statements inadmissible.

482. Decisions relating to the admissibility of evidence and the general conduct of proceedings largely fall within the discretion of the Trial Chamber.[30] An interlocutory appeal challenging the discretion of the Trial Chamber is not a hearing *de novo*.[31] The standard of review on interlocutory appeal for such discretionary matters is therefore not whether the Appeals Chamber agrees with the Trial Chamber's conclusion, but whether the Trial Chamber reasonably exercised its discretion in reaching its decision.[32] The Appeals Chamber affirms that:

> a Trial Chamber's exercise of discretion will be overturned if the challenged decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. Absent an error of law or a clearly erroneous factual finding, then, the scope of appellate review is quite limited…[33]

483. During cross-examination of Mr. Ntahobali by Defence Counsel for Mr. Kanyabashi, the latter distributed Mr. Ntahobali's Previous Statements to the parties, indicating that he intended to use them in further cross-examination of Mr. Ntahobali.[34] In response to a query raised by Mr. Ntahobali

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[26] Kanyabashi's Response, paras 25-40.
[27] Kanyabashi's Response, paras 9-16.
[28] Ntahobali's Reply to the Prosecutor, paras 15, 19.
[29] Ntahobali's Reply to Kanyabashi, paras 14-17.
[30] *Tharcisse Muvunyi v. The Prosecutor*, Case N°ICTR-00-55A-AR73(C), Decision on Interlocutory Appeal, 29 May 2006, para. 5 ("*Muvunyi* Decision").
[31] *The Prosecutor v. Sefer Halilović*, Case N°IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, para. 5 ("*Halilović* Decision").
[32] *The Prosecutor v. Théoneste Bagosora et al.,* Case N°ICTR-98-41-AR73, ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, para. 3 ("*Bagosora* Appeal").
[33] *Prosecutor v. Slobodan Milošević*, Case N°IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, para. 10 ("*Milošević* Decision").
[34] T. 8 May 2006, p. 77: the Defence for Mr. Kanyabashi stated "I have distributed the transcripts that we received from the Office of the Prosecutor to the various Defence teams […]".

from the witness box,[35] the Trial Chamber gave the parties the opportunity to present submissions on whether there was sufficient basis to the allegation that the Previous Statements were in violation of the Rules such as to require a *voir dire* procedure.[36]

484. The Defence for Mr. Ntahobali argues that this procedure adopted by the Trial Chamber was impermissibly informal[37] since prior statements of an accused should be subject to an inquiry conducted "in accordance with pre-established rules of law which are known to the parties"[38] and not by merely requiring the parties to indicate their views on whether the Rules were complied with in taking the Previous Statements.[39] The Defence for Mr. Ntahobali has not identified any error in the procedure adopted by the Trial Chamber. The *voir dire* procedure originates from the common law and does not have a strictly defined process in this Tribunal.[40] There are no provisions in the Rules which direct Trial Chambers to adopt a formal procedure for determining whether they should conduct a *voir dire*. Instead, Rule 89 (B) of the Rules provides that reference may be made to evidentiary rules "which will best favour a fair determination of the matter". This discretion can extend to the conduct of a *voir dire* procedure when it is determined appropriate by the Trial Chamber.[41] The procedure conducted by the Trial Chamber permitted the parties to make submissions as to whether the Prosecution and Co-Accused could use the Previous Statements to impeach Mr. Ntahobali. The Trial Chamber considered the submissions of the parties on whether it was necessary to grant the request for a *voir dire* procedure by the Defence of Mr. Ntahobali, and after finding that it was not necessary, the Trial Chamber determined the admissibility of the Previous Statements on the basis of the submissions made by the parties. At several stages during the hearing[42] the Trial Chamber affirmed that this was the procedure to be followed, in particular when it stated:

> We would like to hear the challenge, the basis of the challenge [to the admissibility of the Previous Statements]. And in the process, certainly, the Trial Chamber will examine the [admissibility] issue, including whether to determine the issue as presently presented, or whether there would be any need for voir – for trial within a trial, voir dire.[43]

13. Therefore, the parties were informed of the procedure the Trial Chamber was adopting and made submissions pursuant to this procedure.[44] Indeed, the procedure adopted by the Trial Chamber, while characterised as one adopted to determine whether a *voir dire* procedure was necessary, was very similar to a *voir dire*. The Trial Chamber heard the parties on the circumstances surrounding the taking of the Previous Statements, admitting a written affidavit from Mr. Ntahobali into evidence on that issue, and decided that no further evidence was required to determine whether the Previous Statements were in accordance with the Rules. The Appeals Chamber does not see any abuse of the Trial Chamber's discretion in the way that it chose to proceed.

14. The Defence for Mr. Ntahobali further asserts that if it were not for the initiative of the Defence for Mr. Ntahobali, the Trial Chamber "would have proceeded" without his opinion on the matter.[45] This argument is mere speculation. There was no prejudice to Mr. Ntahobali regarding the

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[35] T. 8 May 2006, pp. 76-77.
[36] T. 9 May 2006, p. 3.
[37] Interlocutory Appeal, para. 5.
[38] Interlocutory Appeal, para. 8.
[39] Interlocutory Appeal, para. 6.
[40] As an example of the flexibility with which the *voir dire* procedure is utilised at trial, *voir dire* examinations have previously been deferred to the cross-examination stage in determining a Witness's qualification as an Expert Witness: *Prosecutor v. Muvunyi*, Case N°ICTR-2000-55A-T, Decision on the Prosecutor's Motion for Admission of Testimony of Expert Witness Rule 92 *bis* of the Rules, 24 March 2005, para. 27. See also *Halilović* Decision, para. 46 finding that a *voir dire* procedure is not necessarily required for identifying the voluntariness of an interview of an accused, although "there may be certain advantages in doing so."
[41] *Halilović* Decision, para. 46.
[42] T. 9 May 2006, pp. 3, 16, 42; T. 15 May 2006, p. 16.
[43] T. 9 May 2003, p. 16.
[44] See the full submissions on T. 8 May 2006 pp. 76-78; T. 9 May 2006; T. 15 May 2006.
[45] Interlocutory Appeal, paras 10-11.

presentation of his opinion to the Trial Chamber on this matter as he was given an opportunity to present submissions in support of his objection, following which he presented a written affidavit[46] and confirmed in the witness box that he had nothing to add to these submissions.[47]

15. The Defence for Mr. Ntahobali also argues that the Trial Chamber erred in law in finding that the conduct of a *voir dire* is confined to jury trials.[48] The Appeals Chamber does not consider it necessary to address this argument on its merits as the Trial Chamber did not base its decision upon this observation in the Impugned Decision. Rather, it merely acknowledged the common law origins of the procedure in jury trials.[49]

16. The Defence for Mr. Ntahobali further argues that the Trial Chamber erred by distinguishing the Previous Statements (as interviews by the Prosecution investigators) from a confession, in finding that a *voir dire* procedure is inappropriate in this case.[50] The Appeals Chamber notes that a confession does indeed require additional consideration under the Rules as confessions are specially addressed under Rule 92 of the Rules. However, this provision requires the confession to be conducted in strict compliance with Rule 63 of the Rules. Therefore the distinction between confessions and interviews of the accused is not an appropriate basis for deciding when to conduct a *voir dire* because both forms of statements require the same consideration under Rule 63. However, contrary to submissions of the Defence for Mr. Ntahobali, the Trial Chamber did not merely rely upon such a distinction in deciding not to conduct a *voir dire* procedure as the Trial Chamber additionally found that the "circumstances of the case" did not require further investigation.[51]

17. Finally, the Defence for Mr. Ntahobali submits that where there is *prima facie* proof of inducements or threats made to an accused during an interview by representatives of the Prosecution, it should be mandatory to conduct a *voir dire*.[52] In support of this argument, the Defence for Mr. Ntahobali refers to Rule 95.[53] Rule 95 provides for the exclusion of evidence which is "obtained by methods which cast *substantial doubt* on its reliability or if its admission is antithetical to, and would *seriously damage*, the integrity of the proceedings" (emphasis added). The Defence for Mr. Ntahobali alleges that he received inducements and threats from representatives of the Prosecution before the 1997 interviews were conducted. These claims, if substantiated, could fall within the terms of Rule 95.[54] The Trial Chamber considered these allegations and heard the parties' submissions. It concluded, however, that there was nothing to suggest that the interviews had been conducted in an improper manner and thus there was no need for further evidence on the matter – Mr. Ntahobali was informed of his rights and the proceedings contained no evidence of oppressive questioning by the Prosecution investigators.[55] The trial record confirms that this was a reasonable conclusion[56] and the submissions in this Interlocutory Appeal have not demonstrated how this aspect of the Impugned Decision was based

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[46] Impugned Decision, para. 73; T. 15 May 2006, p. 4.
[47] See T. 15 May 2006, pp. 4-5.
[48] Interlocutory Appeal, para. 29.
[49] Impugned Decision, paras 47, 50.
[50] Interlocutory Appeal, paras 37-39.
[51] Impugned Decision, paras 51, 55.
[52] Interlocutory Appeal, para. 40.
[53] Interlocutory Appeal, para. 47.
[54] Interlocutory Appeal, para. 59. The Appeals Chamber notes that Mr. Ntahobali made more detailed allegations, which were considered in the Impugned Decision, and the review of the trial record conducted by the Appeals Chamber supports the Trial Chamber's conclusions on these more specific points.
[55] Impugned Decision, paras 71-72.
[56] English translation of the transcripts from Mr. Ntahobali's interviews with representatives of the Prosecution, 24 July 1997, pp. 2-10; 26 July 1997. For example, the Defence for Mr. Ntahobali alleged before the Trial Chamber that Mr. Ntahobali was handcuffed whilst sleeping (Impugned Decision, para. 43) whereas the Previous Statements reveal that this was discussed in the initial interviews, and it was explained that this was the national procedure in Kenya which the Tribunal representatives had no authority over (K0153-3798, Tape 1, Side A). The Trial Chamber concluded that this was not a violation of the rights of the Accused by the Prosecutor, see *Prosecutor v. Delalić et al.*, Case N°IT-96-21-T, Decision on Mucić's Motion for the Exclusion of Evidence, 2 September 1997, para. 40.

upon an incorrect interpretation of the governing law or resulted in a patently incorrect conclusion of the factual circumstances of the interview.

18. As the above analysis demonstrates, it has not been shown in this Interlocutory Appeal that the Trial Chamber erred in finding that the Previous Statements were not obtained in a manner violating any provision of the Rules or of the Statute. Given the broad discretion afforded to Trial Chambers in evidentiary matters, the Appeals Chamber finds no error in the procedure employed by the Trial Chamber to determine the admissibility of the Previous Statements and in its decision to admit portions of the Previous Statements into evidence for the purpose of testing Mr. Ntahobali's credibility during cross-examination.

Disposition

19. For the forgoing reasons, the Appeals Chamber DISMISSES the Interlocutory Appeal in its entirety.

Done in English and French, the English text being authoritative.

Done this 27th day of October 2006, At The Hague, The Netherlands.

[Signed] : Fausto Pocar

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Decision on Prosecution's Motion to Unseal the Transcripts of Witness WDUSA 1st November 2006 (ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Joseph Kanyabashi, Elie Ndayambaje, Sylvain Nsabimana, Alphonse Nteziryayo, Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Request by the Danish Government which is not party to any proceedings before the Tribunal, Principles of state cooperation envisaged by the completion strategy in Security Council Resolutions, Disclosure of sealed transcripts, Parts of testimony of the Witness heard in open session accessible to the public without further order by the Chamber, Witness has given his written consent for his prior statements to be disclosed to the Danish Authorities, No prejudice to the witness – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A), 75, 78 and 79 (A) (ii) ; Statute, art. 28 (1)

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy B. Bossa (the "Chamber");

BEING SEIZED of the "Prosecutor's Motion to Unseal the Transcripts of Witness WDUSA (the "Motion"); filed on 9 October 2006.

HAVING RECEIVED the "*Réponse de Arsène Shalom Ntahobali à la requête du Procureur intitulée* 'Prosecutor's motion to unseal the transcripts of Witness WDUSA ("Ntahobali's Response") filed on 12 October 2006;

CONSIDERING the "Prosecutor's Reply to Ntahobali's Response to the Prosecutor's Motion to Unseal Transcripts of Witness WDUSA" ("Prosecution's Reply") filed on 16 October 2006;

NOW DECIDES the Motion, pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the"Rules"), on the basis of the written submissions of the Parties.

Introduction

1. Witness WDUSA is a Defence protected witness. The protection he enjoys was ordered pursuant to the Chamber's decision of 15 February 2000 regarding Ntahobali's witnesses. It entails among others, that his identity be concealed from the press and the public. Witness WDUSA testified on 3 and 4 April 2006. Part of his evidence was given in closed session to avoid the disclosure of his identity.

2. On 26 September 2006, the Prosecution filed an *ex-parte* Motion seeking leave from the Chamber to disclose to the Danish authorities the transcripts and other relevant documents pertaining to the testimony of Witness WDUSA in open and closed session.[1] On 9 October 2006, the Chamber instructed the Prosecution to refile the Motion *inter partes,* should it wish to pursue this matter.[2] The same day, the Prosecution refiled the Motion *inter partes*.[3]

Submissions of the Parties

The Prosecution

3. The Prosecution seeks a variance order of the witness protection Decision of 21 April 2001 regarding Ntahobali's witnesses, to be authorised to disclose the open and closed session transcripts of Witness WDUSA's testimony of 3 and 4 April 2006[4] and exhibit D-392, containing the witness's identifying information, to the Danish Special International Crimes Office (*Statsadvokaten Forsverlige Internationale Straffesager*).[5]

4. The Prosecution submits that under Rules 54, 73, 75 and 66 (C), the Chamber has the authority to vary its own witness protection order and issue the order sought for disclosure. The Prosecution further argues that the sharing of information between the Tribunal and national authorities is consistent with Articles 15 and 28 of the Statute and Security Council Resolution 1503.[6]

5. The Prosecution also submits that Witness WDUSA's written consent annexed to the Motion demonstrates that the disclosure of the witness's own testimony can have no negative repercussions for his protection.[7]

6. Further, the Prosecution submits that the disclosure of the transcripts to the Danish Special International Crimes Office will not prejudice Witness WDUSA or any other witnesses, given the guarantees that exist under Danish law and the assurances of the Danish Prosecutor regarding a

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[1] Prosecutor's Motion to Unseal the Transcripts of Witness WDUSA, filed on 26 September 2006.
[2] Facsimile transmission dated 9 October 2006.
[3] Prosecutor's Motion to Unseal the Transcripts of Witness WDUSA, filed on 9 October 2006.
[4] Motion, para 6.
[5] Motion, para 10.
[6] Motion, para 9.
[7] Motion, para 8.

previous request that: "[I]f the witness statement (transcript) needs to be produced in court the prosecution will request (under Section 729a) a closed session and the court may… order non-disclosure to the public of any records identifying a witness."[8]

Ntahobali's Response

7. The Defence opposes the Motion, arguing that the consent form allegedly signed by Witness WDUSA is the only element supporting the disclosure, and it is not sufficient, and that, in the present case, it is hazardous to disclose the transcripts of WDUSA's testimony to the Danish authorities, as neither the Statute nor the Rules prescribe the possibility of disclosing testimonies heard in closed session before the Tribunal to parties outside the Tribunal.[9]

8. The Defence requests that the witness' consent *a posteriori* and while in detention, be subjected to further verification. Moreover, the Defence argues that there is no reference in the Motion to the fundamental rights of a suspect or an accused in Denmark.

9. The Defence also questions the manner in which the Danish authorities would be bound by the protective orders issued by the Chamber.

Prosecution's Reply

10. The Prosecution submits that its Motion also relied on Rules 54 and 73, which the Defence failed to acknowledge, and which both provide a sufficient basis for granting the Motion.[10] The Prosecution further submits that the sharing of information between the Tribunal and national authorities is consistent with the completion strategy envisaged in Security Council Resolutions 1503 and 1534 and, most recently, in the President's report to the General Assembly on 9 October 2006.[11]

11. The Prosecution also submits that the signature on the signed consent form of Witness WDUSA is identical to that of exhibit D-392 signed by the witness. In the absence of any evidence, the Defence assertion that the witness may have been subjected to threats, promises or violations of his rights, is mere speculation.[12]

Deliberations

12. The Chamber recalls that pursuant to Rule 78, "all proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided" and that as such, the transcripts of the testimony of Witness WDUSA heard in open session are accessible to the public without further order by the Chamber.

13. The Chamber also recalls that the Defence had asked for protective measures for Witness WDUSA to safeguard his privacy and safety, and which included the protection of identifying materials from the public's knowledge. Further, parts of the testimony of Witness WDUSA were heard in closed session under Rule 79 (A) (ii) for reasons of safety, security or non-disclosure of identity of a protected witness, pursuant to Rule 75.[13]

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[8] Motion, para 9.
[9] Reference is made to R. 75 (F) which allows disclosure to other Chambers of the Tribunal.
[10] Prosecution reply, p.1.
[11] Prosecution reply, p.1.
[12] Prosecution reply, p.2.
[13] 'Décision relative à la requête de la Défense aux fins d'obtenir des mesures de protection pour les témoins de la Défense' (Chamber's witness protection decision of 15 February 2000.)

14. However, the Chamber notes that the Danish authorities are aware of the identity of Witness WDUSA and of the fact that he has testified before the Tribunal. Moreover, the Chamber notes and accepts that Witness WDUSA has given his written consent for his prior statements to be disclosed to the Danish Special International Crimes Office. In the absence of any cogent element indicating the contrary, the Chamber finds the Defence request for the Chamber to inquire further into the consent of the witness to be speculative.

15. The Chamber recognises the uniqueness of the Motion, as disclosure of the transcripts of the testimony of a witness is requested for by Danish authorities; who are not party to any proceedings before the Tribunal. The Chamber considers that the guiding principles of state cooperation under Article 28 (1) of the Statute also apply to requests for cooperation or judicial assistance from States to the Tribunal, in their investigation or prosecution of persons accused of committing serious violations of international humanitarian law. Moreover, the Chamber notes that the Danish authorities' investigation of Witness WDUSA for crimes committed in Rwanda in 1994 is in line with the principles of state cooperation envisaged by the completion strategy in Security Council Resolutions 1503 and 1534.

16. Accordingly, having considered that there is no prejudice to the witness, the Chamber is of the view that it is in the overall interest of justice to vary its order for protective measures for Witness WDUSA, pursuant to Rule 75 (A). The Chamber directs the Registry to provide copies of the closed session transcripts of the witness and of exhibit D-392 for the purpose of the proceedings before the Danish Special International Crimes Office. The Chamber further orders that the protective measures granted to Witness WDUSA shall continue to have effect *mutatis mutandis* in any proceedings before the Danish authorities unless and until they are rescinded, varied, or augmented in accordance with the procedure set out in Rule 75.

FOR THE ABOVE REASONS, THE TRIBUNAL

DIRECTS the Registry to provide the Prosecution with the closed session transcripts of Witness WDUSA's testimony of 3 and 4 April 2006, together with exhibit D-392, for the purpose of disclosure of the same to the Danish Special International Crimes Office. *(Statsadvokaten forsverlige Internationale straffesager)*.

With regard to the testimony of Witness WDUSA heard in open session, the Chamber observes that this is accessible to the public without further order of the Chamber.

ORDERS that the protective measures granted to Witness WDUSA shall continue to have effect *mutatis mutandis* in any proceedings before the Danish authorities.

Arusha, 1 November 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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Decision on Ndayambaje's Motion for Reconsideration of the Chamber's Decision to deny Certification to Appeal its Decision on the Motion for Exclusion of Evidence 2 November 2006 (ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Joseph Kanyabashi, Elie Ndayambaje, Sylvain Nsabimana, Alphonse Nteziryayo, Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Reconsideration of the Chamber's Decision to deny Certification to Appeal, Lateness of the Motion, Counsel acted without due diligence, Inherent power of the Trial Chamber to reconsider its own decisions in "particular circumstances", Not in the interest of judicial economy to relitigate issues the Chamber has already decided on – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 73 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Laurent Semanza, Decision on the Defence Motion to Reconsider Denying Leave to Call Rejoinder Witnesses, 9 May 2002 (ICTR-97-20) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E)", 15 June 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v.Pauline Nyiramasuhuko et al., Decision on Sylvain Nsabimana's Extremely Urgent Motion to Reconsider Sylvain Nsabimana's Extremely Urgent-Strictly Confidential-Under Seal Motion to Have Witness AGWA Testify Via Video-Link, 5 September 2006 (ICTR-98-42) ; Appeals Chamber, Appeals Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006 (ICTR-98-41)

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy B. Bossa (the "Chamber");

SEISED of Ndayambaje's "*Requête d'Elie Ndayambaje aux fins de reconsidération de la décision intitulée:* Decision on Ndayambaje's Motion for Exclusion of Evidence*, du 1er septembre 2006*", filed on 16 October 2006 (the "Motion");

CONSIDERING the "Prosecution's Response to the *Requête d'Elie Ndayambaje aux fins de reconsidération de la décision intitulée:* Decision on Ndayambaje's Motion for Exclusion of Evidence of 1st September 2006", filed on 20 October 2006 ("Prosecution's Response");

RECALLING the Chamber's "Decision on Ndayambaje's Motion for Exclusion of Evidence" of 1 September 2006 ("Decision on Exclusion") and "Decision on Elie Ndayambaje's Motion for Certification to Appeal the Decision on Ndayambaje's Motion for Exclusion of Evidence Issued on 1st September 2006" of 5 October 2006 ("Decision on Certification");

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

NOW DECIDES the Motion, pursuant to Rule 73 (A) of the Rules, on the basis of the written submissions of the Parties.

Submissions of the Parties

Defence for Ndayambaje

1. On 1 September 2006, the Chamber denied the Defence for Elie Ndayambaje's Motion requesting the exclusion of thirteen prosecution witnesses' testimonies on account of lack of relevance

and/or defect in the indictment, stressing that "some of the matters raised may be considered at a later stage of the proceedings".[1] Ndayambaje moved the Chamber for certification to appeal this decision, and the Chamber denied that motion on 5 October 2005, finding that the Defence had "generally revisited the thrust of its previous arguments which led to the Impugned Decision rather than demonstrating the conditions required for the Chamber to grant certification to appeal".[2]

2. The Defence now requests the Chamber to reconsider both earlier decisions in light of an Appeals Chamber decision rendered on 18 September 2006 in the *Bagosora et al.* case, also regarding the exclusion of evidence.[3] According to the Defence, the Appeals Chamber's ruling is irreconcilable with the Chamber's decisions in the instant proceedings and therefore, constitutes a valid basis for their reconsideration.[4] The Defence submits that the Appeals Chamber, in contrast with the Decision on Exclusion, held that objections regarding the lack of notice may be raised at any time during the trial stage.[5] Further, the Appeals Chamber found that Trial Chamber's decisions on the identification of legal principles applicable to the exercise of its discretion to admit evidence can be overturned, if an error of law has been committed.[6]

3. The Defence also submits that the Decision on Exclusion of evidence is ambiguous, *inter alia*, with respect to issues that would be considered at a later stage of the proceedings and the allegations pleaded in the Indictment to which the impugned evidence might be relevant.[7] Further, the Defence argues that the Chamber's decision puts the Defence in a difficult situation, given the Scheduling Order of 5 October 2006, which exhorts the Defence to significantly reduce the number of witnesses it intends to call.[8]

Prosecution's Response

4. The Prosecution submits that the Motion should be dismissed because it is inadmissible *ab initio*[9] and does not meet the threshold to move the Chamber to reconsider its decision, as there are no new facts, change in the law or other intervening circumstances.[10] Rather, the Motion constitutes an attempt to relitigate issues that have already been subject of a denial of certification to appeal.[11]

Deliberations

5. As a preliminary matter, the Chamber notes that on 27 October 2006, Counsel for the Defence seems to have applied by way of an electronic mail to CMS for an extension of time to reply to the Prosecution's Response. The Chamber observes that for a motion for extension of time to be

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[1] *Prosecutor v. Pauline Nyiramasuhuko et al.*, Decision on Ndayambaje's Motion for Exclusion of Evidence, 1 September 2006 ("Decision on Exclusion"), para. 25.
[2] *Prosecutor v. Pauline Nyiramasuhuko et al.*, Decision on Elie Ndayambaje's Motion for Certification to Appeal the Decision on Ndayambaje's Motion for Exclusion of Evidence Issued on 1st September 2006, 5 October 2006, para. 15.
[3] Requête d'Elie Ndayambaje aux fins de reconsidération de la décision intitulée: Decision on Ndayambaje's Motion for Exclusion of Evidence, du 1er septembre 2006", filed on 16 October 2006 (the "Motion"), para. 7, refers to Prosecutor v. Bagosora et al., Appeals Chamber, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006.
[4] The Motion, paras. 8, 10, 31.
[5] The Motion, paras. 13-14, quoting Prosecutor v. Théoneste Bagosora et al., Appeals Chamber, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006, para. 44.
[6] The Motion, paras. 15-17, quoting Prosecutor v. Théoneste Bagosora et al., Appeals Chamber, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006, paras. 15-16.
[7] The Motion, para. 22.
[8] The Motion, para. 30.
[9] Prosecution's Response, para. 7.
[10] Prosecution's Response, paras. 12, 13, 21, 25.
[11] Prosecution's Response, para. 23.

admissible, the Defence should have addressed it to the Chamber not later than 25 October 2006, taking into account that the Prosecution filed its response on 20 October 2006 and that the Defence was allowed five days from the date of said response to file its reply. On the date of the Defence's letter to the Registry, there was therefore no time left to extend. The Chamber is of the opinion that Counsel for Ndayambaje acted without due diligence in this matter and considers that the issue of an extension of time does not arise.

6. With regard to the request for reconsideration, the Chamber notes that it has an inherent power to reconsider its own decisions in "particular circumstances". However, reconsideration is an exceptional measure[12] to be applied if new circumstances have unfolded after the relevant decision, and if unfairness has been caused to a party to the proceedings, due to an error.[13]

7. The Chamber has carefully considered the submissions of the Parties and the Appeals Chamber's Decision the Defence relies on. It is the Chamber's view that the Appeals Chamber's decision contains no new elements with regard to the Chamber's decision, but merely underscores the Appeals Chamber's interpretation of particular legal elements.[14] The Chamber is therefore of the view that the requirements for a reconsideration have not been met and dismisses the Motion.

8. The Chamber underscores that it is not in the interest of judicial economy to relitigate issues the Chamber has already decided on.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion.

Arusha, 2 November 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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[12] *Prosecutor v. Pauline Nyiramasuhuko et al.*, Decision on Sylvain Nsabimana's Extremely Urgent Motion to Reconsider Sylvain Nsabimana's Extremely Urgent-Strictly Confidential-Under Seal Motion to Have Witness AGWA Testify Via Video-Link, 5 September 2006, para. 5, quoting *Prosecutor v. Théoneste Bagosora et al.*, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E)", 15 June 2004, para. 7. See also *Prosecutor v. Laurent Semanza*, Decision on the Defence Motion to Reconsider Denying Leave to Call Rejoinder Witnesses, 9 May 2002, paras. 7-8.

[13] *Prosecutor v. Laurent Semanza*, Decision on the Defence Motion to Reconsider Denying Leave to Call Rejoinder Witnesses, 9 May 2002, para. 8; *Prosecutor v. Théoneste Bagosora et al.*, Decision on Prosecution's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecution's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E)", 15 June 2004, para. 8.

[14] See Prosecutor v. Bagosora et al., Appeals Chamber, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006, para. 46.

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Scheduling Order
Rule 54 of the Rules of Procedure and Evidence
9 November 2006 (ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Joseph Kanyabashi, Elie Ndayambaje, Sylvain Nsabimana, Alphonse Nteziryayo, Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Schedule, Revision of the witness lists, Counsel's non-compliance with the Chamber's Order, Presentation of the Defence case to be completed by mid-2007

International Instrument cited :

Rules of Procedure and Evidence, rule 73 ter

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber"), pursuant to Rule 54 of the Rules of Procedure and Evidence (the "Rules");

RECALLING the Scheduling Order of 5 October 2006 in which the Chamber ordered

> "the Defence for Alphonse Nteziryayo, Elie Ndayambaje and Joseph Kanyabashi to review their witness list with a view to significantly reducing the total number of witnesses as well as reducing the number of witnesses who are being called to prove the same facts, and to file a realistic and updated list of witnesses by Monday 6 November 2006 pursuant to Rule 73 *ter* of the Rules;"

RECALLING that the presentation of the Defence case should be completed by mid-2007 and that all efforts should be made to ensure the efficient conduct of the proceedings until then and to comply with that deadline;

CONSIDERING that as of 6 November 2006, neither Defence have complied with the Chamber's Order of 5 October 2006: the Defence for Alphonse Nteziryayo has not submitted a revised witness list, the Defence for Kanyabashi has filed a list of witnesses that it does not intend to call but has not submitted a revised witness list,[1] and the Defence for Ndayambaje has not filed a revised list of witnesses;[2]

CONSIDERING that the Defence for Ndayambaje submits that since January 2006, it has been searching and identifying witnesses who are essential to the preparation of its Defence but because some witnesses have moved, or have otherwise disappeared, it is not in a position to provide the Chamber with a revised list of witnesses at this stage.

CONSIDERING that the Chamber's instructions were very clear and straightforward, that the Defence for Ndayambaje has had 10 months since the last filing of its witness list to investigate its

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[1] The Prosecutor v. Kanyabashi, Mise à jour de la liste des témoins du mémoire préalable (Scheduling Order du 5 octobre 2006), 6 November 2006.
[2] The Prosecutor v. Ndayambaje, Réponse au "Scheduling Order" du 5 octobre 2006, 6 November 2006.

potential witnesses, there is not objective reasons justifying the non compliance with the 5 October 2006 Order;

FURTHER CONSIDERING that at this stage of the proceedings, each and every Defence must be in a position to file a list of the witnesses it intends to call to testify at Trial pursuant to Rule 73 *ter* of the Rules taking into account the Chamber's instructions to downsize the total number of witnesses and to reduce the number of witnesses who are called to prove the same facts notwithstanding the order of presentation of the respective Defence case;

HAVING OBSERVED that Counsel's non-compliance with the Chamber's Order obstructs the proceedings and is also contrary to the interests of justice, the Chamber orders that this conduct must stop and instructs that if repeated, it may attract sanctions in accordance with the Rules.

HEREBY

RECALLS that the presentation of the Defence case should be completed by mid-2007;

ORDERS the Defence for Alphonse Nteziryayo, Elie Ndayambaje and Joseph Kanyabashi to review their witness list with a view to significantly reducing the total number of witnesses as well as reducing the number of witnesses who are being called to prove the same facts, and to file a realistic and updated list of witnesses by 4 December 2006, pursuant to Rule 73 *ter* of the Rules.

Arusha, 9 November 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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Scheduling Order
Rule 54 of the Rules of Procedure and Evidence
13 December 2006 (ICTR-98-42-T)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

Joseph Kanyabashi, Elie Ndayambaje, Sylvain Nsabimana, Alphonse Nteziryayo, Arsène Shalom Ntahobali and Pauline Nyiramasuhuko – Schedule, Charge of the Trial Chamber to set and implement timeframes, Revision of the witness lists, Need to balance the rights of each Accused to a fair trial, Right to have adequate time and facilities for the preparation of his or her defence, Presentation of the Defence case to be completed by mid-2007

International Instruments cited :

Rules of Procedure and Evidence, rules 54, 73 ter (D), 82 and 90 (F) ; Statute, art. 19 (1), 20 (2), 20 (4) (b), 20 (4) (c) and 20 (4) (e)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Elie Ndayambaje et al., Decision on Prosecutor's Motion Pursuant to Rules 54, 73, and 73 ter to Proceed with the Evidence of the Accused Nyiramasuhuko as a Witness on 15 August 2005 or in the Alternative to Proceed with the Defence

Case of the Accused Ntahobali, 19 August 2005 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Scheduling Order, 14 December 2005 (ICTR-98-42)

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

SITTING as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber"), pursuant to Rule 54 of the Rules of Procedure and Evidence (the "Rules");

RECALLING the Scheduling Orders of 5 October 2006 and 9 November 2006, in which the Chamber ordered the Defence for Alphonse Nteziryayo, Elie Ndayambaje, and Joseph Kanyabashi to review their witness list and file updated and realistic witness lists;

HAVING RECEIVED the Responses to the Scheduling Order of 9 November 2006 by the Defence for Kanyabashi,[1] Nteziryayo,[2] and Ndayambaje,[3] a consolidated Response by the Prosecution[4] and a Reply by Arsène Shalom Ntahobali,[5] as well as Ndayambaje's Reply to the Prosecutor's Response;[6]

NOTING that the Defence for Nteziryayo has indicated that it will withdraw four witnesses, bringing the total number of proposed witnesses to 24,[7] whereas the Defence for Kanyabashi withdraws 14 witnesses from its list and thus intends to call at least 56 witnesses, while 23 other witnesses may be the subject of a motion for addition to the witness list,[8] and that the Defence for Ndayambaje has withdrawn two witnesses and intends to call a total of 49;[9]

NOTING further that most of the documents annexed to Ndayambaje's Response to the Scheduling Order date from 2005 or the beginning of 2006 and thus were known to the Defence long before the two Scheduling Orders were issued, that the Defence does not indicate which witnesses it is unable to locate, and that if the Defence for Ndayambaje cannot locate potential witnesses, they should be withdrawn from its witness list;

RECALLING that the Chamber has always been alive to the need to balance the rights of each Accused to a fair trial, including the right to have adequate time and facilities for the preparation of his or her defence, pursuant to Art. 20 (4) (b), and to the right of each Accused in this joint trial to be tried without undue delay, pursuant to Art. 20 (4) (c), Rule 82 (A),[10] as is borne out by the numerous

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[1] Réponse de la défense de Joseph Kanyabashi au "Scheduling Order" du 9 novembre 2006, 4 December 2006.
[2] Réponse de la défense d'Alphonse Nteziryayo au "Scheduling Order" du 9 novembre 2006, 4 December 2006.
[3] Réponse de la défense d'Elie Ndayambaje au "Scheduling Order" du 9 novembre 2006, 4 December 2006.
[4] Prosecutor's Consolidated Response to Elie Ndayambaje, Joseph Kanyabashi and Alphonse Nteziryayo's Responses to the Trial Chamber's Scheduling Order of November 9 2006 Pursuant to Rules 73 and 54 of the Rules of Prosecure and Evidence, 6 December 2006.
[5] Réplique d'Arsène Shalom Ntahobali à "La réponse de la défense de Joseph Kanyabashi au "Scheduling Order" du 9 novembre 2006" du 4 décembre 2006, 7 December 2006.
[6] Réplique de la défense d'Elie Ndayambaje à la réponse du Procureur suite aux réponses d'Alphonse Nteziryayo, Joseph Kanyanabashi et d'Elie Ndayambaje au "Scheduling Order" du 9 novembre 2006, 12 December 2006.
[7] Réponse de la défense d'Alphonse Nteziryayo au "Scheduling Order" du 9 novembre 2006, 4 December 2006, paras. 112, Annexure 1.
[8] *Réponse de la défense de Joseph Kanyabashi au "Scheduling Order" du 9 novembre 2006*, 4 December 2006, paras. 103-105. The approximate number of witnesses is caused by the Defence's indication that on several points, it intends to call "one or more" witnesses.
[9] Réponse de la défense d'Elie Ndayambaje au "Scheduling Order" du 9 novembre 2006, 4 December 2006, paras. 139-140, 142.
[10] *Prosecutor v. Pauline Nyiramasuhuko et al.*, Decision on Prosecutor's Motion Pursuant to Rules 54, 73, and 73 *ter* to Proceed with the Evidence of the Accused Nyiramasuhuko as a Witness on 15 August 2005 or in the Alternative to Proceed with the Defence Case of the Accused Ntahobali, 19 August 2005, para. 30: "The Chamber underscores that when seeking to give effect to an Accused's rights under Article 20, it has a duty to ensure that there is a balance between the competing and respective rights of all the Parties in this case."

directions to the Parties to review their list of witnesses with a view to the reduction of witnesses who will be called,[11] and to complete their Defences in a timely fashion[12] or by a specific date;[13]

CONSIDERING that the number of witnesses to be called by a party cannot merely be justified by equating it with the number of witnesses that another party has called and that rather, the calling of each proposed witness must be justified by the exigencies of a fair trial, a trial without undue delay, and a complete defence, pursuant to Art. 20 (2), (4) (b), (e);

CONSIDERING that is for the Chamber, and not the Parties, to control proceedings,[14] pursuant to Art. 19 (1) and Rules 54, 73 *ter* (D) and 90 (F), including but not limited to the setting and implementation of timeframes, and that the Chamber's discretion in this matter should not be considered to be any form of threat;

CONSIDERING that the Chamber has been alive and will continue to be alive to good cause shown by the Parties which may be relevant to the conduct of proceedings;

CONSIDERING that the timeframe for the completion of the Defence case by mid-2007 is reasonable in the circumstances of a trial which started in 2001 and that it is in the interest of justice that proceedings should come to an end;

HEREBY

RECALLS that the presentation of the Defence case is scheduled to be completed by mid-2007; and

ORDERS the Defence for Elie Ndayambaje and Joseph Kanyabashi to further review their witness lists with a view to significantly reducing the total number of witnesses as well as reducing the number of witnesses who are being called to prove the same facts, and to file final and realistic lists of witnesses by 31 January 2007, pursuant to Rule 73 *ter* of the Rules.

Arusha, 13 December 2006.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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[11] *Prosecutor v. Pauline Nyiramasuhuko et al.*, Proceedings of 31 January 2005, Daily Minutes, 1 (e), 2 (c) (Nyiramasuhuko, Kanyabashi); Proceedings of 13 December 2005, T. p. 82 (Ntahobali); Status Conference of 25 February 2005, Daily Minutes 1 (a), (h), 2 (i) (Kanyabashi, Nyiramasuhuko); Status Conference of 26 April 2005, Daily Minutes 1 (b), 2 (c) (Nyiramasuhuko); Scheduling Order, 14 December 2005, Order (h) (Ntahobali, Nsabimana, Nteziryayo, Kanyabashi, Ndayambaje), referred to during proceedings on 26 January 2006, Daily Minutes, 2 (d), and during the Status Conference of 8 February 2006, Daily Minutes, 2 (e) ("the Parties").

[12] *Prosecutor v. Pauline Nyiramasuhuko et al.*, Scheduling Order, 14 December 2005, Order (d) (Ntahobali).

[13] Status Conference of 26 April 2005, Daily Minutes 1 (c) (Nyiramasuhuko); Daily Minutes 1 June 2005, 2 (d) (Nyiramasuhuko); Status Conference of 8 February 2006, Daily Minutes, 2 (b) (Ntahobali).

[14] *Prosecutor v. Pauline Nyiramasuhuko et al.*, Decision on Prosecutor's Motion Pursuant to Rules 54, 73, and 73ter to Proceed with the Evidence of the Accused Nyiramasuhuko as a Witness on 15 August 2005 or in the Alternative to Proceed with the Defence Case of the Accused Ntahobali, 19 August 2005, para. 37: "Furthermore, the Chamber reminds all Parties that it is for the Parties, and not either the Defence or the Prosecution teams, to set the agenda for the conduct of this trial."

Le Procureur c. Joseph KANYABASHI, Elie NDAYAMBAJE, Sylvain NSABIMANA, Alphonse NTEZIRYAYO, Arsène Shalom NTAHOBALI, et Pauline NYIRAMASUHUKO

Affaire N° ICTR-98-42 (affaires N° ICTR-96-15, ICTR-96-8, ICTR-97-21 et ICTR-97-29)

Fiche technique : Joseph Kanyabashi

- Nom: KANYABASHI
- Prénom: Joseph
- Date de naissance: 1937
- Sexe: masculin
- Nationalité: rwandaise
- Fonction occupée au moment des faits incriminés: Bourgmestre de Ngoma
- Date de confirmation de l'acte d'accusation: 15 juillet 1996
- Date des modifications de l'acte d'accusation: 12 août 1999 et 11 mai 2000
- Date de jonction d'instance: 5 octobre 1999 – Ndayambaje, Nsabimana, Ntahobali, Nteziryayo et Nyiramasuhuko
- Chefs d'accusation: génocide, entente en vue de commettre le génocide, complicité dans le génocide, incitation publique et directe à commettre le génocide et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date et lieu de l'arrestation: 28 juin 1995, en Belgique
- Date du transfert: 8 novembre 1996
- Date de la comparution initiale: 29 novembre 1996
- Précision sur le plaidoyer: non coupable
- Date du début du procès: 12 juin 2001

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Fiche technique : Elie Ndayambaje

• Nom: Ndayambaje

• Prénom: Elie

• Date de naissance: 8 mars 1958

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: Bourgmestre de Muganza

• Date de confirmation de l'acte d'accusation: 21 juin 1996

• Date de jonction d'instance: 5 octobre 1999 – Kanyabashi, Nsabimana, Ntahobali, Nteziryayo, Nyiramasuhuko

• Chefs d'accusation: génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date et lieu de l'arrestation: 28 juin 1995, en Belgique

• Date du transfert: 8 novembre 1996

• Date de la comparution initiale: 29 novembre 1996

• Précision sur le plaidoyer: non coupable

• Date du début du procès: 12 juin 2001

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Fiche technique: Sylvain Nsabimana

• Nom: NSABIMANA

• Prénom: Sylvain

• Date de naissance: 29 juillet 1953

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: Préfet à Butare

• Date de confirmation de l'acte d'accusation: 16 octobre 1997

• Date des modifications de l'acte d'accusation: 24 juin 1999

• Date de jonction d'instance: 5 octobre 1999 – Kanyabashi, Ndayambaje, Ntahobali, Nteziryayo et
Nyiramasuhuko

• Chefs d'accusation: génocide, entente en vue de commettre le génocide, incitation publique et directe à commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date et lieu de l'arrestation: 18 juillet 1997, au Kenya

• Date du transfert: 18 juillet 1997

• Date de la comparution initiale: 24 octobre 1997

• Précision sur le plaidoyer: non coupable

• Date du début du procès: 12 juin 2001

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Fiche technique: Alphonse Nteziryayo

• Nom : NTEZIRYAYO

•Prénom: Alphonse

•Date de naissance: inconnue

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: commandant de la police militaire puis préfet de Butare

• Date de confirmation de l'acte d'accusation: 16 octobre 1997

• Date des modifications subséquentes portées à l'acte d'accusation: 24 juin 1999

• Date de jonction d'instance: 5 octobre 1999 – Kanyabashi, Ndayambaje, Nsabimana, Ntahobali et Nyiramasuhuko

• Chefs d'accusation: génocide, entente en vue de commettre le génocide, incitation publique et directe au génocide, complicité dans le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date et lieu de l'arrestation: 24 avril 1998, au Burkina Faso

• Date du transfert: 21 mai 1998

• Date de la comparution initiale: 17 août 1998

• Précision sur le plaidoyer: non coupable

• Date du début du procès: 12 juin 2001

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Fiche technique: Arsène Shalom Ntahobali

• Nom: NTAHOBALI

• Prénoms: Arsène Shalom

• Date de naissance: 1970

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: étudiant et dirigeant d'un groupe de miliciens du MRND (*Interahamwe*)

• Date de confirmation de l'acte d'accusation: 29 mai 1997

• Date de jonction d'instance: 5 octobre 1999 – Kanyabashi, Ndayambaje, Nsabimana, Nteziryayo et Nyiramasuhuko

• Chefs d'accusation: entente en vue de commettre le génocide, génocide, complicité dans le génocide, incitation publique et directe à commettre le génocide, crimes contre l'humanité violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date des modifications subséquentes portées à l'acte d'accusation: 17 juin 1997

• Date et lieu de l'arrestation: 24 juillet 1997, au Kenya

• Date du transfert: 24 juillet 1997

• Date de la comparution initiale: 17 octobre 1997

• Précision sur le plaidoyer: non coupable

• Date du début du procès: 12 juin 2001

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Fiche technique: Pauline Nyiramasuhuko

• Nom: NYIRAMASUHUKO

• Prénom: Pauline

• Date de naissance: 1946

• Sexe: féminin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: ministre de la famille et des affaires féminines

• Date de confirmation de l'acte d'accusation: 29 mai 1997

• Date de jonction d'instance: 5 octobre 1999 – Kanyabashi, Ndayambaje, Nsabimana, Ntahobali et Nteziryayo

• Chefs d'accusation: entente en vue de commettre le génocide, génocide, complicité dans le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977

• Date et lieu de l'arrestation: 18 juillet 1997, au Kenya

• Date du transfert: 18 juillet 1997

• Date de la comparution initiale: 3 septembre 1997

• Précision sur le plaidoyer: non coupable

• Date du début du procès: 12 juin 2001

Décision relative à la Requête en extrême urgence de Arsène Shalom Ntahobali pour faire témoigner WDUSA par voie de vidéoconférence conformément à l'article 71 (A) et (D) du Règlement de procédure et de preuve
15 février 2006 (ICTR-98-42-T)

(Original : Anglais)

Chambre de première instance II

Juges : William H. Sekule, Président de Chambre ; Arlette Ramaroson ; Solomy Balungi Bossa

Arsène Shalom Ntahobali et Pauline Nyiramasuhuko – Témoignage par video-conférence, Témoin Alibi, Témoin dans l'incapacité de se rendre à Arusha pour des raisons médicales, Circonstances exceptionnelles justifiant que le témoin dépose par voie de vidéoconférence à La Haye – Requête acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 71 (A), 71 (D), 73 (A) et 90 (A).

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Ferdinand Nahimana et consorts, Décision sur la requête du Procureur aux fins d'ajouter le témoin X à sa liste de témoins et de se voir accorder des mesures de protection, 14 septembre 2001 (ICTR-99-52) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision sur la requête du procureur aux fins d'obtenir des mesures exceptionnelles de protection du témoin en vertu des articles 66 (C), 69 (A) et 75 du règlement de procédure et de preuve, 5 juin 2002 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Joseph Nzirorera, Décision sur la requête du Procureur aux fins d'obtenir des mesures exceptionnelles de protection en faveur des témoins G et T et aux fins d'étendre les mesures de protection des témoins à charge dans les affaires Nzirorera et Rwamakuba aux co-accusés Ngirumpatse et Karemera, et décision relative à la requête de la défense en communication immédiate de pièces, 20 octobre 2003 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Casimir Bizimungu et consorts, Decision on Prosecutor's Extremely Urgent Motion Requesting That the Extraordinarily Vulnerable Witnesses XI006 and 039 Testify by Closed Video Transmission Link With a Location at The Hague And Other Related Special Protective Measures Pursuant to Article 21 of the Statute and Rules 73 and 75, 4 juin 2004 (ICTR-99-50) ; Chambre de première instance, Le Procureur c. Pauline Nyiramasuhuko, Décision relative a la requête strictement confidentielle ex parte et sous scellés de Pauline Nyiramasuhuko en mesures de protection additionnelles de certains témoins à décharge, 1 mars 2005 (ICTR-98-42) ; Chambre de première instance, Le Procureur c. Pauline Nyiramasuhuko, Decision on Nyiramasuhuko's Strictly Confidential Ex-Parte – Under Seal – Motion for Additional Protective Measures for Defence Witness WBNM, 17 juin 2005 (ICTR-98-42) ; Chambre de première instance, Le Procureur c. Pauline Nyiramasuhuko et consorts, Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali, Rule 73 ter (E), Rules of Procedure and Evidence, 26 août 2005 (ICTR-98-42)

T.P.I.Y. : Chambre de première instance, Le Procureur c. Duško Tadić, Décision relative aux requêtes de la défense aux fins de citer à comparaître et de protéger des témoins à décharge et de présenter des témoignages par vidéoconférence, 25 juin 1996 (IT-94-1) ; Chambre de première instance, Le Procureur c. Milorad Krnojelac, Ordonnance aux fins de témoiugnage par video conférence, 15 janvier 2001 (IT-97-25) ; Chambre de première instance, Le Procureur c. Slobodan Milošević, Ordonnance relative à la requête de l'accusation aux fins d'entendre le témoignage de

Nojko Marinović par voie de vidéoconférence, 19 février 2003 (IT-02-54) ; Chambre de première instance, Le Procureur c. Slobodan Milošević, *Décision relative à la requête aux fins de mesures de protection en faveur de témoins au procès déposée à titre confidentiel par l'Accusation et accompagnée d'annexes confidentielles et ex parte*, 19 mars 2003 (IT-02-54)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance II composée des juges William H. Sekule, Président de Chambre, Arlette Ramaroson et Solomy Balungi Bossa (la « Chambre »),

SAISI de la Requête en extrême urgence de Arsène Shalom Ntahobali pour faire témoigner WDUSA par voie de vidéoconférence conformément à l'article 71 (A) et (D) du Règlement de procédure et de preuve[1], déposée le 31 janvier 2006 (la « Requête »),

AYANT REÇU la réponse du Procureur intitulée *Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Video Conference Link Testimony of WDUSA,* déposée le 1er février 2006 (la « Réponse ») ; ET la réplique de la Défense intitulée Réplique à la Réponse du Procureur intitulée *« Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Video Conference Link Testimony of WDUSA »,* déposée le 3 février 2006 (la « Réplique de la Défense ») ;

VU le Statut du Tribunal (le « Statut ») et le *Règlement de procédure et de preuve* (le « Règlement »), en particulier les paragraphes (A) et (D) de son article 71 ;

STATUE sur la Requête, en vertu de l'article 73 (A) du Règlement, sur la base des conclusions écrites des parties.

Conclusions des parties

La Défense

1. Le témoin à décharge WDUSA qui doit déposer sur l'alibi de l'accusé a été ajouté à la liste de témoins à décharge par une décision du 27 janvier 2006[2]. Suite à l'acceptation de cette adjonction à sa liste, la Défense fait valoir qu'il serait dans l'intérêt de la justice que le témoin WDUSA fasse sa déposition par voie de vidéoconférence depuis La Haye, conformément au paragraphe (D) de l'article 71 du Règlement.

2. S'appuyant sur les décisions du 8 octobre 2004[3] et du 20 décembre 2004[4] rendues en l'affaire *Bagosora et consorts,* la Défense fait valoir que le témoin WDUSA n'est pas en mesure de venir à Arusha pour faire sa déposition en raison d'une cardiochirurgie pratiquée en 2002. Cette année-là, le témoin WDUSA a été autorisé à faire sa déposition par voie de vidéoconférence depuis La Haye dans le procès dit de *Cyangugu*[5]*,* et il ne peut toujours pas aujourd'hui faire de longs voyages.

3. La Défense soutient que la déposition du témoin WDUSA, cité à l'appui de l'alibi de l'accusé, est importante parce qu'il est le seul témoin non lié à celui-ci qui est censé déclarer s'être trouvé avec

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[1] Sans objet en français.
[2] Le Procureur c. Nyiramasuhuko et consorts (affaire n°ICTR-98-42-T) (Chambre de première instance), Decision on Arsène Shalom Ntahobali's Motion to Amend his Witness List and to Reconsider the Decision of 26 August 2005 titled: "Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali", 27 janvier 2006, par. 31.
[3] *Le Procureur c. Bagosora et consorts*, affaire n°ICTR-98-41-T (Chambre de première instance), *Decision on Prosecution Request for Testimony of Witness BT via Video-Link*, 8 octobre 2004, par. 5 à 7 (la «Décision *Bagosora* du 8 octobre 2004 »).
[4] *Le Procureur c. Bagosora et consorts,* affaire n°ICTR-98-41-T (Chambre de première instance), *Decision on Testimony by Video-Conference,* 20 décembre 2004, par. 4.
[5] *Le Procureur c. Ntagerura et consorts,* Décision orale du 16 juillet 2002, p. 3.

lui à Cyangugu pendant les événements de 1994. De plus, la Défense rappelle à la Chambre sa décision du 27 janvier 2006 dans laquelle l'importance de la déposition du témoin WDUSA a été examinée.

Le Procureur

4. Le Procureur s'oppose à la requête, au motif que les décisions rendues en l'affaire *Bagosora et consorts* sur lesquelles s'appuie la Défense sont différentes des circonstances de l'espèce : le témoin WDUSA n'est pas d'un âge avancé, aucune déclaration non caviardée du témoin n'a été communiquée au Procureur et il n'y a pas de rapport médical établissant que le témoin n'est pas en mesure de voyager pour des raisons médicales.

Réplique de la Défense

5. En ce qui concerne les allusions du Procureur au fait que le témoin WDUSA n'est pas d'un âge avancé, la Défense se réfère à la Décision du 20 décembre 2004 rendue en l'affaire *Bagosora et consorts* et à l'ordonnance du TPIY rendue en l'affaire *Brdanin*[6] et fait valoir que la Chambre n'a pas besoin de prendre l'âge du témoin en considération, mais doit plutôt rechercher si le témoin est matériellement dans l'impossibilité de voyager pour des raisons de santé.

6. En ce qui concerne la production d'un rapport médical à l'appui de sa requête, la Défense soutient qu'elle pensait qu'il ne serait pas nécessaire de fournir un autre certificat en l'espèce puisqu'il en avait déjà été versé un au dossier lorsque le témoin WDUSA avait déposé dans le procès dit de Cyangugu. Néanmoins, la Défense produit un rapport médical daté du 2 février 2006 joint en annexe à sa réplique.

Après en avoir délibéré

7. La Chambre souligne la règle générale énoncée au paragraphe (A) de l'article 90 du Règlement : « En principe, les Chambres entendent les témoins en personne »[7]. La Chambre rappelle ce qu'elle a dit dans la Décision du 1er mars 2005 en l'affaire *Nyiramasuhuko et consorts* :

> « [S]i le recueil de dépositions par lien vidéo a été autorisé dans d'autres affaires, il ne l'a été que sous l'empire de la nécessité absolue, le Tribunal ayant fréquemment rappelé sa préférence marquée pour une comparution dans le prétoire »[8].

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[6] *Le Procureur c. Brdanin,* affaire IT-99-36-T (Chambre de première instance), Ordonnance aux fins de témoignage par voie de vidéoconférence en application de l'article 71 *bis* du Règlement, 23 septembre 2003.

[7] *Le Procureur c. Tadić,* affaire n°IT-94-I-T (Chambre de première instance), Décision relative aux requêtes de la Défense aux fins de citer à comparaître et de protéger les témoins à décharge et de présenter des témoignages par vidéoconférence, 25 juin 1996, par. 19

[8] *Le Procureur c. Nyiramasuhuko et consorts,* affaire n°ICTR-98-42-T (Chambre de première instance), Décision relative a la requête strictement confidentielle *ex parte* et sous scellés de Pauline Nyiramasuhuko en mesures de protection additionnelles de certains témoins à décharge, 1er mars 2005, par. 40, citant: Le *Procureur c. Nahimana et consorts,* affaire n°ICTR-99-52-I (Chambre de première instance), Décision sur la requête du Procureur aux fins d'ajouter le témoin X à sa liste de témoins, et de se voir accorder des mesures de protection. 14 septembre 2001 (la (« Décision *Nahimana* du 14 septembre 2001 ») ; *Le Procureur c. Bagosora et consorts,* affaire n°ICTR-96-7-I (Chambre de première instance), Décision sur la requête du Procureur aux fins d'obtenir des mesures exceptionnelles de protection du témoin A en venu des articles 66 (C), 69 (A) et 75, 5 juin 2002 ; *Le Procureur c Milosević,* affaire n°IT-02-54-T (Chambre de première instance), Décision relative à une requête confidentielle de l'accusation, accompagnée d'une annexe *ex parte,* aux fins de la comparution d'un témoin par voie de vidéoconférence et de mesures de protection, 19 mars 2003 ; *Le Procureur c. Karemera,* affaire n°ICTR-98-44-1 (Chambre de première instance), Décision sur la requête du Procureur aux fins d'obtenir des mesures exceptionnelles de protection en faveur des témoins G et T et aux fins d'étendre la décision portant mesures de protection de témoins à charge dans les affaires *Nzirorera* et *Rwamakuba* aux co-accusés Ngirumpatse et Karemera, et décision relative à la requête de la Défense en communication immédiate de pièces, 20 octobre 2003 ; *Le Procureur c. Bizimungu et consorts,* affaire n°ICTR-99-50-T (Chambre de première instance), *Decision on Prosecutor's Extremely Urgent Motion Requesting that the Extraordinarily*

8. Toutefois, la Chambre rappelle qu'elle a le pouvoir discrétionnaire d'autoriser l'audition d'un témoin par voie de vidéoconférence à la place de sa comparution en personne si c'est dans l'intérêt de la justice, après avoir apprécié (i) l'importance du témoignage, (ii) l'incapacité du témoin à se présenter à l'audience ou sa réticence à le faire, (iii) la validité de la raison invoquée à l'appui de cette incapacité et de cette réticence. La partie qui demande que la déposition d'un témoin soit recueillie par voie de vidéoconférence supporte la charge de la preuve[9].

9. Pour ce qui est du premier critère, la Chambre rappelle que dans sa décision du 27 janvier 2006, elle a fait droit à la demande d'adjonction du témoin WDUSA cité pour appuyer l'alibi de l'accusé, étant entendu que sa déposition portera uniquement sur la présence de l'accusé à Cyangugu. De fait l'adjonction du témoin WDUSA à la liste des témoins à décharge indique que la déposition qu'il se propose de faire est suffisamment importante. La Chambre rappelle également que le résumé non caviardé de la déposition que fera le témoin WDUSA a été examinée lorsqu'elle a statué le 26 août 2005 sur la requête de la Défense en modification de sa liste de témoins[10].

10. En ce qui concerne les deuxième et troisième critères, la Chambre conclut qu'à la lumière du rapport médical daté du 2 février 2006, la Défense a prouvé que le témoin WDUSA est, pour des raisons médicales, dans l'incapacité de se rendre à Arusha pour faire sa déposition[11].

11. Selon la Chambre, la Défense a démontré l'existence de circonstances exceptionnelles justifiant que le témoin WDUSA dépose par voie de vidéoconférence à La Haye. Par ces motifs et dans l'intérêt de la justice, la Chambre fait droit à la requête de la Défense. Par conséquent, elle autorise le témoin WDUSA à déposer par voie de vidéoconférence à La Haye au lieu de comparaître en personne à Arusha.

12. Pour faciliter l'organisation du recueil d'une déposition par voie de vidéoconférence à La Haye, la Chambre, rappelant les instructions qu'elle a données pour que la présentation des moyens à décharge soit terminée au plus tard le 10 mars 2006, ordonne a la Défense de se mettre immédiatement en rapport avec le Greffe pour faciliter la procédure et la programmation de la déposition du témoin WDUSA.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la requête et ordonne que le témoin a décharge WDUSA fasse sa déposition par voie de vidéoconférence à La Haye au lieu de comparaître en personne à Arusha ;

ORDONNE au Greffe de prendre toutes les mesures nécessaires pour recueillir la déposition du témoin a décharge WDUSA par voie de vidéoconférence à La Haye ;

Vulnerable Witnesses XI006 and 039 Testify by Closed Video Transmission Link With a Location al The Hague and Other Related Special Protective Measures Pursuant to Article 21 of the Stature and Rules 73 and 75 (C), 4 juin 2004. Sont aussi invoquées la Décision *Nahimana* du 14 septembre 2001, par. 37, et la Décision *Bagosora* du 8 octobre 2004, par. 15.

[9] Le Procureur c. Nyiramasuhuko et consorts, affaire n°ICTR-98-42-T (Chambre de première instance), Decision on Nyiramasuhuko's Strictly Confidenfial ex-parte - under seal - Motion for Additional Protective Measures for Defence Witness WBNM, 17 juin 2005, par. 9.

[10] Le Procureur c. Nyiramasuhuko et consorts, affaire n°ICTR-98-42-T (Chambre de première instance), Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali, 26 août 2005, par. 6 ; voir aussi par. 8 de la Décision du 27 janvier 2006.

[11] Décision *Bagosora* du 20 décembre 2004, par. 5 ; Décision *Brdanin* ; *Le Procureur c. Milosević,* affaire n°IT-02-54-T (Chambre de première instance), Ordonnance relative à la requête de l'accusation aux fins d'entendre le témoignage de Nojko Marinović par voie de vidéoconférence, 19 février 2003 ; *Le Procureur c. Krnojelac* (Chambre de première instance), Ordonnance aux fins de témoignage par voie de vidéoconférence, 15 janvier 2001.

ORDONNE à la Défense d'assister le Greffe avec diligence dans la prise des mesures nécessaires pour s'assurer que la déposition du témoin à décharge WDUSA par voie de vidéoconférence soit recueillie sans retard.

Arusha, le 15 février 2006.

[Signé] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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Décision relative à la requête du Procureur intitulée Prosecutor's Motion for Reciprocal Inspection of Documents intended for Use by the Defence of Sylvain Nsabimana
1er mars 2006 (ICTR-97-29-T, Jonction d'instances : ICTR-98-42-T)

(Original : Anglais)

Chambre de première instance II

Juges : William H. Sekule, Président de Chambre ; Arlette Ramaroson ; Solomy Balungi Bossa

Sylvain Nsabimana –Inspection réciproque de documents – Requête acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 66 (B) et 67 (C)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance II, composée des juges William H. Sekule, Président de Chambre, Arlette Ramaroson et Solomy Balungi Bossa (la « Chambre »),

SAISI de la requête du Procureur intitulée Prosecutor's Motion for Reciprocal Inspection of Documents Intended for Use by the Defence of Sylvain Nsabimana et déposée le 20 février 2006 (la « requête »),

CONSIDÉRANT que par lettre du 13 février 2006, le Procureur a demandé à la Défense de lui permettre d'examiner les pièces visées dès que possible,

NOTANT que la Défense de Nsabimana n'a pas répondu à la requête,

ATTENDU que le Procureur demande qu'il soit enjoint à la Défense de Nsabimana de permettre l'examen immédiat de toutes les pièces qu'elle entend utiliser à l'appui de sa cause, dès lors qu'elle-même a déjà pu procéder, en vertu de l'article 66 (B) du Règlement, à l'examen des livres, documents, photographies et autres objets qui se trouvent en la possession ou sous le contrôle du Procureur et que celui-ci entend utiliser dans le cadre de la présentation de ses moyens[1],

ATTENDU que le Procureur rappelle que selon les instructions données par la Chambre à la conférence de mise en état du 8 février 2006, la présentation des moyens de la Défense de Nsabimana

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[1] Requête, par. 2.

doit débuter dès la clôture, prévue pour le 10 mars 2006, de la présentation des moyens de la Défense d'Arsène Shalom Ntahobali[2], et qu'il est crucial que le Procureur puisse procéder à l'examen sollicité dans un délai lui permettant de préparer adéquatement sa cause[3],

AYANT DÉLIBÉRÉ,

RAPPELLE que l'article 67 (C) du Règlement prévoit que

> « [s]i la Défense introduit la requête prévue au paragraphe (B) de l'article 66, le Procureur est autorisé à examiner tous livres, documents, photographies et autres objets se trouvant en la possession ou sous le contrôle de la Défense et qu'elle entend produire au procès »,

CONSTATE qu'il ressort de la lettre du 13 février 2006 adressée par le Procureur à la Défense de Nsabimana que celle-ci a déjà eu recours à l'article 66 (B) du Règlement, et que ce fait n'a pas été contesté.

NOTE que si la Défense forme la requête visée a l'article 66 (B) du Règlement, la contrepartie prévue à l'article 67 (C) du Règlement devient applicable,

PAR CES MOTIFS,

FAIT DROIT à la Requête ;

ENJOINT à la Défense de Nsabimana de se conformer a l'article 67 (C) du Règlement ;

ENJOINT aux parties de se donner rendez-vous dès que possible à l'effet de permettre au Procureur d'examiner tous livres, documents, photographies et autres objets qui sont en la possession ou sous la garde de la Défense de Nsabimana et que celle-ci entend produire au procès.

Arusha, le 1er mars 2006.

[Signé] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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[2] *Ibid*., par. 4.
[3] *Ibid*., par. 5.

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Décision relative à la requête formée par Arsène Shalom Ntahobali en vue d'obtenir une certification pour interjeter appel de la décision relative à la requête en extrême urgence, strictement confidentielle et sous scellés, d'Arsène Shalom Ntahobali aux fins d'autoriser le témoin NMBMP à témoigner par vidéo-conférence
4 avril 2006 (ICTR-98-42-T)

(Original : Anglais)

Chambre de première instance II

Juges : William H. Sekule, Président de Chambre ; Arlette Ramaroson ; Solomy Balungi Bossa

Arsène Shalom Ntahobali – Certification pour interjeter appel, Requêtes formées en vertu de l'article 73 ne sont pas susceptibles d'appel interlocutoire sous réserve du pouvoir souverain d'appréciation de la Chambre de première instance, Pas de démonstration par la Défense des conditions nécessaires pour obtenir une autorisation de certification d'interjeter appel – Requête rejetée

Instrument international cité :

Règlement de Procédure et de preuve, art. 73 (A), 73 (B) et 73 (C)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Pauline Nyiramasuhuko et consorts, Décision relative aux requêtes de Ntahobali et de Nyiramasuhuko aux fins de certification d'appel de la Décision relative à la requête en urgence de la Défense tendant à voir déclarer irrecevables certaines parties de la déposition des témoins RV et QBZ, 18 mars 2004 (ICTR-98-42) ; Chambre de première instance, Le Procureur c. Pauline Nyiramasuhuko et consorts, Décision relative à la requête de la Défense en certification d'appel de la décision relative à la requête de la Défense en arrêt des procédures pour abus de confiance, 19 mars 2004 (ICTR-98-42) ; Chambre de première instance, Le Procureur c. Pauline Nyiramasuhuko et consorts, Decision on Prosecutor's Motion for Certification to Appeal the Decision of the Trial Chamber dated 30 November 2004 on the Prosecution Motion for Disclosure and Evidence, 4 février 2005 (ICTR-98-42)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance II composée des juges William H. Sekule, Président, Arlette Ramaroson et Solomy Balungi Bossa (la « Chambre »),

SAISI de la Requête d'Arsène Shalom Ntahobali afin d'obtenir la certification d'appel de la décision intitulée « Decision on Arsène Shalom Ntahobali's Extremely Urgent Strictly Confidential-Under Seal-Motion to Have Witness NMBMP Testify By Video Link », déposée le 8 mars 2006 mais datée du 7 septembre 2005 (la (« requête »),

VU la réponse du Procureur intitulée Prosecutor's response to the Motion of Arsène Shalom Ntahobali for Certification to Appeal the Decision on the Motion to Have Witness NMBMP Testify Via Vidéo-Link, déposée le 14 mars 2006 (la « réponse du Procureur »),

VU la Réplique de Arsène Shalom Ntahobali à la « Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Certification to Appeal the Decision on the Motion to Have Witness NMBMP Testify Via Video-Link », déposée le 20 mars 2006 (la « réplique de la Défense »),

RELEVANT la Décision relative à la requête en extrême urgence, strictement confidentielle et sous scellés, d'Arsène Shalom Ntahobali aux fins d'autoriser le témoin NMBMP à témoigner par vidéoconférence, rendue le 2 mars 2006 (la « décision contestée »),

PRENANT ACTE du fax intitulé « In the matter of the Prosecutor vs. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko et al », envoyé par le Greffe le 9 mars 2006,

VU le Statut du Tribunal (le « Statut ») et le Règlement de procédure et de preuve (le « Règlement »), notamment l'article 73 du Règlement en ses paragraphes B et C,

STATUE sur la requête sur la base des conclusions écrites des parties, en vertu de l'article 73 (A) du Règlement.

Arguments des parties

Arguments de la Défense

1. La Défense demande à la Chambre de l'autoriser à faire appel de la décision contestée. Selon elle, la Chambre s'est trompée en fait et en droit à deux égards : premièrement dans l'évaluation de la charge qui incombait à la Défense[1], deuxièmement dans l'évaluation de la preuve présentée à l'appui de sa requête et celle des conséquences juridiques du statut du témoin NMBMP dans le cadre de la procédure qu'il a engagée devant la Commission d'immigration des Etats-Unis d'Amérique[2].

2. La Défense fait valoir que la déposition de NMBMP pourrait avoir une incidence sur l'issue du procès, puisque ce témoin doit en principe parler de l'alibi invoqué et récuser l'accusation de viol portée contre Ntahobali[3]. Elle ajoute que l'équité du procès serait sensiblement compromise si elle devait retirer NMBMP de sa liste de témoins parce que l'intéressée ne peut pas quitter son pays de résidence[4].

3. La Défense reproche à la Chambre d'avoir conclu à tort qu'elle n'avait pas établi que le témoin NMBMF était dans l'incapacité de quitter les Etats-Unis d'Amérique, alors qu'elle avait produit à l'appui de sa requête des documents supplémentaires qui rapportent la preuve de cette incapacité et n'ont pas été remis en question par la Chambre[5].

4. Selon elle, il ne fait aucun doute que le règlement immédiat de la question par la Chambre d'appel à ce stade du procès ferait concrètement progresser la procédure, puisqu'il permettrait d'éviter un débat fondé sur l'article 115 du Règlement en appel au cas où l'accusé serait condamné pour des faits dont le témoin NMBMP aurait pu contester l'exactitude en première instance[6].

Arguments du Procureur

5. Le Procureur relève qu'au lieu de concentrer son attention sur les conditions prévues par l'article 73 (B) du Règlement qui doivent être remplies pour que la Chambre procède à la certification, la Défense s'appesantit sur des considérations non pertinentes et tente de rouvrir les débats sur des questions que la Chambre a déjà tranchées dans la décision contestée[7]. À son avis, les arguments et les menaces implicites relatifs à l'article 115 du Règlement que contient la requête sont prématurés et

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[1] Requête, par. 12.
[2] *Ibid*., par. 13.
[3] *Ibid*., par. 15.
[4] *Ibid*., par. 17.
[5] *Ibid*., par. 20.
[6] *Ibid*., par. 35.
[7] Réponse du Procureur, par. 5 et 22.

n'ont aucune importance dans le cadre d'une requête en certification[8]. Le Procureur allègue que la Défense a essentiellement repris les arguments avancés dans sa requête tendant à faire autoriser le témoin NMBMP à déposer par voie de vidéoconférence, notamment ceux concernant le statut que les services d'immigration lui attribuent, alors que la Chambre avait déjà examiné et dûment pris en considération ces arguments[9]. Il ajoute que la requête traite trop longuement des moyens d'appel au lieu de s'intéresser aux conditions qui doivent être remplies pour que la certification soit accordée[10].

6. Selon lui, la Défense n'a pas établi en quoi la décision contestée touchait une question susceptible de compromettre sensiblement la rapidité du procès[11].

7. Qui plus est, elle n'a pas dûment expliqué pourquoi il y a lieu d'interjeter appel sur une question qui relève strictement du pouvoir souverain d'appréciation de la chambre[12].

8. Le Procureur fait observer que selon la Défense, il existe des procédures permettant aux personnes qui se trouvent dans des situations comparables à celle du témoin NMBMP, de quitter le pays concerné, mais souligne que la Défense n'a pas prouvé les avoir toutes épuisées[13]. De plus, il estime que la Défense fait plutôt des conjectures lorsqu'elle prétend que NMBMP pourrait ne pas être autorisée à retourner dans son pays de résidence si elle sollicitait et obtenait une *advance parole* (admission conditionnelle)[14].

9. D'après le Procureur, les arguments de la Défense ne suscitent pas de « véritables doutes quant à l'exactitude des principes juridiques en cause »[15]. Les principes invoqués se rapportent à la législation régissant l'immigration aux Etats-Unis d'Amérique que la Chambre n'est pas tenue de prendre en considération[16]. En conséquence, le règlement de la question par la Chambre d'appel pourrait ne pas concrètement faire progresser la procédure[17].

10. Le Procureur relève que loin d'avoir dénié à l'accusé le droit de citer le témoin NMBMP à l'appui de son alibi, la Chambre a tout simplement décidé que le témoin ne déposerait pas par voie de vidéoconférence[18]. Il. précise que la Défense a l'intention d'appeler d'autres témoins à la barre pour établir son alibi, notamment l'accusé lui-même, son épouse et le témoin NMBMP qui a déjà comparu[19].

Réplique de la Défense

11. Dans sa réplique, la Défense dit que la réponse produite par le Procureur le 14 mars 2006 est tardive et doit être rejetée. Selon elle, le délai de cinq jours dont le Procureur disposait pour déposer sa réponse a expiré le 13 mars 2006.

Après en avoir délibéré,

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[8] *Ibid*., par. 21.
[9] *Ibid*, par. 10 et 16.
[10] *Ibid*., par. 5 et 23.
[11] *Ibid*., par. 15.
[12] *Ibid*., par. 16.
[13] *Ibid*., par. 17.
[14] *Ibid*., par. 18.
[15] *Ibid*., par. 19.
[16] *Id.*
[17] *Id.*
[18] Réponse du Procureur, par. 20.
[19] *Ibid*., par. 20.

12. Avant d'entrer dans le vif du sujet, la Chambre juge que la réponse du Procureur a été déposée dans le délai imparti, le Greffe ayant précisé dans son acte de notification daté du 9 mars 2006 que « les parties disposent d'un délai de cinq jours pour déposer leurs réponses après réception de la présente notification » [non souligné dans l'original]. Le Procureur a accusé réception de la notification le 9 mars 2006. Le délai de dépôt de sa réponse a donc commencé à courir le 10 mai 2006. En conséquence, la Chambre écarte la demande de la Défense tendant à faire rejeter la réponse du Procureur.

13. La Chambre rappelle les dispositions de l'article 73 (B) du Règlement qui se lisent comme suit:

> Les décisions concernant de telles requêtes ne sont pas susceptibles d'appel interlocutoire, à l'exclusion des cas où la Chambre de première instance a certifié l'appel après avoir vérifié que la décision touche une question susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue, et que son règlement immédiat par la Chambre d'appel pourrait concrètement faire progresser la procédure.

14. Elle relève que les décisions concernant des requêtes formées en vertu de l'article 73 ne sont pas susceptibles d'appel interlocutoire, sous réserve du pouvoir souverain d'appréciation dont elle dispose pour accorder des autorisations d'interjeter appel dans les rares cas prévus à l'article 73 (B). La Chambre peut accorder ces autorisations si les deux conditions fixées par l'article 73 (B) sont réunies. Premièrement, le requérant doit établir en quoi la décision contestée touche une question susceptible de compromettre sensiblement (a) l'équité et la rapidité du procès ou (b) son issue. Deuxièmement, il lui incombe de convaincre la Chambre que le « règlement immédiat [de cette question] par la Chambre d'appel pourrait concrètement faire progresser la procédure ». Pour que ces deux conditions soient jugées remplies, le requérant doit apporter des preuves précises et non pas invoquer vaguement les arguments sur la base desquels la décision contestée a été rendue[20].

15. La Chambre prend acte des arguments de la Défense et rappelle que loin de lui avoir interdit dans la décision contestée de citer le témoin NMBMP, elle a tout simplement estimé que les conditions juridiques requises pour autoriser ce témoin à déposer par voie de vidéoconférence n'étaient pas remplies. De plus, elle considère que les raisons invoquées par la Défense constituent des moyens d'appel non pas des éléments permettant d'étayer une requête en certification. Elle en conclut que la Défense n'a pas rempli les conditions prévues par l'article 73 (B) du Règlement,

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête dans son intégralité.

Arusha, le 4 avril 2006.

[Signé] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

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[20] Le Procureur c. Nyiramasuhuko, affaire n°ICTR-97-21-T, Decision on Prosecutor's Motion for Certification to Appeal the Decision of the Trial Chamber Dated 30 November 2004 on the Prosecution Motion for Disclosure of Evidence of the Defence, 4 février 2005, par. 11 ; Le Procureur c. Nyiramasuhuko, affaire n°ICTR-97-21-T, Décision relative à la requête de la Défense en certification d'appel de la décision relative à la requête de la Défense en arrêt des procédures pour abus de confiance, 19 mars 2004, par. 12 à 16 ; Le Procureur c. Nyiramasuhuko, affaire n°ICTR-97-21-T, Décision relative aux requêtes de Ntahobali et de Nyiramasuhuko aux fins de certification d'appel de la décision relative à la requête en urgence de la Défense tendant à voir déclarer irrecevables certaines parties de la déposition des témoins RV et QBZ, 18 mars 2004, par. 14 à 17.